Supreme Court

New South Wales

Case Name:	Warburton v County Construction (NSW) Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1281
Hearing Date(s):	Last written submissions 8 September 2022, 21 September 2022
Date of Orders:	21 September 2022
Decision Date:	21 September 2022
Jurisdiction:	Equity - Technology and Construction List
Before:	Black J
Decision:	Judgment for the plaintiffs in the amount of $224,727.34. Parties to serve and send to the Associate to Black J their respective submissions as to interest and costs by 4pm on 21 October 2022 and their reply submissions by 4pm on 28 October 2022. Reserve liberty to apply on 3 days' notice.
Catchwords:	BUILDING AND CONSTRUCTION — Contract — Damages — Quantification — Quantification of damages for the rectification of defects — Where there is disagreement between expert witnesses as to quantification
Cases Cited:	- Builders Insurers Guarantee Corporation v The Owners – Strata Plan No 57504 [2010] NSWCA 23 - Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64 - Dean v Ainley [1987] 1 WLR 1729 - JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237 - Lichaa v Boutros [2021] NSWCA 322 - McCrohan v Harith [2010] NSWCA 67 - New South Wales v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133 - Placer (Granny Smith) Pty Ltd v Thiess Contractors

	Pty Ltd (2003) 77 ALJR 768 - Re Hair Industrie Penrith Pty Ltd, Hair Industrie Merrylands Pty Ltd [2015] NSWSC 1578 - Schindler Lifts Australia Pty Ltd v Debelak (1989) 89 ALR 275 - Troulis v Vamvoukakis [1998] NSWCA 237 - Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31 - Warburton v County Construction (NSW) Pty Ltd [2022] NSWSC 941 - Yates v Mobile Marine Repairs Pty Ltd [2007] NSWSC 1463
Category:	Principal judgment
Parties:	Mark Warburton (First Plaintiff/First Cross-Defendant) Jacqueline Warburton (Second Plaintiff/Second Cross-Defendant) County Construction (NSW) Pty Ltd (First Defendant/Cross-Claimant) Robert Daryl Hart (Second Defendant)
Representation:	Counsel: F Hicks SC (Plaintiffs/Cross-Defendants) M Klooster (Defendants/Cross-Claimant) Solicitors: William Cotsis & Associates (Plaintiffs/Cross-Defendants) Somerville Legal (Defendants/Cross-Claimant)
File Number(s):	2019/191970

JUDGMENT

Background

1 By my judgment delivered on 15 July 2022 (*Warburton v County Construction (NSW) Pty Ltd* [2022] NSWSC 941) I found (at [224]) that:

> "… County is liable in respect of several aspects of the work done before the Second Agreement took effect (items H2, H3, H13 and G34, in respect of the dividing wall only) as to which it had assumed the wider obligations under the Contract, and the statutory warranties had wider effect, and that liability is not released by the release in the Second Agreement. I will allow the parties an opportunity to reach agreement as to the quantification or works relating to those items, or make further submissions, given the difficulties as to the expert

> quantification evidence, to which I refer below. Mr and Mrs Warburton have otherwise not established their claims for breach of the Contract, the Second Agreement or the statutory warranties against County."

2 I also noted several difficulties which had arisen in respect of the quantification of damages, in explaining why I would not proceed to determine issues as to the disputed scope of defects, rectification work, their disputed costs and damages in the numerous claims as to which County's liability was not established, against the contingency of an appeal. I observed (at [225]-[227]) that:

> "I would ordinarily now proceed to determine the issues as to the disputed scope of defects, rectification works, their disputed costs and damages, as to which I have not found County's liability was established, against the contingency of an appeal, although those questions do not arise on the findings I have reached above. However, it is likely not possible, and it is certainly not practical, now to do so, rather than to deal with those matters on remittal from any successful appeal. First, the experts' positions continued to change until the last day of the hearing, and those changes and their implications were neither fully nor clearly integrated into any final position. I do not say that critically where it resulted from further attendances at site and attempts to narrow their differences. To allow these questions to be determined, I would first have to direct the parties to provide an updated joint report as to the matters as to which the experts now agree and disagree, updated for their changes in position, and then updated quantification reports. There is no utility in doing so where it will make no difference to the result at first instance and may make no difference on any appeal, particularly if the Court of Appeal accepts the view I have formed as to matters of construction and the absence of evidence as to the content of County's obligations.
>
> Second, there is presently no basis to generally prefer the expert witnesses of one party over the other as to the hydraulic and building issues on which consensus had not been reached, where each is experienced and credible and, given the nature of the issues, their differing views are largely based on the application of their experience to reach difference results. This could be addressed in a not particularly satisfying way by reference to the onus of proof, by generally adopting the narrower scope of work conceded by County or not ordering work where there was no such concession, in the many cases where I could not conclude, on the balance of probabilities, that the wider scope preferred of work by Mr Laurie or Mr Zakos should be adopted in preference to Mr Brown's or Mr Nisbett's views, where both are reasonably open. A second possibility would be now to appoint a court-appointed expert, with appropriate expertise, to express a view as to the matters on which the parties' experts differ. There is no reason to think the parties would wish to incur the costs of the latter course, or that there is any utility in it, where it will make no difference to the result at first instance and possibly no difference to the result on any appeal for the reasons noted above.
>
> Third, and most fundamentally, it is impossible to determine the question of the quantum of rectification costs and the amount of any damages on the quantification evidence as it stands. As counsel acknowledge, the joint quantification reports quantify rectification costs on the basis that I accept one

> or other of the hydraulic and building expert reports in its entirety and without modification as to each issue, although there are multiple disagreements between the quantification experts as to the costs of remedial work even on that basis. The quantification reports do not allow costs to be determined unless I make a binary choice of that kind as to each issue. It is plain that I could not proceed in that way, unless I simply determine that the there is no basis to prefer the expert evidence called by Mr and Mrs Warburton to that called by County as noted above, where several issues have sub-issues and raise questions of degree, and the result as to particular issues will also depend on which of the two approaches noted in the second point above was adopted. Once one of those approaches was taken and the many issues and sub-issues as to the scope of rectification works were determined, further quantification reports would then need to be prepared on that basis or this issue would need to be referred to a referee. It is again unlikely that the parties would wish to go to the costs of preparing those reports now or a reference now, after they had incurred any costs associated with the second step above, where the result will again make no difference at first instance and may make no difference on appeal for the reasons noted above."

3 I then directed the parties to submit agreed orders to give effect to the judgment, including as to costs, or, if there was no agreement between them, their respective draft orders and short submissions as to the differences between them.

4 Subsequently, by the parties' consent, I made orders on 1 August 2022 noting that the parties had agreed the quantum in respect of Item H3 as $1,985.64 and the quantum in respect of Item G34 (Item 9A) as $3,562.93 and providing for the Court to determine the quantum of items H2 and H13, if practicable, without the need for an oral hearing, and providing a timetable for written submissions in that respect, and deferring the question of costs to be determined after those matters were determined. At the time I made those orders, my Associate also advised the parties, at my request, that:

> "His Honour has made these orders in Chambers, where the parties have consented to them, but inserting the words "if practicable", in order 1 before the words "without the need for an oral hearing".
>
> His Honour doubts that it will in fact be practicable to determine these matters in this way, for the reasons noted in paragraphs 225 – 227 of the Judgment, but no doubt that will emerge from the parties' submissions in due course."

5 It appears that I was unduly pessimistic in that regard and that these matters can be determined within the constraints imposed by the state of the evidence.

