Civil and Administrative Tribunal
New South Wales

Case Name:	Taylor v Clientel Developments Pty Ltd Clientel Developments Pty Ltd v Taylor
Medium Neutral Citation:	[2020]NSWCATCA
Hearing Date(s):	7 November 2019
Date of Orders:	9 January 2020
Date of Decision:	9 January 2020
Jurisdiction:	Consumer and Commercial Division
Before:	Jeffery Smith, Senior Member

Decision:

(1) The homeowner, Bianca Taylor c/- Coleman Greig, Lawyers, Level 11, 100 George Street, Parramatta NSW 2150, shall pay the builder, Clientel Developments Pty Ltd c/- M J Birch, solicitor, the sum of $12,034.80 immediately.

(2) Application HB 18/46172 is dismissed.

(3) If the parties are unable to agree on the issue of costs, leave is granted for any party seeking a costs order to file and serve a short written submission on that issue only on or before 24 January 2020.

(4) Leave is granted for the other party to file and serve a short written submission

in reply by 12 February 2020.

Catchwords:	Residential building work, damages for defective work, property subsequently sold to third party, whether reasonable for homeowner to recover damages for defects
Legislation Cited:	*Home Building Act 1989*
Cases Cited:	*Bellgrove v Eldridge* [1954]90 CLR 613 *Director of War Service Homes v Harris* [1968]QDR 275 *Westpoint Management v The Chocolate Factory Apartments* [2007]NSWCA 253 *Ruxley Electronics & Construction v Forsythe* [1996]1AC344. *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 *Staunton v Lotus Construction Pty Ltd* [2016]NCSCATCD 64 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009]HCA 8
Category:	Principal judgment
Parties:	Bianca Taylor, homeowner Clientel Developments Pty Ltd, contractor/builder
Representation:	Counsel: Mr Kevin Tang for the homeowner Solicitors: Mr Michael Birch for the builder
File Number(s):	HB 18/46172 and HB 18/52740
Publication Restriction:	None

REASONS FOR DECISION

Background

2 Application HB 18/46172 was filed in the Tribunal on 26 October 2018 by the homeowner seeking orders for payment by the builder of $33,766.12 representing a refund of sums already paid plus compensation in respect of alleged defects and completion costs by another builder together with orders for relief of payment to the builder of a further $18,418.75.

3 On 11 December 2018 the builder filed cross-claim HB 18/52740 in the Tribunal seeking orders for payment by the homeowner of $18,418.75 being $8,265.25 for work completed but not paid plus $10,153.50 for "expectation costs" in circumstances where it was alleged that the homeowner had terminated the contract without lawful excuse.

4 The applications proceeded together and directions were made granting the parties leave to be legally represented and to file and exchange the documentary material to be relied upon.

5 Both matters came on for hearing before me on 7 November 2019. At the commencement of the hearing at 9:15am Mr Birch, for the builder, made an open offer to settle by which each party would withdraw their respective applications and each party pay their own costs. The offer was said to be open until 10:05am on the morning of the hearing. The offer was immediately rejected by Mr Tang for the homeowner.

6 Points of Claim filed by the homeowner amended her application to seek orders in the total sum of $61,284 in respect of alleged defective residential building work, breaches of contract and breaches of the warranties provided under *Home Building Act 1989*. In addition the homeowner maintained her application for relief of payment of the sum of $18,418.75 claimed by the builder.

The builder's claim

7 Mr James Khoury, project manager, gave evidence on affirmation. Mr Khoury adopted his written statement of 12 March 2019 and was cross-examined on it.

8 The builder's submissions were to the following relevant effect.

9 In April 2018 the parties had discussed a proposed bathroom renovation and the builder provided a quote in the sum of $30,344. Subsequently the homeowner required amendments and a further quotation was provided. On 22 June 2018 the parties executed a "Fair Trading Home Building Contract for work over $20,000".

10 The agreed scope of work comprised a renovation to the bathroom including underfloor heating for the agreed sum of $35,345. Subsequent agreed variations were for erection of a wall in the rumpus room for an additional $2,700 and removal and re-framing of the en-suite flooring for $4,800. Thus, the adjusted contract sum was $42,845.

11 It was the builder's submission that it was the homeowner who had repudiated the contract. The builder, by letter to the owner dated 23 July 2019 advised that he was suspending the work due to breach of contract by the owner and requiring the homeowner to remedy the breach within 10 days. There was no dispute that the homeowner had not responded to that letter. In fact, the builder's submission was that a chain of email correspondence between the homeowner and the builder's foreman demonstrated that by 17 July 2019 the homeowner had determined to be no longer bound by her obligations under the contract.

