



Civil and Administrative Tribunal New South Wales

Case Name: **Dhobi -v- Casagrande Homes Pty Limited**

Medium Neutral Citation: **[2024] NSWCATCCD**

Hearing Date(s): 4 October 2024

Date of Orders: 13 November 2024

Date of Decision: 13 November 2024

Jurisdiction: Consumer and Commercial

Before: P Moran, Senior Member

Decision: (1) The respondent is to pay the applicant within twenty-eight (28) days the sum of \$210,783.01.
(2) The respondent is to pay the applicants costs of the Application.

Catchwords: BUILDING CLAIM – breach of statutory warranty – cost of rectification of builder defects – breach of contract – cost to complete work - damages for breach of contract - costs

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Home Building Act 1989 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)

Cases Cited: Nil

Texts Cited: Nil

Category: Principal judgment

Parties: Bhriteshkumar Dhobi; Kinnari Dhobi – Applicants
Casagrande Homes Pty Limited - Respondent

Representation: Applicants: M Birch, Birch Partners
Respondent: not applicable

File Number(s): 2023/00381376 (formerly HB 23/36162)

Publication Restriction: Nil

REASONS FOR DECISION

Background and Application

- 1 The applicants are the registered proprietors of property located in Marsdenia Avenue, Melonba, New South Wales (**property**). On 29 March 2021 they entered into a contract with the respondent for the respondent to perform residential building works (**works**) at the property; the contract price being \$425,000.00. They say that the respondent undertook some of the contract works at the property between December 2021 and May 2023, that in May 2023 NSW Fair Trading issued a Rectification Order to the respondent with respect to the works the subject of the contract (**works**) but that, by late July 2023, it had only undertaken certain of the works referred to in the Order.
- 2 The applicants further contend that on 19 December 2023 the Tribunal ordered the respondent to complete the works set out in (1) to (6) of paragraph 8 of their Points of Claim but that it has failed to undertake any of the works set out in those paragraphs.
- 3 At [11] of the applicants Points of Claim they say that on 21 November 2023 they served, via their solicitors, a Notice of Termination of the building contract on the respondent.
- 4 The applicants have made payments totalling \$350,044.01 to the respondent; the payments being detailed at [12] of the Points of Claim.
- 5 Breach of the statutory warranty prescribed by s18B of the Home Building Act (**HB Act**) is alleged. The applicants claim compensation arising from such breach as well as damages for breach of contract in the respondent failing to complete the works.

Hearing

- 6 At the Tribunal hearing on 4 October 2024 I gave reasons ex tempore concerning hearing the Application in the absence of the respondent who had failed to appear.

7 I also made, at the commencement of the hearing, an order for the delivery by the respondent to the applicant of contract certificates, and gave reasons for doing so.

8 Documents relied upon by the applicants were admitted and marked Exhibit A1. Evidence was also given by the first applicant and by an expert Mr Xue.

Jurisdiction

9 Section 48K of the HB Act gives the Tribunal jurisdiction to hear and determine any building claim brought before it in accordance with Part 3A in which the amount claimed does not exceed \$500,000.00 (or any other higher or lower figure prescribed by the regulations).

10 “*Building claim*” is defined in s48A to mean (relevantly for present purposes) a claim for the payment of a specified sum of money that arises from a supply of building goods or services.

11 I am satisfied that the applicants claim is a building claim as defined by s48A and that the Tribunal has jurisdiction to hear and determine it; subsections (3), (4), (6) and (8) having no relevant application. The applicants claim, I find, was lodged within the period prescribed by s18E.

Applicants Evidence

12 Included within Exhibit A1 is a statement of the first applicant (**Mr Dhobi**). He and his wife are the registered proprietors of the property. They entered into a contract with the respondent builder on 29 March 2021 for the construction of a two storey residence on the property for a sum of \$425,000.00. A copy of the contract is annexed to the statement.

13 The local council provided development consent on 8 August 2021. A private certifier, Building Certifiers, issued a construction certificate on 15 November and the respondent commenced work on 16 December 2021.

- 14 The applicants say that the building contract (**contract**) provided for the works to be completed within thirty two (32) calendar weeks from the date the works were due to commence. On Dhobi's calculations the works would, pursuant to the contract, be completed by 3 August 2022 subject to any contractually permitted extension of time. He says that the respondent did not claim any extensions of time after commencement of works.
- 15 NSW Fair Trading issued a Rectification Order on 8 May 2023; that Order being at pages 176 to 178 of the Exhibit. The Order required the respondent to carry out and complete internal linings by 31 May 2023, door skirtings by 30 June, architraves by the same date, and practical completion by 31 July 2023. Mr Dhobi says that the respondent completed some of the internal linings but failed to undertake any of the other works detailed in the Rectification Order and failed to achieve practical completion by 31 July 2023 or at all.
- 16 On 20 November 2023 the Tribunal made an Order for the respondent to complete building works on or before 20 November 2023; the works being detailed at [5] of the Order - reproduced at page 179 of the Exhibit. The applicants say that the respondent failed to undertake any of the works referred to in the September 2023 Tribunal Order.
- 17 The applicants, via their solicitors, served a Notice of Termination of the building contract on the respondent on 21 November 2023.
- 18 At [21] of Mr Dhobi's statement he sets out the payments that the applicants have made to the respondent in the period April 2021 to June 2023 totalling \$350,044.01. Copies of the respondent's invoices are within the Exhibit.
- 19 Mr Dhobi says in his statement that the applicants were, at the time (January 2024), having negotiations with a builder for that builder to rectify the respondent's defective works and to complete the contract works. He says that as at the date of the statement those negotiations had not been finalised.

- 20 He further says that the applicants and their children had been residing in rented accommodation in Harris Park, New South Wales, and that their intention was to move into the property once construction was complete. They claim against the respondent rental payments from August 2022 at \$390.00 per week. They also say that the Managing Agent of the premises that they rented notified of a rental increase to \$450.00 per week from 27 March 2024.
- 21 The expert report of Mr Xue, referred to further in these Reasons, is at pages 322 to 557 of Annexure A1.

Consideration and Findings

- 22 I accept the applicants evidence of entering into a Home Building Contract with the respondent on 29 March 2021 being the contract reproduced at pages 28 to 80 of Exhibit A1. The contract price was \$425,000.00. The contract records the address where the work will be done as Lot 4161 Marsdenia Avenue, Marsden Park, New South Wales. I accept the evidence of the first applicant given at the hearing, supported by HBFC certificates tendered during the hearing, that the address of the works was 45 Marsdenia Avenue. I also accept the evidence at [20] and [21] of the first applicant's 30 January 2024 statement (within Exhibit A1) of a Notice of Termination of the building contract with the respondent being served on 21 November 2023 and as to payments being made by the applicants to the respondent prior to termination totalling \$350,044.01; the invoices issued by the respondent being at pages 184 to 190 of the Exhibit.
- 23 The applicants, I find, entered into a six month lease agreement on 20 July 2022 for their occupation of premises in Marion Street, Harris Park; the initial agreed rental being \$340.00 per week. I accept the applicants evidence of their intention to move into the property once works pursuant to the building contract were completed. I further accept that they have made the rental payments as set out in the first applicants statement from July 2022 to August 2024 when they moved into the property in its then completed state; the works having been completed by the incoming builder (as to which see below). The Residential

Tenancy Agreements entered into by the applicants made on 20 July 2022, 22 January 2023 and 18 January 2024 commence at pages 191, 216 and 240 of the Exhibit. I accept the applicants evidence of the lease payments made, being supported by a Laing and Simmons Tenant History summary at 265 of Exhibit A1. I further accept that the rental in respect of the Harris Park premises increased to \$450.00 per week from 27 March 2024; evidenced by the Laing and Simmons letter to the first applicant of 18 January 2024 appearing at page 271 of the exhibit.

24 I accept the applicants evidence at [13] to [20] of the first applicant's 30 January 2024 statement within Exhibit A1 of

- (a) The issue of a Rectification Order by NSW Fair Trading in May 2023,
- (b) The respondent failing to undertake all of the works referred to in that Order,
- (c) The applicants in August 2023 making application to the Tribunal,
- (d) The Tribunal making the Works Order referred to in [17],
- (e) The respondent failing to undertake any of the works referred to in the Tribunal Order, and
- (f) The respondent being notified of termination of the building contract as set out at [20].

25 I find the applicants have validly terminated their building contract with the respondent pursuant to clause 25 of the contract.

26 The applicants evidence of defects in the building works undertaken by the respondent is set out in the expert witness report of Gordon Xhang Dune Xue (**Mr Xue**) dated 9 January 2024; the report, with annexures, being at pages 322 to 557 of Exhibit A1. The report is, by its terms, prepared in accordance with

Uniform Civil Procedural Rule 205, schedule 7 Expert Witness Code of Conduct. Mr Xue sets out his qualifications, associations and licensing in section 4 of his report. I accept that he is appropriately qualified to provide expert opinion evidence in these proceedings.

- 27 Mr Xue says at [5.6] that he inspected the property in November 2021 and was provided access to it. At the time of his inspection work at the property remained incomplete. He says that he identified defects at the property and calculated the cost to rectify the defective work at \$70,797.00 exclusive of GST. He also calculates the cost to complete works at the property to be \$468,812.00 exclusive of GST. The expert's costing methodology is set out at [6] at page 327 of Exhibit A1, and the assumptions that are made are set out at [7] at page 328. Works required to bring the property to completion both externally and internally are outlined at [8.2] and [8.3] at page 329 of the Exhibit. Further, the expert expresses the view that none of the work referred to in the NCAT September 2023 Order have been completed. Photographs depicting the incomplete work are at pages 331 to 343.
- 28 I accept the expert's evidence as to the incomplete work and as to the cost of completing such work.
- 29 I find that the respondent, in failing to complete the works, has breached clause 25 of the contract between it and the applicants. The applicants have, I find, validly terminated the contract pursuant to its provisions as a result of the respondent's failure to complete and, hence, contractual breach.
- 30 At pages 273 and 274 of Exhibit A1 is a further statement of the first applicant. He says, and I accept, that on or about 12 December 2023 the applicants entered into a contract with Laksh Homes Sydney Pty Limited (**Laksh**), a builder, for the rectification of the respondent's defects and to complete the works left incomplete by the respondent. I accept that the contract entered into between the applicants and Laksh is the contract at pages 276 to 316 of Exhibit A1; the contract price being \$240,000.00 inclusive of GST.

- 31 The contract between the applicants and Laksh excluded, per clause 4.12 of the Laksh quotation appearing at page 315 of the exhibit, buffalo turf and basic landscaping. I accept, however that Laksh has, subsequently, provided a quotation to the applicants for the performance of that work at \$15,000.00; that quotation appearing at page 318 of the Exhibit.
- 32 I also accept the applicants evidence of having paid \$5,943.00 to a window supplier, ABM Windows and Doors, which had previously been contracted by the respondent. The applicants had already paid that amount to the respondent but the respondent did not pay the window supplier resulting in the necessity for the applicants to repay that amount.
- 33 I accept the evidence of Mr Xue at [9.1] to [9.9] (Exhibit pages 344 to 368) of work performed by the respondent being defective. The defective work relates to damaged tiles to the ground floor, damage to internal walls, a missing post to the pooja room (despite the architectural ground floor plan showing two posts), blocked external brick wall weep holes, alfresco beams supporting the first floor roof to be joined in two pieces, waterproofing to the balcony to have not been installed in accordance with AS4654.2-2012, a missing niche in the hallway wall, a front pillar not to be extended to the height of the front balcony, and the substrata structural flooring to bedroom three to be out of level.
- 34 In respect of each defective item Mr Xue has set out his observations and his opinion including the methodology of rectification and the cost of rectification.
- 35 The rectification costs are then summarised in a Scott Schedule at pages 370 to 372 as a total rectification cost, in the expert's opinion, at \$70,797.00.
- 36 I accept the expert's evidence as to the defective work, the methodology of rectification and the cost of rectification.
- 37 In performing building work that I find is defective the respondent has breached the s18B warranty. The contract is further breached by the failure, I find, of the respondent to remedy its defective work in breach of clause 25. Such breach

entitled the applicants to terminate the contract in the manner that they have done.

38 By reason of the respondent's breach of the contract and breach of the s18B implied term, the applicants have been required to engage the services of another builder – Laksh – to remedy the respondent's defective work and to complete the works that the respondent had contracted to complete.

39 The penultimate paragraph of clause 25 of the contract between the applicants and the respondent provides – under the heading "Termination of Contract by Owner – Due to the Fault of the Contractor" -

"If the reasonable costs of completion of the work exceeds that which would have otherwise been due under the contract the difference will be a debt payable by the contractor to the owner."

40 The reasonable cost of completing the work that the respondent had contracted to complete, including the cost of remedying defective work was \$240,000.00.

41 Were it not for the respondent's breach the applicants, in reliance upon their executed contract with the respondent, could have had works completed by paying a further \$84,999.99 to the respondent.

42 The loss sustained by the applicants flowing from the respondent's undertaking of works which were defective and in failing to complete works, is \$155,000.01. In addition the applicants have incurred the cost of landscaping at \$15,000.00 and the amount that they have had to pay again for windows and doors namely, \$5943.00. Those components total \$175,943.01. Also flowing from the respondent's breach is the cost to the applicants of rental accommodation. In find that the rental payments made were reasonable and total \$34,840.

43 The applicants proceedings in the Tribunal have been brought within the period prescribed by s18E of the HB Act.

- 44 The respondent did not participate in the Tribunal proceedings. Despite that, there is no evidence that, if it did participate, it would have available to it either of the defences set out in subsection (1) of s18F.
- 45 Section 48O (1)(a) of the HB Act provides that in determining a building claim the Tribunal is empowered to make an order that a party to proceedings pay money to another party whether by way of debt, damages or restitution.
- 46 For the reasons outlined herein I order the respondent to pay to the applicants by way of damages for breach of contract and breach of statutory warranty the sum of two hundred and ten thousand seven hundred and eighty three dollars and one cent (\$210,783.01) within twenty-eight (28) days.
- 47 Whilst s48MA provides that in determining a building claim involving an allegation of defective residential building work a Tribunal is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome I find that, here, that is not appropriate. The applicants took appropriate steps to terminate their contract with the respondent then arranged for another builder to complete the work and rectify the defective work. Additionally, the respondent had been the subject of a Rectification Order by Fair Trading New South Wales and had not – I find – completed the works the subject of that Order. It had also failed to perform the works ordered by the Tribunal in September 2023 to be undertaken.

Costs

- 48 In their Points of Claim attached to their amended Home Building Application the applicants seek at paragraph 28d costs of, and incidental to, the proceedings.
- 49 Section 60 of the Civil and Administrative Tribunal Act 2013 provides per subsection (1) that each party to proceedings in the Tribunal is to pay the party's own costs. Subsection (2) provides that the Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

- 50 Rule 38 of the Civil and Administrative Tribunal Rules, applying to proceedings for exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division, which these proceedings are, provides that despite s60 of the Act the Tribunal may award costs in proceedings to which the Rule applies even in the absence of special circumstances warranting such an award if (per subsection (2)(b)) the amount claimed or in dispute in the proceedings is more than \$30,000.00.
- 51 The amount claimed or in dispute in these proceedings is more than \$30,000.00. There is no necessity, accordingly, to find special circumstances.
- 52 I consider it appropriate that the respondent ought pay the applicants costs of the proceedings.

ORDERS

- (1) The respondent is to pay the applicant within twenty-eight (28) days the sum of \$210,783.01.
- (2) The respondent is to pay the applicants costs of the Application.

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 to the left of a circular official seal. The seal features the text 'NEW SOUTH WALES CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem. The signature is a stylized, cursive 'JR'.