

**The Owners – Strata Plan No 83297 v Eastern Construction Group Pty Ltd - [2016]
NSWSC 387**

Supreme Court

New South Wales

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| Medium Neutral Citation: | The Owners – Strata Plan No 83297 v Eastern Construction Group Pty Ltd [2016] NSWSC 387 |
| Hearing dates: | 06/04/2016 |
| Date of orders: | 06 April 2016 |
| Decision date: | 06 April 2016 |
| Jurisdiction: | Equity - Technology and Construction List |
| Before: | McDougall J |
| Decision: | Judgment for plaintiff against defendant for \$2,390,347.98 with costs. |
| Catchwords: | BUILDING AND CONSTRUCTION – Home Building Act 1989 – statutory warranties – withdrawal by defendant’s solicitor – no appearance by defendant – contract in existence between builder and developer – defects in residential building work result of builder’s work – breach of statutory warranties – judgment for plaintiff with costs |
| Legislation Cited: | Home Building Act 1989 (NSW) |
| Category: | Principal judgment |
| Parties: | The Owners – Strata Plan No. 83297 (Plaintiff) Eastern Construction Group Pty Ltd (Defendant) |
| Representation: | Counsel: D Weinberger (Plaintiff) No appearance (Defendant) Solicitors: Grace Lawyers Pty Ltd (Plaintiff) No appearance (Defendant) |
| File Number(s): | 2014/342260 |

Judgment (ex tempore – revised 6 april 2016)

1. **HIS HONOUR:** The plaintiff is the Owners Corporation of a strata title complex at Naremburn. It sues the defendant for defective building work relating to that complex. It asserts that the defendant was the builder who contracted with the Owners Corporation's predecessor in title, the developer, to execute the building works.
2. The builder was represented until this morning, when its solicitor Mr Whitfield sought and was granted leave to withdraw on the basis that he had not received instructions on significant matters.
3. In the circumstances, I have taken the course of going to the evidence to satisfy myself that the matters put in issue on the quasi-pleadings have been proved, to the extent that they are matters of fact and not matters of law or comment.

4. The first matter of fact put in issue is that the defendant as builder contracted with the developer to construct the complex, and did in fact construct it. I am satisfied from the building contract that is in evidence as part of exhibit PX5 that there was a contract made between the builder (under its prior name Napero Holdings Pty Ltd) and the developer for the construction of the works in question. I am satisfied that Napero Holdings Pty Ltd has changed its name to the present name of the defendant, Eastern Construction Group Pty Ltd.
5. In the absence of evidence to the contrary, proof of a contract to carry out the building work, coupled with the self evident fact that the work has in fact been carried out, would support the conclusion that the work was carried out by the entity that contracted to do it. In this case, that commonsense conclusion is confirmed by rectification orders that were issued by the Department of Fair Trading to the builder to rectify defective work in individual lots and common property. It is also confirmed by a certificate of insurance which specifies among other things that the building work was indeed carried out by Napero Holdings Pty Ltd as builder.
6. Accordingly, I am satisfied that the contract upon which the Owners Corporation relies was made, that it was a contract to perform the work in question and that the work was in fact performed by the defendant builder for the developer pursuant to it.
7. The builder does not admit that the work was residential building work for the purposes of the [Home Building Act 1989 \(NSW\)](#). Self-evidently, it was residential building work as defined in that Act.
8. The builder does not admit the statutory warranties implied by s 18B of that Act, nor the Owners Corporation's entitlement, as successor in title of the developer, to claim the benefit of the statutory warranties pursuant to s 18D of that Act. Self-evidently, both of those matters are correct.
9. There is an issue as to the existence of defects in the work that I have found was carried out by the defendant as builder. The nature and extent of those defects is explained in excessive detail in the reports on which the Owners Corporation relies. Those reports were served on the builder. The builder has not served reports in reply. The reports are sufficient to prove that the defects alleged in the Scott Schedule did in fact exist in the common property, so that the Owners Corporation is entitled to damages in respect of them.
10. It is self-evident, although the builder has denied it, that the defects were the result of its defective building work and hence were in a result of breaches of the statutory warranties.
11. The cost of rectification has been quantified at \$2.15 million as at May 2015. On the evidence, I am satisfied that the Owners Corporation is entitled to recover that sum, together with interest. The calculation of interest is a little more than \$119,000 for the almost 12 months that have elapsed since the cost of rectification was assessed.

12. In addition, the Owners Corporation spent a little over \$21,000 to rectify defects in an attempt to mitigate its loss. Again, I am satisfied that it is entitled to recover those amounts.

13. The precise amount for damages and interest is \$2,290,347.98. That does not include any interest in respect of past rectification works, but since there is no evidence of what that interest might be, that is not to the point.

14. In the result, I conclude that the plaintiff should have judgment against the defendant in the sum of \$2,290,347.98 and that the defendant should pay the plaintiff's costs of the proceedings.

15. The exhibits, once marked, are to be handed out.

Decision last updated: 07 April 2016