



## Civil and Administrative Tribunal New South Wales

Case Name(s): Dawson v Edifice Australia Pty Ltd

Medium Neutral Citation: [2019] NSWCAT

Hearing Date(s): 26 July 2019

Date of Decision: 19 September 2019

Jurisdiction: Consumer and Commercial Division

Before: S Thode, Senior Member

Decision:

1. The respondent shall pay \$146,842.64 to the applicant immediately.
2. The respondent shall pay the applicant's costs as agreed or assessed on the ordinary basis.

Catchwords: Home Building – damages - breach of statutory warranty

Legislation Cited: *Civil and Administrative Tribunal Act 2013; Home Building Act 1989*

Cases Cited: *Craftsmen Restoration & Renovations Pty Ltd v Boland* [2011] NSWCA 147; *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613.

Category: Principal judgment

Parties: Dawson (Applicant)  
Edifice Australia Pty Ltd (Respondent)

Representation: Mr Birch solicitor (Applicant)  
Mr Khodir of Gardner Ekes Lawyers (Respondent);

File Number(s): HB 18/50257

Publication Restriction: Nil

## **REASONS FOR DECISION**

- 1 On or about 21 June 2017 the parties entered into a written contract for the provision of residential building work, namely the construction of a dwelling and associated works at xx Close, St Clair for a contract price of \$395,000.
- 2 The scope of the work is not in dispute as set out in the written contract, a Fair Trading Home Building Contract for work over \$5000.
- 3 The builder filed proceedings HB 18/42628 dated 4 October 2019, seeking payment for outstanding invoices in the sum of \$52,112. Solicitor and or counsel appeared on behalf of the builder at two Directions hearings. The builder filed no evidence and on or about 10 May 2019 the builder's application was dismissed for non-appearance.
- 4 The owner filed application HB 18/50257 dated 26 November 2019 seeking damages in the sum of \$196,667 for defective and incomplete work.
- 5 At the hearing of the owner's claim for damages for defective and incomplete work, the builder submitted that it was not the builder for the purpose of the Home Building Act 1989 and that it was not a party to the building contract and that it was not liable for the damages for defective work as it had not performed the work.

### **The owner's claim**

- 6 The owner appeared at the morning of the hearing represented by a solicitor Mr Birch and tendered the following a bundle of documents indexed including:
  - (1) The Building Contract,
  - (2) Points of Claim;
  - (3) An expert report of Mario Bournelis dated 22 October 2018.
  - (4) Bank Statements;

(5) Statement of Kevin Dawson dated

- 7 It is not in dispute that the applicant paid \$355,500 to the builder's contractor, Zacron Pty Ltd for part of the construction. Edifice Pty Ltd was appropriately licensed to perform building work at the time of formation of the contract and instructed a third party builder (Zacron) to perform the contract work. It is unclear whether Zacron was appropriately licensed to perform residential building work as there is no evidence before me to that effect.
- 8 The builder's license was suspended on 12 September 2018 and on 24 September 2018 the owners terminated the contract in writing. At the date of the termination the building work was incomplete and, in part, defective.

### **The builder's submissions**

- 9 The builder relies on the affidavit of Josef Taouk, former director of Edifice Australia. Mr Taouk that Edifice executed a contract for residential building work at the premises of Mr Dawson on 30 June 2017 and admits that it obtained a certificate for home warranty insurance in Edifice's name. Mr Taouk deposes that the respondent builder did not proceed with the works. Instead Edifice authorised and subcontracted the works to Zacron Pty Ltd.
- 10 Mr Taouk relies on a letter dated 14 June 2018, addressed 'to whom it may concern':

Please be advised that I Josef Taouk of Edifice Pty Ltd have engaged Zacron Pty Ltd to project manage and execute works to the proposed detached two story dwelling in accordance with the stamped plans provided by Mr Kevin Dawson and Zacron Pty Ltd.

Please be advised that I Josef Taouk of Edifice Pty Ltd authorise all payment claims in relation to the above project to be claimed by Zacron Pty Ltd and paid directly to Zacron's Pty Ltd account (sic) in clause 12 of the fair trading contract (sic).