12 In response to the homeowner's letter of 27 July 2019 purportedly terminating the contract, the builder had responded on 7 August 2019 denying that the builder had repudiated and asserting that it was the owner who had repudiated and accepting that alleged repudiation and terminating the contract at that time.

13 Despite the fact that the builder's amended Points of Claim sought orders for payment in the sum of $18,418.75 the builder's final submissions sought orders for payment of a higher amount.

14 The value of the work performed by the builder as at the date of termination of the contract was determined by the builder to be the value of all invoices issued at that time, in total $30,279.75.

15 The builder was entitled, it was submitted, to be paid $12,853.50 which represented the loss of the expected profit calculated at 30% of the adjusted contract sum which was $42,845.

16 It was not disputed that the homeowner has paid the builder the total sum of $22,014.50.

17 Hence, the builder's calculation of the sum to which he was entitled was

- Value of the work to date 30,279.75
- Plus profit at 30% 12,853.50
- Sub-total 43,133.25
- Less paid 22,014.50
- Sum owing by the homeowner 21,118.75

18 In regard to the homeowner's claim it was noted that a major point of difference between the expert witness for the builder and that for the owner was that the builder's expert (Mr Bournelis) was of the opinion that most of the work said by Mr Colecliff (for the owner) to be defective work was in fact incomplete work yet to be undertaken by the builder at the time of termination of the contract.

19 The total sum claimed by the homeowner for defective work, breaches of the contract and of the statutory warranties was $61,284.

20 However, on the builder's submission, there was a significant intervening event that deprives the owner from recovering that sum. The homeowner, on 5 August 2019, exchanged contracts for the sale of the subject property. Subsequently the sale has been completed. The contract of sale does not require the homeowner to undertake any works to the property prior to completion and the contract specifically provides that the purchaser accepts the property in its present condition.

21 The homeowner has not sought to demonstrate that she suffered any loss on the sale of the property or resolved to remedy the defects after the sale of the property.

22 Further, as there is no intention to use the damages claimed to rectify any defect it cannot be said that it is reasonable to make any award for damages in favour of the homeowner. Reliance for the above proposition was placed on the judgement of Bathurst CJ in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 and on the decision of the Tribunal in *Staunton v Lotus Construction Pty Ltd* [2016]NCSCATCD 64

The homeowner's case

23 The homeowner provided a Statutory Declaration dated 8 February 2019 with annexures. The homeowner adopted that statement on affirmation and was cross-examined on her evidence.

24 The homeowner's submission was to the following relevant effect.

25 The homeowner had purchased the property at – Ave, Beecroft in August 2016 with the intention to renovate the entire house. In early April 2018 the homeowner had initially contacted the builder to obtain a quotation for proposed work to the en-suite bathroom. That quote was provided and subsequently amended to provide for underfloor heating.

26 On or about 22 June 2018 the parties executed a standard form "Fair Trading home building contract for works over $20,000". The scope of the work under the contract was as set out in the quote provided by the builder and dated 18 June 2018. The agreed contract sum was $35,345.

27 The homeowner alleged breaches of the Home Building Act 1989 in regard to

- Demand for a deposit in excess of 10% contrary to s 8,
- Inadequate statutory insurance in place in breach of s 94
- Premature demands for payment contrary to s 92(2),
- Failure to provide a written contract in a timely manner contrary to s 7B.

28 The works are incomplete and defective in accordance with the items agreed in the joint Scott schedule and the opinions provided by the homeowner's expert witness Mr Colecliff.

29 The homeowner's submission was that the builder engaged in repudiatory conduct comprising "numerous" breaches of the contract and by letter from the homeowner's solicitors dated 27 July 2918 the builder was notified that the contract was terminated. The NSW Fair Trading Contract specifically provides (clause 25) for retention of the homeowner's rights to terminate under the common law.

30 Further correspondence between the parties on 9 August 2018 clarified the repudiation by the builder. In that correspondence the homeowner complained of examples of the builder failing to perform his contractual obligations and set out what was referred to as "fundamental breaches" of the contract listing 14 such alleged breaches.

31 The various breaches of contract referred to by the homeowner, failure to act on reported defective work and a stated unwillingness or inability to complete

the works, collectively amounted to a repudiation of contract giving rise to the homeowner's entitlement to terminate, which she claimed to have done in the letter of 27 July 2018.

