

AUSTRALIA / JUDGMENT

Kay v 3D Design & Build Pty Ltd

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:

Kay v 3D Design & Build Pty Ltd [2016] NSWCATCD 81

Hearing dates:

15 June 2016

Decision date:

29 September 2016

Jurisdiction:

Consumer and Commercial Division

Before:

D. Goldstein, Senior Member

Decision:

1. 3D Design & Build Pty Ltd must pay Amber Kay the sum of \$29,609.40 immediately.
2. The following orders will apply in the event that either party wishes to make an application for costs.
3. Any costs application pursuant to section 60 of the Civil and Administrative Tribunal Act 2013 or rule 38 of the Civil and Administrative Tribunal Rules 2014 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.
4. The costs respondent will have 21 days after the date of receipt of the costs application referred to above, to lodge in the Tribunal and serve on the costs applicant the submissions, if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.

5. The cost applicant will have 14 days after the date of receipt of the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent the submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.
6. The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

Catchwords:

Renewal of proceedings

Legislation Cited:

Civil and Administrative Tribunal Act 2013

Home Building Act 1989

Cases Cited:

Baak v Concrete Services Group Pty Ltd [2016] NSWCATAP 42

Kay v 3D Design & Build Pty Ltd [2016] NSWCATAP 68

Nguyen v Cosmopolitan Homes [2008] NSWCA 246

Category:

Principal judgment

Parties:

Applicant: Amber Kay

Respondent: 3D Design & Build Pty Ltd

Representation:

The parties were unrepresented

File Number(s):

HB 16/20040

Publication restriction:

Unrestricted

Reasons for Decision

The whole of Tribunal Proceedings HB 14/32008 were the subject of Appeal Proceedings AP 15/42268, Kay v 3D Design & Build Pty Ltd [2016] NSWCATAP 68 dated 17 March 2016 and were remitted to the Consumer and Commercial Division to be heard by me as a differently constituted Tribunal, in conjunction with any renewal application filed by the appellant.

The remitted proceedings are HB 16/13834. On 15 June 2016 consent orders were made in the remitted proceedings.

At paragraphs 76 – 78 in *Kay v 3D Design & Build Pty Ltd* the Appeal Panel stated:

‘While the appellant appealed against the order made in the respondent’s proceedings that required her to pay money to the respondent, she did not appeal the work order made on 30 January 2015 in her proceedings. Given that that order was made by consent, it would have been surprising had she done so. However, the appellant’s position is that the respondent has not complied with the work order and that she should therefore not have to pay the respondent any of the money she was ordered to pay in the respondent’s proceedings.

As was explained to the parties during the hearing, if the appellant seeks damages in the form of rectification costs or completion costs, that is an outcome which cannot be achieved by this appeal. Rather, the appellant’s remedy lies in a renewal application pursuant to sch 4, cl 8 of the CAT Act, which relevantly provides:

8 Renewal of proceedings in respect of certain Division decisions

- (1) If the Tribunal makes an order in exercise of a Division function in proceedings, the Tribunal may, when the order is made or later, give leave to the person in whose favour the order is made to renew the proceedings if the order is not complied with within the period specified by the Tribunal.
- (2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.
- (3) The provisions of this Act apply to a notice lodged in accordance with subclause (2) as if the notice were a new application made in accordance with this Act.
- (4) When proceedings have been renewed in accordance with this clause, the Tribunal:
 - (a) may make any other appropriate order under this Act or enabling legislation as it could have made when the matter was originally determined, or
 - (b) may refuse to make such an order.

The applicant has not yet filed a renewal application. However, it remains open to her to do so. A renewal application will allow all relevant issues in relation to compliance with the work order made on 30 January 2015 to be fully ventilated and considered in conjunction with the builder’s application for payment of money.

As the work order was made on 30 January 2015, the time limit for filing an application specified in cl 8(2) has expired. However, under s 41 of the CAT Act the Tribunal has power to extend time to make the application. We recommend that the Tribunal favourably consider extending time if the appellant files a renewal application expeditiously in order to facilitate resolution of all issues in dispute between the parties in a manner consistent with the guiding principle set out in s 36(1) of the Act.'

These proceedings are the renewal application that the Appeal Panel referred to in the passage quoted above. They were commenced on 27 April 2016. As stated by the Appeal Panel these proceedings arise under clause 8 of schedule 4 of the Civil and Administrative Tribunal Act 2013.

The applicant has the burden of proving on the balance of probabilities that the work orders contained in the Tribunal's 30 January 2015 order have not been complied with within the period specified by the Tribunal which expired on 31 March 2016.

The relevant principles in relation to discharging the burden of proof in civil cases were recently summarised by the New South Wales Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [55] as follows:

'(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the

relevant time did) exist;

(2) where on the whole of the evidence such a feeling of actual persuasion is

induced, so that the fact-finder finds that the probabilities of the fact's

existence are greater than the possibilities of its non-existence, the burden of

proof on the balance of probabilities may be satisfied;

(3) where circumstantial evidence is relied upon, it is not in general necessary

that all reasonable hypotheses consistent with the non-existence of a fact, or

inconsistent with its existence, be excluded before the fact can be found; and

(4) a rational choice between competing hypotheses, informed by a sense of

actual persuasion in favour of the choice made, will support a finding, on the

balance of probabilities, as to the existence of the fact in issue.'