Quantification as to Item H2

6 I first deal with the question of quantification in respect of Item H2. I described the issue in respect of that item in the primary judgment (at [171]) as follows:

> "First, Mr and Mrs Warburton contended that plumbing works performed by a contractor, Civic Plumbing, "may have" been initially performed prior to that Agreement and were defective so far as a sanitary drainage system incorporated a boundary trap not provided with a low level vent (MFI 1A, item H2). County accepted, in closing submissions, that this work was done prior to 5 March 2017, when the Second Agreement took effect. The parties, by an Agreed Statement of Facts dated 8 July 2022, then recorded their agreement that this work was completed before the Second Agreement was made and I proceed on that basis. The hydraulic experts retained by Mr and Mrs Warburton and by County, Mr Laurie and Mr Brown respectively, agree as to this matter, which it appears was rectified by the date that Mr Brown undertook his inspection at the property. I accept that a breach of the contractual and the statutory warranties under the HBA is established in respect of this matter, where the work was done while the Contract rather than the Second Agreement was in effect."

7 Mr Hicks, with whom Ms Anderson appears for Mr and Mrs Warburton, now points out that this defect was rectified by a contractor engaged by them and pointed to the experts' agreement that this item was defective and had been rectified to the experts' satisfaction. Mr Hicks submits that the rectification work was done to rectify their loss and damage and points to the invoice for that work, which discloses work done to address several matters including this item, the number of hours worked and the rates charged for the relevant tradespersons and additional amounts charged in respect of materials. However, the contractor's invoice cannot be relied on to establish the cost incurred in rectifying that defect, because it includes other work not related to this matter and does not apportion the costs between this matter and the other work done. The cost of repairing this item was estimated in Mr Zakos' report dated 21 August 2020, on which Mr and Mrs Warburton relied, and was not addressed by County's expert evidence or in the joint report as to quantum. Mr and Mrs Warburton submit, rightly, that this is a "relatively small item" and also submit that Mr Zakos' costing for the item should be accepted.

8 Mr Klooster, with whom Ms Clark appears for County, acknowledges in response that an installation defect was present and necessary repair works were completed between the site inspections by the experts, but submits that the evidence is not sufficient to support the costs claimed. He refers to the decision of the Court of Appeal in *Lichaa v Boutros* [2021] NSWCA 322, dealing with the position where an invoice for rectification costs was relied on to establish a loss but did not separately specify the cost of rectification of the relevant defect. Here, of course, the invoice is not the only evidence of the

costs incurred, because the estimated costs of the repair are also addressed in Mr Zakos' report, to which County made no response.

9 It seems to me that County's submission is, at best, unconvincing, where the extent of evidence that is necessary to establish the amount of the loss should be assessed having regard to the size of the loss, and on the basis that Mr and Mrs Warburton should not be required to incur disproportionate costs for the recovery of the relatively small amount of the loss claimed. I am satisfied that the loss claimed in respect of this amount, being $3861.00 inclusive of GST as set out in Mr Zakos' quantification report, is established. It is regrettable that the parties have likely incurred greater costs in their dispute as to this amount than the amount claimed.

Item H13

10 Mr and Mrs Warburton's claim in respect of Item H13 is more substantial, and provides some commercial justification for this additional stage of the proceedings. I summarised that issue in my primary judgment (at [174]) as follows:

> "Mr and Mrs Warburton also identify defects in the property's stormwater drainage system (MFI 1A, item H13). In closing submissions, Mr and Mrs Warburton at least left open the possibility that that this work was done prior to the entry into the Second Agreement, and County submitted that this work was done prior to 5 March 2017, when the Second Agreement took effect. The parties, by an Agreed Statement of Facts dated 8 July 2022, recorded their agreement that this work was completed before the Second Agreement was made and I proceed on that basis. The hydraulic experts agree that there was an installation defect in relation to a reflex valve in a stormwater line, and more widely in respect of pipework issues, but disagree as to the reasonable and necessary scope of rectification works. In concurrent evidence concerning this and another defect (MFI 1A, item H18), both considered that defects in the pipework needed to be corrected, although Mr Brown considered that a more limited repair or remediation was required and Mr Laurie considered that complete replacement would be more cost effective (T162). Mr Klooster submits that the narrower repair supported by Mr Brown, should be preferred to the wider repair for which Mr Laurie contended, and Mr Hicks contended for the inverse position. That seems to me to be a question as to which minds may reasonably differ, and it may be that the Plaintiffs have not established that Mr Laurie's scope of works should be established on that basis. I accept that a breach of the contractual or statutory warranties under the HBA is established in respect of this matter, where the work was done while the Contract rather than the Second Agreement was in effect. …"

11 As I noted in my primary judgment, the hydraulic experts agree the storm water drainage system is defective but disagree as to the scope of work required to

rectify it. Mr Hicks submits that the Court should prefer the evidence of Mr Laurie.

12 As I noted above, I had observed in the primary judgment at [226], that there was no basis to prefer Mr Laurie's evidence to Mr Brown's evidence as to these matters generally, although I was not there specifically addressing this item. Mr Hicks now repeats and possibly expands the points that he had made in earlier submissions in respect of the different views of Mr Laurie and Mr Brown, to which I had regard in expressing the view recorded in the primary judgment in general terms. Mr Klooster responds by pointing to the view that I the expressed in general terms. I continue to take that view, not least because this is not an occasion on which to revisit my findings in then primary judgment. However, that does not fully resolve the position in respect of this item, because Mr Laurie had fully scoped the work required for this item in his report, although his view is open to challenge; Mr Brown did not develop an alternative scope of works, as distinct from recommending further investigation and highlighting the possibility that a lesser scope of works may be sufficient and the likelihood or possibility that some existing pipe works may be able to be re-used. Where I cannot prefer Mr Laurie's view to Mr Brown's view, and where they are not true alternatives, then I must have regard both to Mr Laurie's scope of work and the prospect that a lesser scope of work, not fully defined by Mr Brown, may be sufficient.

13 Mr Hicks submits that the approach proposed by Mr Brown requires Mr and Mrs Warburton to bear some risk that the scope of work he prefers will not ensure that the works comply with contractual requirements, so far as he had suggested that a further detailed examination was required in order to scope the necessary works and that a portion of the existing pipe work could be reused. Mr Hicks also submits that, if a lesser remedial scope is proposed by the party in breach, then it bears the legal and evidentiary onus of establishing that what is proposed will provide functional equivalence and refers to *Builders Insurers Guarantee Corporation v The Owners – Strata Plan No 57504* [2010] NSWCA 23 at [79]-[80] in that regard. Mr Klooster responds that that decision in *Building Insurer's Guarantee Corporation* does not establish the general proposition for which Mr and Mrs Warburton contend and that, where equally

credible and experienced experts provide different opinions as to how to remedy a defect, and both methods are reasonable, a plaintiff's entitlement is limited to the cheaper remedial option, referring to *Dean v Ainley* [1987] 1 WLR 1729 and to *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463. It seems to me that I could only reach the finding that Mr Brown's approach involves risks which Mr and Mrs Warburton should not be required to bear if I preferred Mr Laurie's evidence to Mr Brown's evidence, or disregarded Mr Brown's assessment that a lesser scope of portion of the pipes are likely to be able to be reused and a lesser scope of works may be required. I am unable to do so, where no more evidence is available now than was available at the earlier hearing in that regard.

14 Mr Hicks also submits that the quantum experts have included a provisional sum in relation to Mr Brown's proposed scope and also submits that Mr and Mrs Warburton should not have to "carry the risk that the provisional sum may not cover the cost required to investigate the system and undertake the appropriate rectification work". It seems to me that the allowance of a provisional sum is a proper way to address uncertainty in the scope of the work. In the quantum evidence, Mr Zakos costs this item at $179,458.25, adopting Mr Laurie's scope of work, and Mr Seeto costs it at $115,131.16, also adopting Mr Laurie's scope of work. Neither quantification expert quantified Mr Brown's position, since it was not a sufficiently defined scope of work to do so.

15 After the receipt of County's submissions as to quantum, and prior to Mr and Mrs Warburton's reply submissions, I requested further brief submissions in respect of the specific issue whether Mr Zakos' quantification of costs of rectification of Item H13 depended upon the acceptance of Mr Laurie's scope of work for that item, so that it did not apply if that scope of work was not accepted. Mr Klooster responded that Mr Zakos applied Mr Laurie's scope of work for Item H13 and his costings did not apply if Mr Laurie's wider scope of work was not accepted by the Court. Mr Klooster also submits that both Mr Zakos and Mr Seeto costed Mr Laurie's wider scope and the difference between them arose through the use of different rates to carry out the same work.

16 In submissions addressing that issue and in reply, Mr Hicks repeats the proposition, in relation to this item, that the Court should prefer Mr Laurie's to Mr Brown's assessment of the hydraulic defects, and should prefer the consequential quantification undertaken by Mr Zakos, by reference to Mr Laurie's scope of work to the quantification undertaken by Mr Seeto. Mr Hicks also submits that the figure of $115,131.16 for which County contends reflects Mr Seeto's quantification with reference to Mr Laurie's scope of work and contends on that basis that County does not press the proposed scope of work of Mr Brown. Mr Hicks submits that the remaining question is whether the quantum for Item H13 should be referenced to the estimate of Mr Zakos or Mr Seeto. I prefer the approach of Mr Zakos to that of Mr Seeto for the reasons noted below. Mr Hicks also identifies an approach which could be adopted by adjusting Mr Seeto's costings, by reference to Mr Laurie's work, to include Mr Zakos' figures for particular items, resulting in a total figure of $141,200.07. It is not necessary to take that approach, where I prefer the approach of Mr Zakos to the approach of Mr Seeto in this respect.

17 An issue also arises as to the rates to be allowed in respect of the quantification of this item. Mr Klooster refers to a difference in rates allowed by Mr Zakos and Mr Seeto in respect of Items 13.1 – 13.4 in respect of removal of drainage. I prefer Mr Zakos' approach in that respect, where Mr Seeto's approach appears to allow a nominal figure that is not likely to compensate for the actual costs of the work. Mr Hicks points out that there is a difference in respect of items 13.5 – 13.8, where Mr Zakos includes an additional charge for laying of pipes and Mr Seeto treats that amount as included in the appropriate rate for the supply and laying of the pipe. I also prefer Mr Zakos' approach to Mr Seeto's approach in this respect, where two separate and distinct steps will be required, one to remove at least part of the existing drainage line in internal and external areas, including landscaped areas, and another to supply and lay the additional line. I prefer Mr Zakos' approach in respect of the costing of items 13.21 – 13.24, where there is no explanation for Mr Seeto's position that those amounts should not be charged for, and Mr Klooster did not press that contention in submissions in the primary hearing.

18 As I noted above, I am satisfied that I must do the best I can to quantify the damages which plainly exist in respect of this item. In principle, the damages to which Mr and Mrs Warburton are entitled, in respect of Mr County's breach of contract as to this item is the monetary sum which, so far as money can, represents "fair and adequate compensation for the loss or injury" which they sustained by reason of that breach: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 116 per Deane J ("*Amann*"). The Court must do the best it can to make a reliable assessment of damages, where damages are difficult to assess, including where a party has failed to lead the best evidence of damages: *Amann* above at 83 per Mason CJ and Dawson J, 125 per Deane J, 153 per Gaudron J. In *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31 at [135], Beazley JA (as her Honour then was) observed that:

> "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provides for breach of contract, an award of damages … . Such damages should not be nominal only, notwithstanding that the award may be difficult to assess. …" (citations omitted)

19 I bear in mind that the case law also recognises that damages must be proved with a degree of precision which reflects the proof that is reasonably available to the parties: *New South Wales v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133 at [72] ; *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768 at [38]; *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319; *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 243; *Troulis v Vamvoukakis* [1998] NSWCA 237; *McCrohan v Harith* [2010] NSWCA 67 at [128]; and *Re Hair Industrie Penrith Pty Ltd, Hair Industrie Merrylands Pty Ltd* [2015] NSWSC 1578 at [20], on which I have drawn for this summary. It seems to me that the reports of Mr Laurie and Mr Zakos on which Mr and Mrs Warburton rely plainly meet this standard, although there remains a degree of uncertainty as to the recoverable loss suffered as to this items until the work is done.

20 Doing the best I can in this respect, and recognising that scientific or mathematical certainty is here not possible, it seems to me that I should adopt Mr Zakos' quantification of the damages recoverable by Mr and Mrs Warburton in respect of this item, discounted by 15% to allow for a real but uncertain

prospect that the scope of the necessary work will be reduced by some use of existing pipework, reducing the recoverable loss as to this item to $152,540, rounding to the nearest dollar.

Orders and costs

21 Mr and Mrs Warburton have been substantially successful in respect of their claims as to the quantification of Items H2 and H13 and, on 14 September 2022, made on open offer to accept an amount less than that which they have recovered under this judgment in respect of Item H13, which would reasonably have been accepted by County. On that basis, it seems to me that County must pay Mr and Mrs Warburton's costs of the quantification application in respect of item H2 on an ordinary basis and in respect of item H13 on an ordinary basis to 14 September 2022 and thereafter on an indemnity basis. Neither Counsel contended to the contrary.

22 Turning now to the position as to costs generally, in the primary judgment, I had observed (at [230]) that:

> "… Mr and Mrs Warburton's claim against County in respect of three defects and one aspect of a fourth and their money claim, which occupied little time at the hearing, have succeeded, and the large part of their claim will be dismissed, after issues as to the quantification of damages relating to these several defects are agreed or are resolved. As I noted above, Mr and Mrs Warburton did not press their claim against Mr Hart at the hearing, and the proceedings will be dismissed as against him. My preliminary view is that, in these circumstances, Mr and Mrs Warburton's limited success, in respect of a much larger and longer case, means that they must pay County's and Mr Hart's costs of the proceedings as agreed or as assessed. However, I will give the parties an opportunity to be heard in that regard."

23 Plainly, this preliminary observation may now require qualification, because Mr and Mrs Warburton have recovered compensation that is material in amount in respect of Item H13, and the significance of that matter may well not have escaped the parties' attention in the extended dispute as to quantification of that item. I should defer further comment in that respect where I made orders by consent, on 1 August 2022, deferring the question of costs to be dealt with by submissions after the issues as to items H2 and H13 were determined.

24 I make the following orders:

1. Judgment in favour of Mr and Mrs Warburton in the amount of $224,727.34, in respect of the amount referred to in paragraph 229 of the

principal judgment, Items H3 and G34 (Item 9A) as previously agreed between the parties, and Items H2 and H13, quantified as follows:

(i) The amount referred to in paragraph 229 of the principal judgment: $62,777.77

(ii) Item H3 $1985.64

(iii) Item G34 (item 9A): $3562.93

(iv) Item H2: $3861.00

(v) Item H13: $152,540.00

2. County pay Mr and Mrs Warburton's costs of the quantification application in respect of item H2 on an ordinary basis and in respect of item H13 on an ordinary basis to 14 September 2022 and thereafter on an indemnity basis.

3. Other than in respect of interest and remaining issues as to costs, the proceedings otherwise be dismissed.

4. The parties serve, and send their respective submissions as to interest and costs to the Associate to Black J by 4pm on 21 October 2022 and their reply submissions by 4pm on 28 October 2022.

5. Reserve liberty to apply on 3 days' notice.

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