32 Reliance was placed on the decision of the High Court in *Bellgrove v Eldridge* [1954]90 CLR 613 in regard to the measure of damage to which the homeowner is entitled.

33 The sum sought by the homeowner as set out in the Points of Claim was $61,284 based on the expert opinion of Mr Colecliff.

34 The homeowner's submission did not dispute that the property in question was sold on 5 August 2019 with completion being 42 days later. Reliance was placed on the decision of the Supreme Court of Queensland in *Director of War Service Homes v Harris* [1968]QdR 275 to the effect that it is not relevant for the purpose of assessing damages that a homeowner may have sold the property, as in this case, to a third party. Further reliance in this regard was placed on the decision of the NSW Court of Appeal in *Westpoint Management v The Chocolate Factory Apartments* [2007]NSWCA 253 and on the decision of the House of Lords in *Ruxley Electronics & Construction v Forsythe* [1996]1AC344.

35 No reliance was placed by the homeowner on any issue relating to diminution in value of the property.

36 As the homeowner no longer has possession of the property it is inappropriate under the Home Building Act 1989 s 48MA to order the builder to return and rectify the defects.

37 Curiously the homeowner's written submission also claimed [40] that the homeowner, in addition to any other remedy to which she may be entitled, was entitled by reason of the breaches of the Home Building Act referred to at [5] of the submission to a full refund of all money already paid to the builder. No legal argument or reasoning was provided in support of that claim.

Consideration

How did the contract terminate?

38 The contract document (at p 363, *et seq* of the Joint Bundle) was entered into by the parties on 22 June 2018. The only information in the contract as to the scope of the intended works is provided at Clause 1 where the quote of 16 April 2018 (#1208) and the Plans prepared by the builder dated 12 April 2018 are referred to. The parties are in agreement that the contract was for the renovation of the homeowner's bathroom with provision for underfloor heating. The agreed contract sum was $35,345.

39 The homeowner agreed under cross examination that additional works being re-framing of the floor for the additional sum of $4,800 and the erection of a wall in the rumpus room for the additional sum of $2,700 were agreed to as variations to the contract. That is, the total sum agreed to be paid was $42,845.

40 The homeowner's submission is not clear as to when and how it is claimed that she terminated the contract. There are allegations made in regard to repudiation of contract by the builder, but no clear submission was made about how such repudiation was accepted or, in the alternative, how the contract was otherwise terminated at common law.

41 The applicant claimed to have requested a "hiatus in works" on 17 July 2018. There is no suggestion that such request amounted to acceptance of the alleged repudiation by the builder and termination by the owner.

42 The homeowner's submission refers to "various examples of the termination process engaged in by the homeowner" and relies on the homeowner's written statement adopted under affirmation by the owner. That part of the written statement referred to relates alleged conversations going to a dispute between the parties as to whether some specific work would be performed and some dissatisfaction with work already done.

43 Further reference to alleged repudiatory conduct by the builder is referred to in correspondence between the parties' solicitors dated 9 August 2018.

44 The first suggestion made by the homeowner that she had in fact accepted the alleged repudiation and terminated the contract was by letter from her solicitors to the builder's solicitors, dated 27 July 2018 in which non-specific allegations were made that the works conducted by the builder were not in accordance with the contract, did not comply with the BCA and did not comply with the statutory warranties. The letter went on to say

> It follows, that through its conduct, your client has repudiated the contract and the contract has now come to an end"

45 In the alternative to the above, the homeowner's submission was that she had elected to terminate the contract by 23 July 2018 when the builder served a notice of dispute. The submission was that the "hiatus of work" had been in force since 18 July 2018 and that she had communicated to the builder multiple examples of defective and unsatisfactory works.

46 The above submissions demonstrate a lack of understanding by the homeowner's legal advisers of the law relating to termination of a contract by repudiation. If one party to a contract evinces an intention to no longer be bound by one or more terms of the contract the other party has two options. They may, for example if the transgression is a minor one, elect to continue under the contract without recourse to any remedy at that time. Alternatively, if the innocent party is of the opinion that the repudiation is so serious that the contract ought to be terminated the decision to accept the repudiation and to terminate the contract must be communicated to the other side in clear terms.