The original work order the subject of the Appeal Panels' comments was made in HB 14/33898 on 30 January 2015 and was to be complied with on 31 March 2015. As the Appeal Panel states the time for renewal under clause 8(2) of schedule 4 of the Civil and Administrative Tribunal Act expired on 31 March 2016. The applicant requires an extension to that 12 month period in order that these proceedings may be heard.

Section 41 of the Civil and Administrative Tribunal Act states:

‘The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.

Such an application may be made even though the relevant period of time has expired.’

I will extend the time for the applicant to file her renewal application to 27 April 2016, the date of the filing of the Renewal because the applicant was concerned with the appeal referred to above and was obviously unaware of the proper procedures to follow as explained by the Appeal Panel. The fact that there were two applications on foot led to that confusion. These circumstances are sufficient to justify the extension of time that I have granted.

I will also allow the applicant pursuant to section 53 of the Civil and Administrative Tribunal Act to amend her Renewal Application by amending Box 11 of the Renewal Application by the addition of the words ‘and 30 January 2016’ and Box 12 of the Renewal Application by the addition of the words ‘and non-compliance with orders 5 and 6 of the 30 January 2015 orders’.

The applicant in this renewal hearing seeks orders under section 48O(1)(a) of the Home Building Act 1989 that the respondent pay her \$70,000.00 because it did not comply with orders 5 and 6 of the Tribunal’s work order of 30 January 2015.

Orders 5 and 6 of the Tribunal’s work order of 30 January 2015 stated:

‘5. By consent, the Tribunal orders that the respondent(s): 3D Design & Build

Pty Ltd 15 Belgenny Avenue CAMDEN NSW 2570 Australia is to cause the

undertaking of the following work in a proper and workmanlike manner on or before 31-Mar-2015.

Details of Work order:

Undertake and carry into effect, taking all necessary steps and retaining any and all sub-contractors as may be required to give effect to the works, the schedule of rectification works contained within paragraphs 5.1.1 - 5.1.7 inclusive of the report of GP Design Pty Ltd dated 26 September 2014, which is contained within Ex. 2, Tab 46 of the materials received in evidence before the Tribunal on 30 January 2015.

Additionally,

6. By consent, the Tribunal orders that the respondent(s): 3D Design & Build

Pty Ltd 15 Belgenny Avenue CAMDEN NSW 2570 Australia is to cause the

undertaking of the following work in a proper and workmanlike manner on or before 31-Mar-2015.

Details of Work order:

Undertake and carry into effect (taking all necessary steps and retaining any and all sub-contractors as may be required to give effect to the works) the schedule of rectification works contained within the Rectification Order made by the Department of Fair Trading dated 12 May 2014, which is contained within Ex. 1, Green divider, Tab 3 of the materials received in evidence before the Tribunal on 30 January 2015.'

It emerged during the hearing of this Renewal Application that the applicant was under the impression that all of the documents that she filed and relied upon in support of her Appeal would be made available to the Tribunal on her renewal. The applicant's appeal documents have not been made available to the Tribunal (and that is not what ordinarily occurs) nor has the applicant filed them separately in these proceedings. In order to deal with this state of affairs the applicant was invited by me to apply for an adjournment of these proceedings so that the relevant documents to which she referred, including expert reports, could be filed as evidence.

The applicant having been given ample opportunity to consider that invitation declined to apply for the adjournment with the result that the hearing was conducted without the Appeal documents which she had assumed would be before the Tribunal.

The evidence in the Renewal Application was:

Exhibit A, Applicant's Bundle of documents;

Exhibit B, Applicant's further documents filed 10 June 2016;

Exhibit C, Photograph of post measurement;

Exhibit 1, Respondent's bundle of documents filed 23 May 2016;

Exhibit 2, Compliance Certificate Wideline Pty Ltd- Windows and doors;

Exhibit 3, Malua Building Co Certificate of Compliance and Warranty – Waterproofing; and

Exhibit 4, Letter dated 4 September 2014 certifying roof installation.

Since these proceedings are in the nature of a 'renewal' of the original proceedings and I may make an appropriate order under the Home Building Act as the Tribunal could have when the matter was originally determined, I have taken the view that it is permissible for me to have regard to the evidence that was before the Tribunal when the matter was originally determined.

The respondent has commissioned expert reports from Tyrrells in connection with its performance of the work that it was ordered to carry out by reason of the Tribunal's 30 January 2015 orders. Those expert reports are in Exhibit 1 at pages 27 – 60. There were a number of expert reports from Tyrrells Property Inspections Pty Limited dated, respectively, 11 February 2015 prepared by Mr C Singe, 28 April 2015 prepared by Mr M Craig and 29 May 2015 prepared by Mr M Craig. The reports were not formally signed by their authors but instead were signed by Mr S Ransley, who is referred to at page 35 of exhibit 1. I infer that Mr Ransley is a director or

executive of Tyrrells.

The applicant has raised an objection to the Tyrrells reports on the basis that they have not been signed by the person who is named on the front cover of each of the reports as the person who prepared the report. I agree that it would have been desirable for the person who prepared the report to have signed it. However, the issue is whether for the lack of a signature to the reports, they should be rejected in their entirety.

NCAT Procedural Direction 3 applies to the Tyrrells' reports. The reports state in their terms and conditions that Tyrrells are bound by the Expert Witness Code of Conduct which although not defined, would in my view relate to the Expert's Code of Conduct referred to at paragraph 10 and the following paragraphs of NCAT Procedural Direction 3. I note that the Report of 28 April contains Expert Witness Codes of Conduct in section 7.

NCAT Procedural Direction 3 does not require an expert report to be signed, although it is obvious that should be done. If the applicant thought it to be a significant issue it was always open to her to put the respondent on notice that the author of the report was required for cross examination to establish that the report was indeed his. I also find that the Tyrrells reports comply with the Experts' Code of Conduct found in NCAT Procedural Direction 3.

Apart from the issue of signature, there was no objection taken to the Tyrrells reports. I find that there is no reason not to accept that the persons stated to be the authors of the Tyrrells reports are indeed the authors. I find that those persons are suitably qualified to be giving expert opinion in the Tribunal and their reports should be accepted into evidence. I also infer that Mr Ransley's signature was a corporate sign off to the report.

In making this finding I am guided by section 38(4) of the Civil and Administrative Tribunal Act which states:

'The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.'

I would make the observation that the only issues in these proceedings are whether or not the work referred to in orders 5 and 6 of the Tribunal's work order of 30 January 2015 has been carried out by the respondent and if not the money order to be made in the applicant's favour pursuant to clause 8(2) of schedule 4 of the Civil and Administrative Tribunal Act.

Dealing with the work orders that were the subject of the Tribunal's orders dated 30 January 2015 as set out above, they are conveniently dealt with in two parts. The first is the work referred to in paragraphs 5.1.1 - 5.1.7 inclusive of the report of GP Design Pty Ltd dated 26 September 2014. The second part is the work referred to in the schedule of rectification works contained within the Rectification Order made by the Department of Fair Trading dated 12 May 2014.

Paragraphs 5.1.1 - 5.1.7 of the GP Design Pty Ltd report dated 26 September 2014

The parties agree that the work referred to in paragraphs 5.1.1 and 5.1.2 has been completed.

Item 5.1.3

There is a dispute about whether item 5.1.3 of the GP Design Pty Ltd report has been completed.

Item 5.1.3 refers to the following work:

‘The northern balcony posts are to be repaired or replaced to incorporate bolted connections for the top and bottom connections. The top and bottom connections can consist of M20 stainless steel bolts to use the existing 22 MM diameter counter sunk holes. However, the bottom connection needs to be assessed to ensure there is sufficient edge distance around the bolt holes for the vertical steel cleat of the base plate. Otherwise fabricate new base plates to suit the post holes or replace all three posts.’

The respondent relies on the report of Donovan Associates at pages 13 and 14 of exhibit 1. I do not find that report to be of assistance since it pre-dates the GP Design Pty Ltd report which was relied upon by the Tribunal to frame the work order in item 5.1.3. Further it is conceded by the respondent that the report does not deal with the top connection referred to in the passage quoted above.

Exhibit A at pages 26 and 27 contains a letter from GP Design Pty Ltd dated 20 April 2016. The letter is addressed to the applicant and states that GP Design who, are structural engineers, attended the applicant’s site on 5 and 17 February 2016. GP Design stated that as of 5 February 2016 the respondent had not completed the rectification work to items 5.1.4 and 5.1.5 in a satisfactory manner or had not undertaken items 5.1.3 and 5.1.6 at all. GP Design went on to state that work identified was undertaken by local builder, BM Total Building Pty Ltd under its instruction and supervision.

I accept the evidence contained in the letter from GP Design Pty Ltd dated 20 April 2016 that the respondent had not undertaken item 5.1.3 at all.

I find on the evidence before the Tribunal that the respondent has not completed this work.

Item 5.1.4

There is also a dispute about whether item 5.1.4 of the GP Design Pty Ltd report has been completed. Item 5.1.4 refers to the following work:

‘Provide structural blocking beneath all first floor balcony balustrade connections so that it is connected to the floor joists to transfer any balustrade loadings into the floor joists and not the Scyon floor sheeting.’

The respondent relied on a report from Tyrrells contained in exhibit 1 which was prepared after an inspection conducted on 28 April 2015. The report stated that ‘Installation of solid blocking and web stiffeners beneath balustrade supports appear adequate’.

A photograph showed an example of solid blocking and web stiffeners to the underside of the façade balcony.

The applicant stated before me that she had no evidence in connection with this item, but makes a point that there is no certification of this work. Be that as it may, item 5.1.4 of the GP Design Pty Ltd report does not call for certification.

Despite the applicant's submission, I have referred to the letter from GP Design Pty Ltd dated 20 April 2016 as referred to. GP Design stated that as of 5 February 2016 the respondent had not completed the rectification work to items 5.1.4 in a satisfactory manner. GP Design went on to state that work in items 5.1.4 was undertaken by local builder, BM Total Building Pty Ltd under its instruction and supervision.

There is a conflict of the evidence of GP Design Pty Ltd and the evidence in the report from Tyrrells contained in exhibit 1 which was prepared after an inspection conducted on 28 April 2015. I prefer the Tyrrells evidence because it was compiled after a site inspection in April 2015, after the work had been carried out by the respondent. The GP Design Pty Ltd inspection was carried out some 9 months later. The GP Design Pty Ltd letter concedes that rectification work has been carried out, but states that in its opinion the work was not carried out satisfactorily. Details of the unsatisfactory nature of the respondent's work were not provided which I find detracts from the veracity of the GP Design Pty Ltd evidence.

Importantly, the BM Total Building Pty Ltd receipt for this work at page 20 of Exhibit 1 does not refer to structural blocking beneath first floor balcony balustrade connections so that they are connected to the floor joists to transfer any balustrade loadings into the floor joists. I find that the BM Total Building Pty Ltd receipt is acceptable evidence of what work was actually undertaken for and on behalf of the applicant, so far as can be ascertained from its content. The invoice does however refer to 'Balcony balustrading requires removal and replacement to allow for correct collar height.' The reference to 'collar height' is unexplained. I find that this work does not obviously refer to blocking below balustrade connections so they are connected to the floor joists, thereby transferring the loadings directly onto the joists.

I find on the evidence as referred to above that the respondent has complied with this aspect of the work order.

Item 5.1.5

There is also a dispute about whether item 5.1.5 of the GP Design Pty Ltd report has been completed. Item 5.1.5 refers to the following work:

'Expose the balustrade connections for the first floor balcony adjacent to Bedroom 1 and rectify as required in accordance with item 5.1.4 above.'

The respondent relies on the same evidence as referred to in item 5.1.4 in connection with this item.

I accept this evidence which relates to the façade balcony and I infer from the generality of the comments of the respondent's expert, the balcony adjacent to bedroom 1 has been addressed in that there has been an installation of solid blocking and web stiffeners beneath balustrade supports in this area which appear adequate.

The applicant has made comments that there is no certification of this work. As stated, item 5.1.5 of the GP Design Pty Ltd report does not call for certification of this work.

For the same reasons as stated in connection with item 5.1.4, which includes consideration of the GP Design Pty Ltd evidence, I find on the evidence that the respondent has complied with this aspect of the work order.

Item 5.1.6

There is also a dispute about whether item 5.1.6 of the GP Design Pty Ltd report has been completed. Item 5.1.6 refers to the following work:

‘Ensure all timber framing components over first-floor steel beams are fixed to the steel beams (B1, B3 & B5) in accordance with the specifications of the engineering details by Donovan Associates.’

The applicant relies on page 4 of exhibit A to demonstrate that ‘One of the bottom plates showing no tie downs as per the Donovan’s engineering detail’. The applicant also submits that the Tyrrells reports in exhibit 1 do not address this item.

The respondent refers to page 50 of the Tyrrells report which is the front cover of the report. The respondent was unable to refer to specific evidence to establish that this work had been rectified. It stated words to the effect ‘Some document somewhere exists to show that the work has been rectified’. Be that as it may, the respondent has not produced any evidence to persuade me that this item of work has been rectified.

In addition as stated above, the GP Design Pty Ltd letter dated 20 April 2016 states that the respondent had not undertaken item 5.1.6 at all.

I will accept the applicant’s evidence that the work has not been rectified.

Item 5.1.7

There is also a dispute about whether item 5.1.7 of the GP Design Pty Ltd report has been completed. Item 5.1.7 refers to the following work:

‘Replace all external wall cladding fixings with stainless steel nails’

The parties stated to me that they had no evidence at all in relation to this item. The applicant stated that it relied on a document it filed in Appeal Proceedings AP 15/42268, Kay v 3D Design & Build Pty Ltd. As stated above the Appeal documents are not in evidence in these proceedings.

The respondent has referred to paragraph 3.1.6 of page 52 of Exhibit 1 to establish that it has complied with this item of the work order. Paragraph 3.1.6. states that 'All external fixings to be certified from suppliers that they are suitable for this location. By Builder'. There is no certification provided. Page 55 of exhibit 1 paragraph 4.1.40 is also relevant to this item. It states that this item of work has been completed.

Despite the parties submissions I have had regard to the letter from GP Design Pty Ltd dated 20 April 2016 as referred to above. GP design stated:

Furthermore section 4.1 29 of the Tyrrells report, states that the nail fixings employed to the wall cladding are fit for purpose as per cladding manufacturer's specifications has been completed.

The replacement of the nail fixings has not been undertaken at this stage.

It is our opinion that the existing galvanised nail fixings do not comply with the manufacturer's specifications, which specifies stainless steel fixings for severe marine environment. This recommendation was made in Section 5, Item 5.1.7 of our report dated 26 September 2014 and forms part of the Work Orders (Item 5) dated 30 January 2015 by NCAT'

I accept the GP Design Pty Ltd evidence extracted above. As a result I find that this item of work has not been rectified.

Department of Fair Trading Rectification Order dated 12 May 2014

Order 6 of the orders made on 30 January 2015 required the respondent to undertake and carry into effect (taking all necessary steps and retaining any and all sub-contractors as may be required to give effect to the works) the schedule of rectification works contained within the Rectification Order made by the Department of Fair Trading dated 12 May 2014.

The Rectification Order made by the Department of Fair Trading dated 12 May 2014 contained a Schedule of 43 items under the headings 'Incomplete Work', 'Defective Work' and 'Damage'.

Of the 43 items, the parties stated that the following are in dispute, 2, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 22, 24, 27, 28, 35, 41 and 43. I will deal with each item in turn by reference to these item numbers which are identical to those in the 'Schedule to Rectification Order'.

Item 2

The applicant stated that she relied on a document it filed in Appeal Proceedings AP 15/42268, Kay v 3D Design & Build Pty Ltd. As stated above, the Appeal documents are not in evidence in these proceedings.

The respondent relies on page 53 of exhibit 1 paragraph 4.1.2 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 4

This relates to item 5.1.3 of the GP Design Pty Ltd report. I have already found for the applicant in connection with this item. The respondent referred to an email dated 18 December 2013 in connection with that item. I do not regard that evidence as being overwhelming in its favour as it pre dated the GP Design Pty Ltd report and the work orders of 30 January 2015. No doubt that document was taken into account in the hearing which produced the work orders of 30 January 2015.

Item 5

The applicant has no evidence to support her case that this work has not been attended to.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.5 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 7

The applicant has no evidence to support her case that this work has not been attended to.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.7 which states that this item of work has been not been completed. 'due to restricted cavity depth caused by clients electrical cables'. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been not been completed due to work that the applicant had carried out in her behalf.

Given that the applicant's actions have prevented the respondent from performing the relevant work, the applicant will not be entitled to an order in her favour in connection with this item.

Item 8

The applicant has no evidence to support her case that this work has not been attended to.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.8 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 11

The applicant has no evidence to support her case that this work has not been attended to.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.11 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 12

The applicant has no evidence to support her case that this work has not been attended to. However she refers to item 5 of page 4 of Exhibit B which is a schedule item from a certifier calling for certification that the work has been carried out. This aspect of the work order, item 12, does not require certification to be provided.

The respondent relies upon on page 53 of Exhibit 1 paragraph 4.1.12 which states that this item of work has been completed. I accept the respondent's expert's evidence. The respondent also relies on Exhibit 3 which shows waterproofing at balconies.

On the basis of the respondent's evidence, I find that this item of work has been completed.

Item 13

The applicant has no evidence to support her case that this work has not been attended to.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.13 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 14

Item 14 relates to completion of flashing to bedroom 1 balcony junctions.

The applicant refers to item 5 of page 4 of exhibit B which is a schedule item from a certifier calling for certification that the work undertaken to doorway jambs/architraves has been carried out. This aspect of the work order, item 14, does not require certification to be provided. In any event item 5 of page 4 of exhibit B does not, I find, respond to item 14 as described above.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.14 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been completed.

Item 15

Item 15 relates to completion of flashing to doorway onto bedroom 1 balcony area.

The applicant refers to item 5 of page 4 of exhibit B which is a schedule item from a certifier calling for certification that the work undertaken to doorway jambs/architraves has been carried out. This aspect of the work order, item 15, does not require certification to be provided. In any event item 5 of page 4 of exhibit B does not, I find, respond to item 15 as described above.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.15 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been completed.

Item 16

Item 16 relates to complete work to ensure particleboard sheet flooring is protected against premature deterioration at doorway locations of bedroom 1 balcony area.

The applicant refers to item 5 of page 4 of exhibit B which is a schedule item from a certifier calling for certification that the work undertaken to doorway jambs/architraves has been carried out. This aspect of the work order, item 16, does not require certification to be provided. In any event item 5 of page 4 of exhibit B does not, I find, respond to item 16, particleboard sheet flooring, as described above.

The respondent relies upon on page 53 of exhibit 1 paragraph 4.1.16 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been completed.

Item 17

This item relates to complete glazing installation including but not limited to installation of safety glazing to en-suite south window.

The applicant states that a compliance certificate has not been provided by the respondent. As stated in connection with other items, this aspect of the work order, item 17, does not require certification to be provided.

The respondent has referred to photographs referred to in the evidence in the original proceedings in Bundle 2 at page 96 as providing certification. The photographs are of stickers attached to windows photographed back to front which are not helpful at all. I do not find these photographs to be of use because they cannot be read.

On page 53 of exhibit 1 paragraph 4.1.16 the respondent's expert states 'Have glazing certified by window supplier (Note – 4mm toughened glass installed).

The applicant by not filing evidence has failed to prove this aspect of her case on the balance of probabilities. The respondent's expert's evidence states that '4mm toughened glass installed' which indicates that the work has been completed. On the basis of the respondent's evidence which is the only evidence in relation to this item, I find that this item of work has been completed.

Item 22

This item states additional to the items of work outlined within the Rectification Order: Complete all work on site as per contractual agreement.[Emphasis added]

This item is not helpful given its generality.

In order to deal with a general work order such as this it is necessary to identify specific items of work required by the contract which have been left incomplete by the respondent.

The applicant has referred to the following evidence to support her assertion that the respondent has not completed the work covered by this item:

Exhibit B page 4 which is a schedule item from a certifier calling for certification of various items of work;

Exhibit A, all receipts relating to Rain water tank and Hot water systems and pages 15 – 30 of exhibit A summarised on page 14 of 33.

The respondent states that the work referred to by the applicant is not related to the work shown on the contractual drawings.

This item of rectification work requires the respondent to complete all contractual work not referred to in items 1 – 21 of the Schedule to the Rectification Order. In order to take advantage of this item I find that it is necessary for the applicant to produce the contract and all contractual documents including drawings and specifications and from that evidentiary basis to establish on the balance of probabilities what work has not been completed.

The contract and all contractual documents including drawings and specifications are in evidence in the proceedings which have been renewed. I note from the contract that respondent's quotation is a contract document. That quote states that the respondent's preliminaries, and therefore included within the contractual scope of work, included the provision of an Occupation Certificate. The section of the quote titled 'Site Works and Site Establishment' includes 'Rainwater tank 2000 litre Colorbond tank with concealed pump unit'. The quote also stated that no allowance had been made for the inclusion of among other things 'The hot water system as discussed and diagrammatically designed'.

In connection with the applicant's reference to Exhibit B page 4 which is a schedule item from a certifier calling for certification of various items of work, the best that I can do is to infer that the certificates are required for a final inspection of the applicant's residence with a view to obtaining an Occupation Certificate. I find that the contract required the respondent to obtain the Occupation Certificate and the fact that it has not done so would come within item 22.

However in seeking a money order under section 48O(1)(a) of the Home Building Act, the applicant must provide evidence of the cost of the that would be incurred in carrying out the relevant work item. There is no evidence of that cost contained in the applicant's cost to complete table at page 14 of Exhibit A. By reason of the lack of evidence regarding the cost of obtaining certification, I am unable to make a monetary order in favour of the applicant as regards the provision of certification as referred to at pages 3 and 4 of Exhibit B.

I will now consider the applicant's claim under this item for the Rain water tank and Hot water systems and the costs at pages 15 – 30 of exhibit A summarised on page 14 of 33. I find that the contract required the respondent to provide a 'Rainwater tank 2000 litre Colorbond tank with concealed pump unit'. I also find that there is no basis for the respondent's submission that this work was not required by the contract.

The applicant has produced evidence that on 21 April 2016 she paid \$2,877.61 for a Slimline Water Tank with a 3,059 litre capacity. I infer from the quote that a pump was also included for a cost of \$873.00. Pursuant to the contract she was only entitled to receive a 2,000 litre tank. If I were to apportion the cost on a per litre basis the applicant will be entitled to the sum of \$1,881.40 ($\$2,877.61/3,059 \times 2,000 = \$1881.40$). I will also allow the applicant the sum of \$350.00 that she paid for the installation of the Rainwater tank as evidenced by a plumbers tax invoice dated 30 June 2016. The total allowed for the Rainwater tank is therefore \$2,231.40.

In so far as the applicant's claim for hot water systems are concerned, the applicant has claimed \$803.96 for hot water and a hot water cover plate. She has also claimed \$2,005.00 as money paid to her plumber for a variety of thing, including the installation of the Rainwater tank which I have dealt with.

I find that the contract stated that no allowance had been made for the inclusion of among other things 'The hot water system as discussed and diagrammatically designed'. I further find that the meaning of these words was that the hot water system had not been included in the original contractual scope of works. I have also referred to a document referred to at paragraph 23 of the Tribunal's decision of 30 January 2015, namely Exhibit B item PCV4 pp 15 & 16.

Item 36 of that document which is a summary of variations dated 8 August 2013 states:

'The owner has calculated a water heating system that incorporates a combination of solar panels, a hot storage tank, a gas power hot water booster and a continuous circulation proposal that need to be considered before the system is installed. Cost yet to be determined. NOTE'

The evidence referred to above establishes that the hot water system was not included in the contract price and was at 8 August 2013 still being developed as a variation. This means that as at 8 August 2013, the hot water system was not included in the contractual scope of work and therefore cannot be incomplete work. I have not been referred to any evidence that would require a different conclusion to be reached.

For the reasons set out above I dismiss the applicant's claim in connection with the hot water system.

In connection with the applicant's general claim summarised on page 14 of 33 of Exhibit A, that is her overall claim in the proceedings, in the absence of specific references to the relevant evidence to establish that various line items fall within this item 22, I decline to make a general order for \$71,899.84 as the applicant appears to have claimed in connection with this item.

The applicant will be entitled to an order for \$2,231.40 in connection with item 22.

Item 24

The applicant refers to item 2 of page 4 of exhibit B which is a schedule item from a certifier calling for evidence that the fixings used in all external claddings are suitable for intended use in aggressive marine conditions as outlined in 4.1.27 of the recommendations of the Tyrrells report dated 29 May 2015 and the report of GP Design dated 20 April 2016.

This aspect of the work order, item 24, relating to roofing screws, does not require certification to be provided. Remedial work is required.

The respondent relies upon on page 54 of exhibit 1, paragraph 4.1.24 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been completed.

Item 27

This item states carry out remedial work to ensure roofing screws are fit for the site environmental conditions.

The applicant refers to item 2 of page 4 of exhibit B which is a schedule item from a certifier calling for evidence that the fixings used in all external claddings are suitable for intended use in aggressive marine conditions as outlined in 4.1.27 of the recommendations of the Tyrrells report dated 29 May 2015 and the report of GP Design dated 20 April 2016.

This aspect of the work order, item 27, does not require certification to be provided. Remedial work is required.

The respondent relies upon on page 54 of exhibit 1, paragraph 4.1.27 which states that this item of work has been completed. I accept the respondent's expert's evidence. Paragraph 4.1.27 also states that 'Licensed roofer to supply certification from supplier of fixings'.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been completed. In addition I find that the Tribunal's work order in relation to Item 27 does not require the respondent to provide certification.

Item 28

This item requires the respondent to carry out remedial work to address cladding damage including laps at second storey on southern and eastern elevations.

The applicant refers to item 3 of page 4 of exhibit B which is a schedule item from a certifier calling for certification that the remedial work to address the cladding damage, including but not limited to laps at the second story on the southern and eastern elevations, has been completed in accordance with the Tyrrells Report.

This aspect of the work order, item 28, does not require certification to be provided. Remedial work is required.

The respondent has referred to page 54 of exhibit 1, paragraph 4.1.28 which states that this item of work is incomplete. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only relevant evidence that there is in connection with this item, I find that this item of work has been not been completed.

Item 35

The applicant has no evidence to support its case that this work has not been attended to.

The respondent relies upon on page 54 of exhibit 1 paragraph 4.1.34 which states that this item of work has been completed. I accept the respondent's expert's evidence.

On the basis of the respondent's evidence which is the only evidence that there is in connection with this item, I find that this item of work has been completed.

Item 41

The applicant refers to item 2 of page 4 of exhibit B which is a schedule item from a certifier calling for evidence that the fixings used in all external claddings are suitable for intended use in aggressive marine conditions as outlined in 4.1.27 of the recommendations of the Tyrrells report dated 29 May 2015 and the report of GP Design dated 20 April 2016.

This aspect of the work order, item 41 relates to 'carry out remedial work to ensure the cladding to facades is installed as per manufacturer's specifications'. It does not require certification to be provided. Remedial work is required.

The respondent relies upon on page 55 of exhibit 1 paragraph 4.1.40 which states that this item of work has been completed.

I refer to my findings in connection with item 5.1.7 of the GP Design Pty Ltd letter of 20 April 2016 and accept the evidence of GP Design Pty Ltd in connection with this item.

On the basis of that evidence I find that this item of work has been not been completed.

Item 43

This item requires the respondent to carry out remedial work to address the damage incurred to the waterproofing membrane at the external verge location.

The applicant refers to item 6 of page 4 of exhibit B which is a schedule item from a certifier calling for certification that the damage incurred to the waterproofing membrane at the external verge location has been repaired as outlined in 4.1.42 of the Tyrrells Report.

This aspect of the work order, item 43, does not require certification to be provided. Remedial work is required.

The respondent refers to page 55 of exhibit 1 paragraph 4.1.42 which states that this item of work is incomplete. I accept the respondent's expert's evidence.

Conclusion on work order items which are uncompleted

The applicant has been successful in establishing that the following items referred to in the Tribunal's work order dated 30 January 2015 have not been completed by the respondent, items 5.1.3, 5.1.6, 5.1.7 and items 22, 28, 41 and 43.

Clause 8 of Schedule 4 of the to the Civil and Administrative Tribunal Act states that when proceedings have been renewed in accordance with that clause, as is the case with the present proceedings, the Tribunal:

‘(a) may make any other appropriate order under this Act or enabling legislation as it could have made when the matter was originally determined, or

(b) may refuse to make such an order.’

When the matter was originally determined the Tribunal had the power under section 48O(1)(a) of the Home Building Act 1989 to make:

‘an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person’

Such an order would be based on a failure by the respondent to comply with the warranties implied by section 18B of the Home Building Act.

As stated in these renewal proceedings, the applicant seeks orders that the respondent pay her \$70,000.00.

However I have found that the respondent has completed the majority of the work orders and in some cases that the applicant has failed to discharge the burden to establish that a work order has not been complied with.

It is the applicant's obligation to file and serve evidence that will induce, in my mind an actual persuasion of the amount required to be expended to rectify items 5.1.3, 5.1.6, 5.1.7 and items 22, 28, 41 and 43 or the amount that has in fact been spent to rectify items 5.1.3, 5.1.6, 5.1.7 and items 28, 41 and 43.

In paragraph 2 of Exhibit A, the applicant states her financial claim and refers to a table on page 15. Her 'Cost for Completion' table is made up of 15 items which total \$71,899.84. None of the 15 items specifically relate to items 5.1.3 and 5.1.6, 5.1.7 or items 28, 41 and 43. I have dealt with item 22 separately. The applicant states that the amount of \$71,899.94 is supported by receipts and quotations at pages 16 to 28 to which I have had regard.

Item 5.1.3 relates to:

'The northern balcony posts are to be repaired or replaced to incorporate bolted connections for the top and bottom connections. The top and bottom connections can consist of M20 stainless steel bolts to use the existing 22 MM diameter counter sunk holes. However, the bottom connection needs to be assessed to ensure there is sufficient edge distance around the bolt holes for the vertical steel cleat of the base plate. Otherwise fabricate new base plates to suit the post holes or replace all three posts.'

I have not been referred to any part of the applicant's evidence which is said to relate to the cost of rectifying this item. The BM Total Building Pty Ltd receipt refers to the repair of balcony posts at fixing point at a cost of \$1,150.00. I accept this document as evidence of the cost incurred by the applicant to rectify item 5.1.3 and will find in her favour in that amount.

Item 5.1.6 relates to:

'Ensure all timber framing components over first-floor steel beams are fixed to the steel beams (B1, B3 & B5) in accordance with the specifications of the engineering details by Donovan Associates.'

As above, I have not been referred to any part of the applicant's evidence which is said to relate to the cost of rectifying this item. The BM Total Building Pty Ltd receipt does not specifically relate to this item. It does however state 'First floor tie down to universal beams'. No individual cost is given in connection with this item. It is one of seven items which total \$14,800.00.

In *Baak v Concrete Services Group Pty Ltd* [2016] NSWCATAP 42 the Appeal Panel stated at paragraphs 83 – 87:

'Another category of decisions is where the breach is proved and there is some evidence relevant to deciding the amount of the damage but insufficient evidence to prove precise quantification of the damage or loss. In *Chaplin v Hicks* [1911] 2 K.B. 786, the submission of the appellant was that because the amount of the loss that would be suffered was subject to contingencies, only nominal damages of 1 shilling should be awarded. That was rejected and the jury verdict of 100 pounds was upheld. Farwell LJ said (at p 799):

In my opinion the existence of a contingency, which is dependent on the volition of a third person, is not enough to justify us in saying that the damages are incapable of assessment.'

Vaughan Williams LJ said (at 792)

Sometimes however, there is no market for the particular class of goods but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guess work. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.

That decision was followed by the Full Bench of the NSW Supreme Court in *Howe v Teefy* (1927) NSWSR 301 and there Street CJ said (at 306):

There may be cases where it would be impossible to say that any assessable loss had resulted from a breach of contract, but short of that, if a plaintiff has been deprived of something that has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty.

This line of authorities was continued in the High Court decision of *Fink v Fink* [1946] HCA 54(1946) 74 CLR 127. There Dixon and McTiernan JJ (with whom Latham CJ and Williams J agreed) held (at p143):

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 provided for breach of contract, and award of damages.

Similarly in *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54, Mason CJ and Dawson J said (at [31]:

The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can: *Fink v. Fink* [1946] HCA 54; (1946) 74 CLR 127, at p 143; *McRae v. Commonwealth Disposals Commission* [1951] HCA 79; (1951) 84 CLR 377, at pp 411-412; *Chaplin v. Hicks* (1911) 2 KB 786, at p 792. Indeed, in *Jones v. Schiffmann* [1971] FICA 52; (1971) 124 CLR 303, Menzies J went so far as to say that the 'assessment of damages ... does sometimes, of necessity involve what is guess work rather than estimation': at p 308. Where precise evidence is not available the court must do the best it can: *Biggin and Co. Ltd. v. Permanite Ltd.* (1951) 1 KB 422, per Devlin J. at p 438. And uncertainty as to the profits to be derived from a business by reason of contingencies is not a reason for a court refusing to assess damages: see *McGregor on Damages*, 15th ed. (1988), pars 357-359.'

Having regard to the discussion of the relevant authorities in the passage quoted above it is clear that I must do the best that I can in connection with the cost actually incurred by the applicant in having the work referred to in item 5.1.6 rectified by BM Total Building Pty Ltd. I have been provided with the report of GP Design Pty Ltd dated 26 September 2014. At paragraph 4.16 it

describes the work the subject of item 5.1.6 which if I may say does not appear to be overly complicated. The work is connect the timber frames to steel beams using M10 bolts. Doing the best I can in connection with estimating the relevant cost I will allow one seventh of the rectification cost incurred by the applicant, \$14,800.00, in connection with this item, namely the sum of \$2,114.00.

Item 5.1.7 relates to 'Replace all external wall cladding fixings with stainless steel nails'. I find that it is highly likely that item 41 relates to the same subject matter as item 5.1.7. The BM Total Building Pty Ltd receipt states that a cost of \$22,000.00 relates to this item. The receipt states under a column 'Extras':

'Replace Gal nails with stainless steel

N/A This cannot be done to comply with the building code. The Stratum sheets will need to be removed and replaced with the correct fixings. Owner to advise to proceed.'

I find that the only evidence that I have regarding the order to be made in connection with this aspect of the work order is that the cost of complying will be \$22,000.00. I accept this evidence. If sheets will need to be removed and replaced as part of this exercise, it is my view that is caused by the respondent's breach of contract in failing to comply with the manufacturer's specifications. I will allow the applicant the full amount of this quote \$22,000.00.

Further since this is a contractor's quote it is my view that there is no need for an additional margin to be added.

Item 28 relates to carrying out remedial work to address cladding damage including laps at second storey on southern and eastern elevations. As above, I have not been referred to any part of the applicant's evidence which is said to relate to the cost of rectifying this item. The applicant has not produced any evidence of the actual or estimated cost of addressing this item. As a result I will not make an order in her favour in connection with this item.

Item 43 relates to the respondent carrying out remedial work to address the damage incurred to the waterproofing membrane at the external verge location. As above, I have not been referred to any part of the applicant's evidence which is said to relate to the cost of rectifying this item. The evidence in relation to this item is not clear. However BM Total Building Pty Ltd receipt refers to waterproofing work. Doing the best as I can and without being informed of the nature of the work required, I will allow one seventh of the rectification cost incurred by the applicant, \$14,800.00, in connection with this item, namely the sum of \$2,114.00.

As previously found, the applicant is entitled to \$2,231.40 in connection with item 22.

The total amount found in the applicant's favour is \$29,609.40.

Costs

The following orders will apply in the event that either party wishes to make an application for costs which will include the costs of expert witnesses.

Any costs application pursuant to section 60 of the Civil and Administrative Tribunal Act 2013 or rule 38 of the Civil and Administrative Tribunal Rules 2014 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.

The costs respondent will have 21 days after the date of receipt of the costs application referred to above, to lodge in the Tribunal and serve on the costs applicant the submissions, if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.

The cost applicant will have 14 days after the date of receipt of the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent the submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.

The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

D Goldstein

Senior Member

Civil and Administrative Tribunal of New South Wales

29 September 2016

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

Registrar

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Decision last updated:

01 December 2016

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