Please be advised that I Josef Taouk of Edifice Pty Ltd authorise that all matters in relation to the above project to be forwarded to Mr Ronnie Joudo (managing director) of Zacron Pty Ltd acting on behalf of Edifice Pty Ltd.

Also a copy of the deed of agreement between builder/owner/developer (Project Manger (sic)) is attached for above consideration.

- 11 The letter is signed by Mr Taouk but no by Mr Joudo.
- 12 Mr Taouk relies on a further affidavit dated 25 July 2019 which was tendered on the morning of the hearing. He deposes that he never received the deposit of \$39,500 pursuant to clause 4 of the contract and that therefore he was of the view he had never entered into a contract with the applicant and that he was advised by the director of Zacron Pty Ltd that Zacron was engaged by the homeowner to complete the entirety of the works that were subject of the contract. Mr Taouk deposes that Edifice never carried out any works under the contract and the contract was abandoned by the applicant. Edifice has never received any money from Mr Kevin Dawson and/or his wife pursuant to the contract or otherwise and Edifice is not liable for any defects for work “never rendered” pursuant to the contract.
- 13 Mr Dawson denies he retained Zacron and was unsure of the arrangement between Zacron and Edifice. Mr Dawson submits that their arrangement is irrelevant.

### **Consideration**

- 14 The following facts are uncontested and uncontroversial.
- 15 On 23 June 2017 the builder obtained an insurance certificate with respect to the residential building works. I have had regard to the certificate of insurance and it names Edifice Australia Pty Ltd as the entity to carry out the building work. The licence number displayed on the certificate of insurance is 232479C which was at all relevant times the license number of Edifice Australia Pty Ltd.
- 16 I had regard to the building contract which is signed by Josef Taouk. The contractor details are left blank but Mr Taouk admits that he entered into the contract but that the respondent “abandoned” it. On the evidence before me I am satisfied that the insurance policy dated 28 June 2017 discloses that the builder was, for the purpose of insurance obtained on the behalf of the owner, responsible for residential building work at 1 xx Place, St Clair, NSW 2759 . I

am further satisfied that the builder under the hand of Josef Taouk executed the building contract on Edifices' behalf. For these reasons I am satisfied that Edifice and not Zakron is the builder who contracted with the owner. Considering the owner's untraversed and unopposed evidence, I am further satisfied that the building contract was validly terminated on 24 September 2019 and that at that stage the building work was incomplete. The owner was entitled to terminate the contract as the builder became unlicensed, and I am satisfied that the builder was unauthorised to carry out residential building work and that this constituted a breach of an essential term of the contract.

17 Pursuant to clause 6 of the contract construction was to be completed within 30 calendar weeks from the date the work was due to commence by 17 January 2018. The builder has not claimed any extension of time for completion of the works pursuant to clause 7 of the contract. The builder's licence was suspended from 12 September 2018 and has not been renewed since. By reason of the fact that the builder was unlicensed the homeowner terminated the contract effective on 24 September 2018. As at the date of the contract termination the builder had not completed the works pursuant to the scope of the contract, entitling the owner to damages for the cost of completing the work.

18 The homeowner has made the following payments to Zacron Pty Ltd:

- (1) deposit \$39,500;
- (2) foundation slab \$39,500;
- (3) frame \$79,000;
- (4) external lining \$118,500;
- (5) internal \$79,000;
- (6) total \$355,500.

- 19 I have had regard to the affidavit of Mr Kevin Dawson. The homeowner deposes that as at the time of termination his expert had identified a number of defects which are detailed in the expert report of City Wide Building Consultants Pty Ltd under the hand of Mario Bournelis dated 22 October 2018. Mr Dawson deposes that a significant amount of the building work remained uncompleted as at the date of termination. Among other things the bathroom and master ensuite were incomplete, the builder had not supplied and installed wardrobes, the kitchen was incomplete, air conditioning throughout the dwelling was incomplete, the painter had commenced with preparation and application of the undercoat to internal walls but had not commenced painting doors and external surfaces. The builder had not erected a new carport, and had not excavated and constructed a sewer junction for the property.
- 20 The owner was obliged to commence contracting with licensed contractors to complete the building work. Due to a lengthy delay by the builder undertaking the work Mr Dawson and his family were required to vacate rented premises and move into his parents' premises. The living arrangements for the family were unacceptable and the owner undertook all necessary steps to complete the building works as expeditiously as possible. The owner retained a number of services and paid third-party contractors and suppliers.
- 21 The owner has paid \$146,842.64 to third-party contractors to complete some of the contract work.
- 22 The owner acknowledges that \$355,500 has been paid to the builder to date, leaving a contract sum outstanding in the sum of \$39,500 (\$395,000 - \$355,500).
- 23 In summary, and as set out in a reconciliation document tendered at the hearing the owner claims \$140,102.74 for losses and damages, based on the evidence as follows:

- (1) Incomplete defective work as per invoices paid by the owner to date:  
\$146,842.64
- (2) Plus Losses and damages for incomplete and defective work yet to be undertaken as per the Bournelis Report and scott schedule:  
\$32,760.10
- (3) **Subtotal: 179,602.74**
- (4) Less contract balance of (\$39,500)
- (5) **Total \$140,102.74**

24 In respect of the defective work, I am satisfied on the uncontested sworn evidence of the applicant's expert, Mr Bournelis, that the applicant has proved non-compliance with the requirements of the contract. I am particularly persuaded by the independent expert report that the standard of workmanship was poor and that the work did not comply with the Australian Standards and the Building Code of Australia. I find that the evidence established breaches of the statutory warranties which apply to residential building work pursuant to section 18B of the Home Building Act 1989, and in particular that the respondent failed to perform the work in a proper and workmanlike manner.

25 In addition I am satisfied on the uncontested evidence tendered by the applicant that the respondent failed to complete the contractual works and that the cost incurred to date and the future cost of completing the contractual works as estimated by Mr Bournelis is reasonable under the circumstances.

26 In light of the findings above, the owner is entitled to the reasonable cost of correcting the defective work (Craftsmen Restoration & Renovations Pty Ltd v Boland [2011] NSWCA 147. The damages allowed must be necessary to produce conformity with the contract and also a reasonable course to adopt. Bellgrove v Eldridge [1954] HCA 36; (1954) 90 CLR 613.

27 I am satisfied that the cost incurred to date and the cost to rectify as set out in the Bournelis Report is reasonable under the circumstances and I award \$140,102.74 for damages for defective and incomplete work.

### **The Adjournment Application**

28 The respondent, Edifice Australia Pty Ltd applied for an adjournment on the morning of the hearing. The application for an adjournment was refused and these are the written reasons for decision.

29 The builder commenced proceedings for debt recovery on 4 October 2018 before the owner filed application HB 18/50257 for damages for breach of statutory warranty. At all times the builder was represented by Gardner Ekes Lawyers. The firm acted on behalf of the builder in its application and the cross application and appeared at the first directions on 5 March 2019 and at the second directions hearing on 13 November 2018. The Tribunal ordered the builder to file and serve its evidence by 27 November 2018. The builder failed to comply with all directions of the Tribunal and has failed to file any evidence either in its own claim or in the related proceedings .

30 Further, the builder has not sought an extension of time in relation to those directions prior to the hearing on 23 July 2019. The legal representatives appearing at the final hearing were unable to provide a satisfactory explanation for the delay to date. The homeowner has properly requested an extension of time for the service of evidence and complied with all directions to file and serve documents.

31 The matter was listed before Senior Member Simon on 5 March 2019. The Tribunal made fulsome directions and permitted the builder a last extension:

The Tribunal before listing this matter for final hearing will allow the builder one final opportunity to provide the documents the builder intends to rely on. The builder is on notice that any further requests for extension of time or for adjournments must be accompanied by supporting affidavit explaining the delay, the steps that were taken to comply and when compliance is to occur.

32 The Tribunal further ordered the builder to provide to the homeowner and the Tribunal either in person or by post a copy of all documents in support of its application and in reply to the homeowner's application by 2 April 2019. Those included points of defence expert and lay evidence.

33 The builder did not comply with the directions and no expert or lay evidence was filed.

34 On 10 May 2019 the matter was listed before Principal Kim Rosser in the non-compliance list. The Tribunal made directions and the matter was set down for hearing, again noting the builder's complete non-compliance:

The Tribunal notes the failure of the builder to comply with procedural directions made on 5 March 2019 and the failure of the builder to seek an extension of time in which to do so and the failure of the builder to attend directions hearing on 10 May 2019.

The Tribunal further notes that the builder's application HB 18/42628 has been dismissed for non-appearance.

Lastly the Tribunal confirms that the hearing of the owner's application will proceed on 26 July 2019 on the basis of the evidence provided by the applicant.

35 At this stage the builder was represented by Gardner Ekes lawyers. On 15 April 2019 the Tribunal sent a notice of hearing to the email address nominated by Gardner Ekes lawyers.

36 A solicitor by the name of "Sadek" confirmed to the Tribunal that 26 July would be suitable for hearing. The email of 8 March 2019 under the email address of the respondent solicitor was signed by Gardner Ekes lawyers acting on behalf of the builder.

37 The builder appeared at the hearing seeking an adjournment on the basis that the solicitor with the carriage of the matter had suddenly left the employ of the firm Gardner Ekes Lawyers.

- 38 It was further submitted from the bar table that the partner with the carriage of the matter, Mr Hector Ekes, was unavailable due to illness but without filing any supporting medical evidence.
- 39 It was submitted that the applicant required a short time to file “fresh” evidence but the solicitor was unable to inform the Tribunal what form of evidence it would file should the matter be adjourned. There was no evidence before the Tribunal that any steps have been taken to obtain expert evidence even though the applicant served its expert report on the solicitor for the respondent as early as 19 February 2019.
- 40 It was submitted that the adjournment should be granted for the following reasons:
- (1) The applicant, if successful, could bankrupt Mr Taouk.
  - (2) The builder should not be ordered to pay the owner’s costs thrown away because it “is not the builder’s fault that three solicitors of the firm Gardner Ekes have suddenly left that firms’ employ”.
  - (3) Failure to grant an adjournment amounts to a denial of natural justice;
  - (4) A winding up application is currently brought against the respondent in unrelated proceedings. The respondent is resisting the winding up application and an order against the builder in these proceedings would further prejudice the respondent in the unrelated proceedings.
  - (5) It is the builder’s case that he never entered into a contract with the homeowner and that he was of the view that the contract had been finalised or abandoned by reason of the fact that he never received a deposit from the applicant homeowner and the proceedings are doomed to fail.

## **Consideration**

- 41 The adjournment application was refused and the parties were informed that written reasons for decision would be published in due course. These are those written reasons.
- 42 In the absence of any evidence to support the adjournment application the Tribunal was not satisfied that the respondent has provided any persuasive reasons why the matter could not proceed on 26 July 2019. It was clearly set out in the directions of 5 March 2019 that any further adjournment application or extension of time application must be supported by the appropriate affidavit evidence.
- 43 The Tribunal received no evidence to the effect that the partner with the carriage of the matter was ill, or when the solicitor with the carriage of the matter left the employ of Gardener Ekes Lawyers, or why another solicitor was unable to prepare the matter for hearing.
- 44 The application for adjournment was opposed. The solicitor for the applicant homeowner was ready to proceed and the owner has incurred significant costs to get the matter ready for hearing. The applicant is ready to proceed, having already expended over \$100,000 to rectify and complete the building works.
- 45 On these bases the application for adjournment was refused.

## **COSTS**

- 46 The owner seeks an order for costs.
- 47 As the owner was wholly successful in his claim, costs should follow the event.
- 48 I order the respondent to pay the applicant's costs as agreed or assessed on the ordinary basis.

49 If the parties wish to be heard on the question of costs they shall file and serve submissions on costs by 27 September 2019.

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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

The image shows a handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. To the right of the signature is the official seal of the NSW Civil & Administrative Tribunal. The seal is circular with a double border. The outer border contains the text "NSW CIVIL & ADMINISTRATIVE" at the top and "TRIBUNAL" at the bottom, separated by two small stars. The inner circle features the coat of arms of New South Wales, which includes a shield supported by a kangaroo and an emu, with a sun rising over a landscape.