47 Although it may be argued that the letter from the homeowner's solicitors to the builder's solicitors of 27 July 2018 did communicate the homeowner's decision to accept the repudiation and to terminate the contract, the wording of the letter does not make that decision abundantly clear. It is clear from the letter the builder's solicitor sent on 31 July 2018 enquiring whether in fact the words were intended to show that the homeowner had terminated the contract

that the ambiguity in the wording created a doubt in the mind of the builder's solicitor. In her response to that enquiry the homeowner failed to clarify her intentions.

48 Although the homeowner's written submission [10] claims that the contract pursuant to clause 25 retains the homeowner's right to terminate under the general law, no submission is made that it was in fact terminated in that way other than by the letter dated 27 July 2018, which was based on the alleged repudiation.

49 For the above reasons I am not satisfied that any actions taken by the homeowner were effective to bring the contract to an end.

50 The builder, on the other hand, had delivered in person to the homeowner on 23 July 2018 a letter setting out alleged breaches of the contract by the homeowner, notices pursuant to those alleged breaches and a notice of dispute pursuant to clause 27 of the contract. Under the contract the parties were required to continue performance of their respective contractual obligations. It is not disputed that the homeowner did not respond to that notice and did not engage in discussion to resolve the dispute.

51 The builder, by letter from his solicitors dated 7 August 2018, firstly denied that the builder had repudiated as alleged by the homeowner, and then asserted that it was the homeowner who had evinced an intention to no longer be bound by the terms of the contract and clearly accepted her repudiation and terminated the contract.

52 There is no submission from the builder that he terminated pursuant to clause 26 of the contract, which he was entitled to do.

53 The failure of the homeowner to respond to the builder's letter of 23 July 2018 in circumstances where she was required by the contract to continue performance under it and also to attempt to resolve the dispute clearly evinces an intention to no longer be bound by the contract. Various breaches

of the contract by the homeowner were alleged in the builder's letter of 23 July 2018. A mechanism was provided under the contract to discuss and come to some resolution about those allegations. The failure to do, I am satisfied, did amount to a repudiation by the owner giving the builder the right to accept the repudiation and terminate the contract, which he did.

54 I am therefore satisfied that the builder validly terminated the contract by his letter dated 7 August 2018.

55 Several things flow from that determination. Firstly, the builder is entitled to recover payment for all work completed up to the date of termination (7 August 2018). Secondly, the builder is entitled to be paid for loss of the profit he would have enjoyed on the work that he was denied. Thirdly, subject to the argument relating to the significant intervening event (see below), the homeowner is entitled to be compensated for the cost to rectify those defects existing in the work as at the date of termination.

What is the value of the work done by the builder but which remains unpaid?

56 The builder's submission was that the value of the work done at the time of termination of the contract is determinable from calculating the sum of the invoices issued to the homeowner, which amount to $30,279.75.

57 The parties each engaged expert witnesses, however, neither provided a valuation of the completed work. The contract provided for payment for the work in stages as each stage was completed. I am satisfied that the first three invoices said to indicate the value of work performed were in fact the first three provided for under the contract. The next two said to be indicative of value of the work were for the two agreed variations to the contract in the sum of $4,800 and $2,700 respectively. The last invoice for which payment is claimed (# 1583) is provided for under the contract in the sum of $10,415.25. Of that sum only $8,265.25 is claimed as work completed as at the date of termination.

58 Although the value of work completed is calculated by the builder in a somewhat unorthodox manner, in the absence of any submission by the homeowner to the contrary I accept the builder's submission that the value of the work completed as at the date of termination of the contract was $30,279.75.

59 There was no dispute that the homeowner has already paid the builder $22,014.50.

60 Deducting one sum from the other it is clear that the homeowner owes the builder $8,265.25.

What sum is the builder entitled to be paid by the homeowner for loss of profit?

61 The builder, for reasons mentioned above, is entitled to be compensated for loss of the profit on the work that he was unable to do due to early termination of the contract arising from the homeowner's repudiation.

62 Mr Tony Younan, managing director of the building company, provided a signed statement to the effect that the builder's profit margin on the contract was 30%. Mr Younan was not called to be cross examined on his evidence and I therefore accept without reservation that 30% was the correct profit margin.

63 However, that profit margin was never going to be levied in a single invoice at the end of the contract. It was included in each of the payments due as they were invoiced. The builder has already received part of the profit as a component of the $22,014.50 already paid by the homeowner and will receive the profit on the remaining $8,265.25 when it is paid. The loss of profit therefore must be calculated at the rate of 30% on that part of the work the builder has had no opportunity to perform.

