The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd (No 2) - [2016] NSWSC 943

Supreme Court

New South Wales

Medium Neutral Citation:	**The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd (No 2) [2016] NSWSC 943**
Hearing dates:	On the papers. Written submissions dated 16 May 2016 and 19 May 2016.
Decision date:	07 July 2016
Jurisdiction:	Equity
Before:	Meagher JA
Decision:	1. Judgment for the plaintiff against the first and second defendants in the sum of $330,744.55. 2. The plaintiff pay the first and second defendants' costs of its motion filed 24 September 2015 and their motion filed 25 September 2015. 3. The first and second defendants otherwise pay the plaintiff's costs of the proceedings including those incurred in the Consumer, Trading and Tenancy Tribunal.
Catchwords:	COSTS – where proceedings commenced in CTTT and transferred to this Court and plaintiff obtains judgment for less than $500,000 – whether commencement and continuation of proceedings in this Court was warranted (UCPR r 42.34) – whether costs should follow the event of the plaintiff's success (UCPR r 42.1)
Legislation Cited:	Uniform Civil Procedure Rules 2005 (NSW), rr 42.1, 42.34
Category:	Costs
Parties:	The Owners of Strata Plan 76888 (Plaintiff) Walker Group Constructions Pty Ltd (First Defendant) Walker Corporation Pty Ltd (Second Defendant)
Representation:	Counsel: D Weinberger (Plaintiff) MG Rudge SC with FP Hicks (Defendants) Solicitors: Bannermans Lawyers (Plaintiff) Squire Patton Boggs (Defendants)
File Number(s):	2013/302145

Judgment

1. On 2 May 2016 the Court delivered its judgment adopting the Referee's Report of Mr Tozer. The orders made on that day included the following direction:

> (4) Direct the parties within 7 days to lodge with my Associate, Short Minutes of Order which provide for the entry of judgment for the plaintiff in accordance with these reasons and which address the costs of the proceedings, including those of the reference and the adoption proceedings. If the parties cannot agree on the form of these orders, each within a further 7 days should submit the form of orders for which it contends, together with written submissions (not exceeding 4 pages) supporting the orders contended for. The question of the appropriate orders will then be decided on the papers.

2. Those written submissions have now been received. The parties are agreed that there should be judgment for the plaintiff against the first and second defendants in the sum of $314,255.45 together with interest on that amount calculated in accordance with Practice Note SC Gen 16 from 22 August 2015 to 7 July 2016, the date of judgment. That rate was 6% up to 30 June 2016 and from 1 July 2016 is 5.75%. Interest for that period calculated at those rates is $16,489.10. Accordingly judgment should be entered for the plaintiff for $330,744.55.

3. The parties are also agreed that the plaintiff should pay the defendants' costs of the hearing of the notices of motion filed by the plaintiff and the defendants on 24 and 25 September 2015 respectively; those being their respective motions for the adoption or rejection of the Referee's Report.

4. The matter remaining in issue is the question as to the costs of the balance of the proceedings. The plaintiff seeks an order that the defendants pay its costs of the proceedings, including those of the reference held in June 2015 and those incurred in the Consumer, Trading and Tenancy Tribunal (**CTTT**), where the proceedings were commenced on 20 March 2013. In doing so the plaintiff accepts that in this case the application of Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), r 42.34 is engaged in relation to the exercise of the Court's discretion as to the payment of costs.

5. UCPR rr 42.1 and 42.34 relevantly provide:

> **42.1 General rule that costs follow the event**
>
> Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.
>
> ...
>
> **42.34 Costs order not to be made in proceedings in Supreme Court unless Court satisfied proceedings in appropriate court**
>
> (1) This rule applies if:
>
> (a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than $500,000, and
>
> (b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.
>
> (2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted.

6. The plaintiff submits that the Court should be satisfied that the commencement and continuation of the proceedings in this Court, rather than in the District Court, was warranted.

7. As to the costs of the balance of the proceedings, the defendants seek an order that each party pay its own costs. In support of that position they submit that the Court should not be satisfied that the continuation of the proceedings in this Court was warranted. They also contend that two further matters should be taken into account in the exercise of the Court's discretion against the making of any order for costs in favour of the plaintiff. The first is that, during and following the reference hearing in June 2015, the plaintiff did not accept the position adopted by its own experts in reaching agreement with the defendants' experts as to the scope of the required rectification works and, it is contented, "sought to disavow its own case and deny the experts' agreements". The second, is that there is a "substantial risk of a lack of proportionality" between the costs sought to be recovered and the amount of the judgment sum.

Whether the commencement and continuation of the proceedings in this Court was warranted?

8. The plaintiff's claim was first made by proceedings commenced in the CTTT. By late August 2013 that claim, as supported by expert evidence, was quantified at $1,000,469. On 27 September 2013, on the plaintiff's application, the CTTT ordered that the proceedings be transferred to this Court. It did so noting that the defendants accepted that the plaintiff's claim exceeded the jurisdiction of that Tribunal ($500,000), and consented to that transfer. Section 23(1)(b) of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) (now repealed) provided that the transferred proceedings were to continue before this Court "as if they had been instituted there".

9. In these circumstances I am satisfied that the transfer of the proceedings to and consequential commencement of the proceedings in this Court was warranted in view of the quantum of the claim which the plaintiff then made, and the fact that it was supported by expert opinion evidence.

10. The defendants contend that the continuation of the proceedings in this Court was not warranted after 23 October 2014, by which time the joint reports of the experts, in relation to each of the areas of dispute, had been produced. In relation to the fire safety defects, that joint report was of Messrs Whitton and Grubits dated 29 July 2014; and in relation to the general building and water ingress defects, it was the joint report of Messrs Copeman and Abbott dated 23 October 2014. The defendants submit, without much elaboration, that with the benefit of those joint reports a realistic assessment of the amount of quantum in issue would have indicated to the plaintiff that even if it was successful in every defect claim remaining in issue, "the judgment sum that it was likely to recover would not surpass the threshold amount of $500,000".

11. That is said to follow because of the 'concessions' made by the plaintiff's experts in these joint reports as to the scope of the required rectification works in relation to the waterproofing defect in the bathroom of each of the 42 apartments and the general fire defects. In response, the plaintiff says that notwithstanding those evidentiary 'concessions' it remained entitled to be heard on legal

arguments as to the scope of the reasonable rectification works required to remedy the relevant defects, notwithstanding the views of the experts. Specifically, the plaintiff maintained before the Referee (as it subsequently did in the adoption application before me) that in relation to the waterproofing defect in the bathroom of each of the 42 apartments, it was entitled to have the existing bathtub removed and re-installed so as to comply with the relevant Australian Standard (see [2016] NSWSC 541 at [33]-[38]); and that in relation to the general fire defects and compliance with the BCA, notwithstanding the agreement of the experts as to the alternative solutions available as a method of achieving the building's compliance, it was entitled to have that compliance achieved by rectification in accordance with a relevant deemed-to-satisfy provision of the BCA (see [2016] NSWSC 541 at [44] ff).

12. The Referee described the way in which the plaintiff conducted its case in the reference, and the defendants' criticism of that conduct, as follows:

> [20] ... [the defendants] noted that the matter had proceeded to a reference hearing on the basis that the experts had agreed the necessary and reasonable rectification work for many items. The plaintiff had, however, revisited those items and 'sought to present a different case' during cross-examination. The defendants submit that the plaintiff is precluded from making claims on the basis set out in its submissions, contrary to the evidence and agreements of its own experts.
>
> [21] I have dealt with these submissions in my reasons for each of the items where submissions of that nature have been made by the plaintiff. I have accepted some of the 'new' arguments may be due to the lack of a responsive expert report on quantum in some instances.

13. The Referee considered, in relation to the waterproofing defect in the bathrooms, the plaintiff's argument as to why it was entitled to have each existing bathroom removed and re-installed notwithstanding Mr Copeman's concession that full demolition and reconstruction of each bath was not required. The Referee rejected that argument: Referee's Report at [57]-[60]. He also considered the arguments made by the plaintiff in the course of the reference as to why the alternative solutions proposed by Mr Grubits should not be adopted as the appropriate means of achieving compliance with the BCA. In relation to each defect the Referee ultimately found that the alternative solution was the appropriate means for achieving that compliance: see, for example, Referee's Report at [162]-[169].

14. The quantum, inclusive of on-costs, of the plaintiff's claim made on the basis of the scope of the rectification works described in its amended Scott Schedule filed in December 2013 (those works including the works involving the re-installation of the existing bathtubs and compliance with the provisions of the BCA by the satisfaction of a relevant deemed-to-satisfy provision) was approximately $1 million adopting the plaintiff's quantum evidence and, adopting the defendants' quantum evidence, approximately $505,000. In my view the continuation of the proceedings in this Court after October 2014 was warranted because notwithstanding the 'concessions' made in the experts' joint reports, the plaintiff's claim as formulated and made before the Referee was not plainly hopeless, and was for a total amount that exceeded $500,000.

Whether an order for costs other than that costs follow the event should be made?

15. I am not persuaded for either of the reasons suggested by the defendants that there should be any departure from the ordinary rule that costs follow the event. Although the plaintiff argued that it was not prevented by the concessions made by Mr Copeman and Mr Whitton from arguing that it was entitled to rectification of specific defects on bases other than as agreed by the experts, its doing so was foreshadowed and did not involve its 'disavowing its own case' or 'denying the experts' agreements'. Secondly, whilst there were additional experts' reports served by each party in and after March 2015, I am not persuaded that this was substantially due to defaults on the part of the plaintiff or that it resulted in a significant prolongation of the proceedings and substantial additional costs being incurred by the defendants.

16. Finally, whilst it may be accepted that the fact of a disproportionate relationship between the judgment sum recovered and the amount of costs sought may be relevant to whether a costs order should be made, in the present case the defendants do not squarely make a submission to that effect. At its highest they suggest that there is a "substantial risk of a lack of proportionality between the costs incurred by the plaintiff and the amount of the judgment". They point to the fact that the hearing of the reference proceeded over five days and to the number of experts retained by the parties. However, they do not undertake any analysis by reference to the issues in the proceedings and the subject matter of the expert reports with a view to showing that the costs incurred or likely to have been incurred were unreasonably excessive. In the circumstances (which include that a separate order is to be made in relation to the costs of the adoption applications), I am not persuaded that any order as to the plaintiff's costs should be made other than that they follow the event.

17. Accordingly, I make the following orders:

1. Judgment for the plaintiff against the first and second defendants in the sum of $330,744.55.

2. The plaintiff pay the first and second defendants' costs of its motion filed 24 September 2015 and their motion filed 25 September 2015.

3. The first and second defendants otherwise pay the plaintiff's costs of the proceedings including those incurred in the Consumer, Trading and Tenancy Tribunal.

****

Decision last updated: 07 July 2016