64 I am satisfied that deducting the $30,279.75 (the value of the work performed) from $42,845 (the adjusted contract sum) and applying the rate of 30% will

provide a figure that correctly represents the loss of profit to the builder. That calculation results in a figure of $3,769.55.

65 Hence, in addition to the payment of $8,265.25 that the builder is entitled to be paid for work performed he should also receive $3,769.55 for loss of profit. In all, the builder is entitled to payment of $12,034.80.

Is the sale of the property fatal to the homeowner's claim?

66 Turning to the homeowner's claim it is alleged that there are a number of defects in the work performed by the builder for which the homeowner is entitled to be compensated.

67 However, the homeowner has now sold the property without doing any rectification of the alleged defects and without being obliged under the contract of sale to rectify any aspect of the work.

68 It is the builder's submission that in those circumstances the homeowner is not entitled to any award of damages and the builder relies principally on the decision of the New South Wales Court of Appeal in *Cordon Investments* in support of that proposition.

69 The homeowner relied on the decision of the Supreme Court of Queensland in *Director of War Service Homes* for the proposition that it is irrelevant for the purpose of assessing damages that a homeowner is not under a legal liability to rectify the defects due to having sold the property to a third party.

70 Reliance was also placed by the homeowner on the decision of the NSW Court of Appeal in *Westpoint Management* and of the House of Lords decision in *Ruxley Electronics* to similar effect.

71 Ms K Rosser, Senior Member of NCAT, as she was then, reviewed the above cases dealing with this issue in *Staunton*. Her decision, with which I respectfully agree, states in part

44. In general terms, the primary measure of damages in relation to a contract for the performance of building work, is the cost of rectifying defective or incomplete work. This is because, by receiving money in substitution for performance, a claimant is put in the position it would have been in had the contract been performed. The possibility that rectification work will not be carried out does not preclude recovery of the cost of rectification work: *Bellgrove v Eldridge* [1954] HCA 36; 90 CLR 613; *Ruxley Electronics & Construction v Forsyth* [1995] 3 WLR 118. However, recovery of the cost of rectification work is subject to the rectification work being necessary and reasonable. If it is not, then the measure of damages is the diminution in the value of the property. If there is no diminution in value, the claimant recovers nothing.

45. Sale by the claimant of the subject property does not of itself displace the entitlement to damages according to the rectification measure: *Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors* [2007] NSWCA 253, per Giles JA at [49] (*Chocolate Factory*)

46. In respect of the relevance of a sale of the property, in *Chocolate Factory* Giles JA cited Gibbs J in *Director of War Service Homes v Harris* [1968] Qd R 275 (FC) who said at 278 that sale did not affect the plaintiff's accrued right to rectification damages, although the fact of sale "might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to effect the remedial work". In that case, Gibbs J stated at 278-9 that, assuming it would be reasonable to do the work

> ... the owner would still be entitled to recover as damages the cost of remedying the defects or deviations from the contract (assuming of course that the contract price had been paid). In assessing those damages it would not be relevant whether the owner was under a legal liability to remedy the defects, or whether he had made a profit or a loss on the sale of the building, for the builder has no concern with the details of any contract that the owner might make with a third party. ... The owner of a defective building may decide to remedy the defects before he sells it so that he may obtain the highest possible price on the sale; he may sell subject to a condition that he will remedy the defects; or he may resolve to put the building in order after it has been sold because he feels morally, although he is not legally, bound to do so. These matters are nothing to do with the builder, whose liability to pay damages has already accrued.

47. In support of the contention that sale of the property in this case meant that the applicants could not recover damages in respect of the cost of rectification, the respondent relied on *Central Coast Leagues Club Limited v Gosford City Council & Ors* BC9802257 (*Central Coast Leagues Club*). However, at [62] of the judgment in *Chocolate Factory*, Giles JA states:

> 62 In *Central Coast Leagues Club v Gosford City Council* the rectification work would not be carried out because other more extensive work had to be carried out in order to comply with

> later court orders. I said that the fact that the work would not be undertaken gave occasion to conclude that it was not a reasonable course to adopt; the reason why it would not be carried out underlay that statement. In *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd*, in which the rectification work could not be carried out because other more extensive work had already been carried out, I referred to this at [99] as a holding that, if it was found that rectification work would never be carried out, no damages should be awarded. I accept, with respect, the reservations expressed by Hodgson JA in *Scott Carver Pty Ltd v SAS Trustee Corporation* at [40] – [44], and my words were apt to mislead; it is necessary to ask why the rectification work would never be carried out. In these cases the rectification work could not be carried out because of supervening events, and established that the plaintiff had not been deprived of the benefit of performance of the contract and thus had not suffered a compensable loss. In other cases, depending on their facts, whether rectification work would be carried out could come under consideration, but not because an intention not to carry out the rectification work itself precluded the award of damages.

72 Ms Rosser went on to decide that in the circumstances of the case before her the sale of the property did not mean that recovery of the cost of rectification was unreasonable.

73 However, in the circumstances of the matter before me I am satisfied that it would be unreasonable for the homeowner to recover the cost of rectification of the defective work.

74 The High Court in *Bellgrove* provides a succinct measure of the damages to which a homeowner is entitled due to defects in the work performed by the builder.

> Subject to a qualification to which we shall refer presently the rule is, we think, correctly stated in *Hudson* on *Building Contracts*, 7th ed. (1946) p.343. "The measure of the damages recoverable by the building owner for the breach of a building contract is, it is submitted, the difference between the contract price of the work or the building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach". But the work necessary to remedy defects in a building and so produce conformity with the plans and specifications may, and frequently will, require the removal or demolition of some part of the structure……In none of these cases is

> anything more done than that work which is required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss.
>
> The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. *Bellgrove v Eldridge* [1953-1954]90 CLR, 613, at 617 et seq.

75 It is in the application of that rule that assistance is obtained from the decision in *Cordon Investments* and *Westpoint Management*.

76 *Cordon Investments* was a case in which the NSW Court of Appeal considered the issue of damages and the circumstances and basis upon which they are awarded in relation to defective building work. The Court considered *Bellgrove v Eldridge* [1954]HCA 36, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009]HCA 8 and *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007]NSWCA 253.

77 His Honour Bathurst CJ at [229] of that decision referred to the decision in *Westpoint Management* and quoted the following with approval

> [60] But the plaintiff's intention to carry out the rectification work, it seems to me, is not of significance in itself. The plaintiff may intend to carry out rectification work which is not necessary and reasonable, or may intend not to carry out rectification work which is necessary and reasonable. The significance will lie in why the plaintiff intends or does not intend to carry out the rectification work, for the light it sheds on whether the rectification is necessary and reasonable. Putting the same point not in terms of intention, but of whether or not the plaintiff will carry out the rectification work, whether the plaintiff will do so has significance for the same reason, and not through the bald question of whether or not the plaintiff will carry out the rectification work. That question is immaterial, see *Bellgrove v Eldridge*.
>
> [61] So if supervening events mean that the rectification work can not be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant. If sale of the property to a contented purchaser means that the plaintiff did not think and the purchaser does not think the rectification work needs to be carried out, it may well be found to be unreasonable to carry out, the rectification work. An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of

> unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained."

78 His Honour went on to say at [230]

> The combination of the lack of intention to carry out the rectification work, the transfer of the property from Lesdor to the owners corporation and the absence of any evidence that the defects were affecting the use and occupation of the building or the common property leads, in my opinion, to the conclusion that it would be unreasonable to carry out the work and that the damages for the cost of rectification should therefore not be awarded.

79 In this case there is no intention of the homeowner to carry out any rectification work and there is no suggestion that there was any diminution in the sale price of the property as a result of the defects. The question, however, in determining the reasonableness or otherwise of compensation, as stated in *Westpoint*, is not whether or not the homeowner intends to carry out rectification work but why the homeowner intends or does not intend to carry out the rectification work. In this case the homeowner does not intend to carry out the rectification work because she has no obligation to do so and has suffered no actual loss as a result of the defective work and no longer has access to the property.

80 In those circumstances, as stated in *Westpoint*, achievement of the contractual objective is no longer relevant and it can hardly be found that compensation for any rectification work that is necessary is also reasonable.

81 Shortly stated, I am satisfied that it would be unreasonable for the homeowner to receive compensation for defective work in circumstances where the home owner has sold her property to a third party and has no obligation to rectify any building defects in the property and has no intention of carrying out any rectification work and no capacity to do so. To award compensation in those circumstances would create an unjust enrichment for the homeowner.

82 As I am satisfied the homeowner is not entitled to recover any damages for the defective work it is unnecessary for me to consider the expert evidence or the value of the defective work.

83 Nor is it necessary to consider any implications under the *Home Building Act 1989* s 48MA.

Conclusion

84 For the reasons already provided I am satisfied the builder is entitled on its application to be paid the sum of $12,034.80.

85 The homeowner's claim is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar