

AUSTRALIA / JUDGMENT

Staunton v Lotus Construction Pty Ltd [2016] NSWCATCD 64

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Staunton v Lotus Construction Pty Ltd [2016] NSWCATCD 64

Hearing dates: 10 December 2015, 27 January 2015 and 14 April 2015 (close of submissions – 27 May 2016)

Decision date: 12 July 2016

Jurisdiction: Consumer and Commercial Division

Before: K Rosser, Senior Member

Decision: (1) A further hearing is dispensed with pursuant to s 50(1)(c) of the Civil and Administrative Tribunal Act 2013

- (2) The respondent is to pay the applicants the sum of \$20,930.80 immediately.
- (3) Order 2 is stayed until the applicants make restitution to the respondent of the sum of \$20,930.80 paid to them by the respondent in compliance with the money order made by the Tribunal on 2 April 2014, which order was set aside by the Appeal Panel on 29 July 2015.

Catchwords: Home Building – remitted proceedings – crystallisation of loss - effect of sale of premises on entitlement to damages – quantum of loss – stay of money order pending restitution

Legislation Cited: Home Building Act 1989

Consumer Trader and Tenancy Tribunal Act 2001

Civil and Administrative Tribunal Act 2013

Cases Cited: Bellgrove v Eldridge 90 CLR 613

Ruxley Electronics & Construction v Forsyth [1995] 3 WLR 118

Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors [2007] NSWCA 253

Director of War Service Homes v Harris [1968] Qd R 275 (FC)

Central Coast Leagues Club Limited v Gosford City Council & Ors BC9802257

Howe v Teeffy [1927] NSWStRp 41; (1927) 27 SR (NSW) 301 (1 July 1927)

Landy v Benteigh Homes Illawarra [2011] NSWCTTT

Production Spray Painting and Panel Beating Pty Limited & Ors v Newnham & Ors [No 2] (1991) 27 NSWLR 659

TCN Channel Nine Pty Limited v Antoniadis [No 2] (1998) 44 NSWLR 682

Hume v Walton (No 2) [2005] NSWCA 458

Category: Principal judgment

Parties: Mark and Bernadette Staunton (Applicants)

Lotus Construction Pty Ltd (Respondents)

Representation: Counsel: Ms Sinclair for Applicants

Mr Snelgrove for Respondent

Solicitors: George Khoury & Co for Applicants

Snelgroves Solicitors for Respondent

File Number(s): HB 13/56853

Publication restriction: Nil

Reasons for decision

Introduction

1. This application was originally filed in the Consumer, Trader and Tenancy Tribunal (CTTT) on 1 November 2013, under s 43 of the Consumer, Trader and Tenancy Tribunal Act 2001 (CTTT Act). It was heard and determined on 2 April 2014, at which time the respondent was ordered to pay the applicants the sum of \$20,930.80. It has been re-heard and determined following remittal from the Appeal Panel.
2. For the reasons set out below, I have also found that the respondent is liable to the applicants in the sum of 20,930.80. However, the respondent paid that sum to the applicants in compliance with the Tribunal's 2 April 2014 order. The applicants did not repay it to the respondent even though the Appeal Panel set aside the Tribunal's order. I have therefore stayed the money order I have made in favour of the applicants pending repayment of \$20,930.80 by the applicants to the respondent. If the applicants do not repay the respondent, the order will be stayed indefinitely.

Background

Proceedings in the Tribunal prior to appeal

1. The application was originally filed on 1 November 2013. As noted above, it was filed under s 43 of the CTTT Act. This provision, which allowed the renewal of proceedings when an earlier order made by the Tribunal had not been complied with, relevantly provided:

43 Enforcement of certain Tribunal orders

- (1) If the Tribunal makes an order in relation to any 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.

....

- (3) The provisions of this Act apply to a notice lodged in accordance with subsection (2) as if the notice were an application made in accordance with section 24.
- (4) When proceedings have been renewed in accordance with this section, the Tribunal:
 - (a) may make any other appropriate order under this Act as it could have made when the matter was originally determined, or
 - (b) may refuse to make such an order.

1. The renewal proceedings arose out of orders made by the Tribunal in the applicant's substantive application, HB 13/17764. That application was filed in the CTTT on 3 April 2013. The applicants sought an order under the Home Building Act 1989 that the respondent pay them the sum of \$62,222.36, being the quoted cost of works to their dwelling, which was constructed by the respondent, plus additional expenses.
2. The substantive application was determined by consent on 17 October 2013, with the making of the following orders:

"By consent: the Tribunal orders that (the respondent) is to carry out the following work on or before 18-Nov-2013 in a proper and workmanlike manner.

Details of Work order:

The respondent perform the work in accordance with the six items contained in the scope of works as set out in the MC Southern Consulting Report signed by the parties and placed with the papers.

In the event that the work order is not complied with applicants are granted leave to renew the proceedings on or before 31 December 2013."

1. The work contemplated by the Tribunal's order was not completed and, as noted above, the applicant filed the renewal application on 1 November 2013. By that stage, the parties had fallen into dispute in relation to the method to be used to rectify water ingress to the garage and the area to be tiled in the front foyer.
2. The application came before the Tribunal for formal hearing on 2 April 2014. The Tribunal found that the applicants were entitled to damages for rectification of defects in the sum of \$18,070.80 and costs in the sum of \$2860, which totalled \$20,930.80. The Tribunal based the quantum for rectification of defects (with the exception of the item relating to water ingress to the garage, which was agreed between the parties' expert witnesses) on a quote from JA Neumann Pty Ltd, which was one of three quotations the applicants provided to the Tribunal. While the Tribunal should have made a money order in favour of the applicants, it mistakenly ordered the applicants to pay the respondent that sum on or before 26 May 2014. It is not in dispute that the wording of the order was a mistake.

Appeal proceedings

1. The respondent appealed the Tribunal's decision. The Appeal Panel heard the appeal on 23 April 2015 and published its orders and reasons for decision on 29 July 2015: *Lotus Constructions v Staunton* [2015] NSWCATAP 154.
2. The Appeal Panel made the following orders:
"(1) On grounds 1 and 2 the appeal is allowed.
(2) The order of the Tribunal made on 2 April 2014 is set aside.
(3) On grounds 4 and 5, leave to appeal is refused.
(4) On grounds 3, 4 and 5, the appeal is otherwise dismissed.
(5) The proceedings are remitted to the Tribunal for a hearing according to law in respect of the calculation of quantum due by the appellant to the respondent as a consequence of the appellant not having performed all of the work the subject of the consent order made on 17 October 2013 in proceedings HB 13/17764."
1. The effect of the Appeal Panel's decision is that the only issue to be determined by the Tribunal on rehearing is the quantum of damages to which the applicants are entitled as a result of the failure to comply with the consent work order in the substantive proceedings.
2. At some point prior to the determination of the appeal, the respondent paid the applicants \$20,930.80 as a consequence of the Tribunal's order of 2 April 2014. The applicants did not repay this sum to the respondent, even though this should have occurred once the Appeal Panel set aside the Tribunal's order. The respondent did not press for the applicants to be ordered to do so.

Proceedings on remittal

1. On remittal from the Appeal Panel, the matter was listed for directions on 31 July 2015. At that hearing, both parties advised the Tribunal that they had provided all documents on which they sought to rely in respect of quantum.

Hearing on 30 September 2015

1. The matter was listed for hearing on 30 September 2015. At that hearing, the applicants were represented by Mr Lee of Counsel. The respondent was represented by its director, Mr Chand. Neither the applicants nor their expert witness attended the hearing. The builder's expert attended the hearing, but it emerged that he had not previously given an opinion on quantum in respect of those items that he did not consider defective. In view of this, and given that the applicants' expert was unavailable to be cross-examined on his opinion on quantum, both parties sought an adjournment of the proceedings so that a joint expert report could be obtained. The Tribunal granted their application.
2. During ensuing settlement negotiations, the respondent conceded quantum in respect of the cost of rectifying water ingress to the garage (\$6124.80), the cost of rectifying a microwave cupboard (\$561) and the applicant's expert witness costs (\$2860). Three other items remained in dispute. These items are the cost of rectifying the driveway / garage slab, the external brickwork and tiles and associated stairs in the entry foyer.
3. The hearing was adjourned with directions requiring the filing of a joint expert report in respect of the disputed items, in the form of a Scott Schedule, by 28 October 2015.
4. The matter was listed for hearing on 10 December 2015. The applicants' solicitor made an application for an adjournment on 23 November 2015. That application was refused.

Hearing on 10 December 2015

1. The hearing proceeded on 10 December 2015. Mr Lee of Counsel again appeared for the applicants. Mr Snelgrove, solicitor, appeared for the respondent. Neither party's expert witness attended the hearing. Contrary to the orders made previously, a joint report was not provided.
2. Prior to the hearing, Mr Snelgrove had placed the Tribunal and the applicants on notice that it had come to the respondent's attention that the applicants had sold the dwelling and that, in his opinion, they could no longer pursue their claim for damages unless they could demonstrate a loss.
3. Mr Snelgrove filed an affidavit from the respondent's director Mr Chand dated 1 December 2015, which provided evidence that the property had been sold, with settlement of the sale having occurred on 28 September 2015. He also filed a written submission in support of the proposition that having sold the property the applicants could not establish a loss. He submitted that the applicants' claim must fail because they had not provided evidence of

payment for rectification of defects or of diminution in the value of their home. Mr Snelgrove submitted that to award a sum of money would unjustly enrich the applicants. These submissions were repeated orally at the hearing.

4. Mr Lee responded to the submissions orally, having not been given a copy of Mr Snelgrove's written submission by his instructing solicitor.
5. The Tribunal reserved its decision. However, on consideration it became clear that Mr Snelgrove had not made any submission to deal with the possibility that the Tribunal would not find in his client's favour on the issue of the effect of the sale of the property. In the absence of a joint report on quantum, procedural fairness required that the respondent be given an opportunity to do so.
6. The Tribunal made directions on 11 December 2015 and the matter came back before the Tribunal for directions on 27 January 2016. At that hearing, the applicants' counsel handed up submissions in response to the respondent's submission on the effect of the sale of the property. The Tribunal made directions allowing the respondent to file and serve a submission in reply. In addition, the respondent was ordered to file and serve its expert evidence on quantum by 24 February 2016 and the parties were ordered to serve a joint report on quantum, in the form of a Scott Schedule, by 9 March 2016.
7. The Tribunal noted that the matter would be determined on the papers if:
 1. The parties were agreed on quantum or
 2. The Tribunal concluded that the applicants were entitled to no damages, other than the sum conceded by the respondent, because of the intervening sale of the property.
1. The parties were advised that a further hearing would be listed on advice from the parties that there was no agreement on quantum and the expert witnesses were required for the purpose of cross-examination. In such a case, directions would be made for the preparation of the matter for hearing.
2. On 8 March 2016, the applicants' solicitor wrote to the Tribunal attaching the Scott Schedule previously prepared by the applicants' expert. In that letter, the applicants' solicitor states that the failure of the respondent to provide any evidence on quantum "confirms that builder's expert accepts the quantum evidence provided by the former homeowners" and confirms that the figures "are those set out in the attached Scott Schedule of the former homeowners' expert Michael Craig formerly of MC Southern Consultancy Pty Ltd as adjusted by the experts when they met and agreed to compromise on 2 April 2014".
3. The proceedings were listed on 14 April 2016, after the Tribunal received notice from the applicants that they wished to address the Tribunal orally. The orders made on 27 January 2016 in respect of the filing of expert evidence by the respondent and the preparation of a joint expert report were not complied with.

4. Prior to the hearing on 14 April 2016, the applicants' expert witness Mr Craig filed and served a new Scott Schedule, costing only the items in dispute. The costs allocated to each of the items in dispute was different to the 2 September 2013 Scott Schedule served previously.
5. At the hearing on 14 April 2016, it emerged that the respondent's solicitor had misunderstood the directions made previously and had expected the Tribunal to make a decision on the preliminary issue of whether the applicants could continue to claim damages in the circumstances where they had sold the property.
6. It was agreed between the parties and ordered by the Tribunal that by 28 April 2016, the respondent would file and serve a completed Scott Schedule responding to that filed by the applicants, together with a brief expert report in the event that there was any difference between the parties' experts on the issue of quantum.
7. The Tribunal ordered the applicants to advise the Tribunal and the respondent on or before 12 May 2016 whether they were content for the matter to be finalised on the papers based on the submissions on loss and the evidence and quantum that had been filed and served, or whether they sought a hearing on the issue of quantum. In the event that a hearing on quantum was sought, the parties were ordered to provide unavailable dates and arrange for their expert witnesses to be present at the hearing.
8. The respondent did not comply with the Tribunal's order in respect of filing and service of a response to the applicants' Scott Schedule. Rather, on 24 May 2016, the respondent's solicitor wrote to the Tribunal raising issues concerning the differences between the costings provided in the applicant's expert's original report (dated 2 September 2013) and in the 8 April 2016 Scott Schedule. Further direction was sought from the Tribunal, with the suggestion that the applicants' expert "might be asked to clarify".
9. In response to this correspondence, the Tribunal advised the parties as follows:

The Tribunal notes the builder's letter dated 24 May 2016.

If the builder is seeking further time to comply with directions made on 14 April 2016, that application should be made without delay.

The Tribunal is not satisfied that it is appropriate to make any further directions in this matter, given its history and the inevitable cost to the parties.

The parties are urged to communicate with each other in respect of the matter raised in the builder's letter dated 24 May 2016. In the absence of an extension of time being sought or granted, the Tribunal intends to determine this application without further notice to the parties, but not before mid June 2016.

1. The applicants' solicitor wrote to the Tribunal on 17 June 2016, relevantly stating that:

We have had no response as to quantum from the builder's expert as per your order 2 made on 14 April 2016.

Our expert Mr Craig has had no response from the builder's expert as per the Scott Schedule he prepared on 8 April 2016 which was under cover of his letter dated 14 April 2016. The implication must be that the builder's expert consents to the estimates set out in that letter.

This matter must be drawn to a close and we therefore ask you to finalise the matter on the papers currently before the Tribunal.

1. This letter was copied to the respondent's solicitor. No further communication has been received either from the respondent directly or from its solicitor. In these circumstances, I am satisfied that it is appropriate to make a decision based on the material already filed and served, including the submissions in respect of the effect of the sale of the property. I am further satisfied that the respondent has had ample opportunity to provide its own evidence on quantum and has failed to do so. I am satisfied that the issues in dispute can and should be determined without a further hearing, in accordance with s 50(1)(c) of the NCAT Act.

Jurisdiction

1. As noted above, these proceedings were commenced in the CTTT when the Consumer Trader and Tenancy Tribunal Act 2001 (CTTT Act) was in force. The CTTT was abolished as of 1 January 2014 and the CTTT Act was repealed. The proceedings were not heard prior to 1 January 2014.
2. Transitional provisions in relation to unheard proceedings are set out in Clause 7 of Schedule 1 of the Civil and Administrative Tribunal Act 2013 (NCAT Act). Pursuant to Clause 7(1), unheard proceedings are taken, on and from 1 January 2014, to have been duly commenced in NCAT and may be heard and determined by NCAT. The application was therefore originally determined by NCAT in accordance with the transitional provisions of the NCAT Act.
3. Since that time, the proceedings have been the subject of an internal appeal under s 80(1) of the NCAT Act and as a result of that appeal were remitted to the Tribunal for re-hearing and determination of the quantum issue. It is not in dispute that the Tribunal continues to have jurisdiction to hear and determine the application.
4. It is not also in dispute that the application constitutes a building claim in respect of which the Tribunal has jurisdiction pursuant to s 48K of the Home Building Act 1989 (the HB Act).

Evidence and submissions

1. In making a decision in relation to the application, I have considered:
 - * The evidence on quantum filed by the applicants prior to and subsequent to remittal;
 - * The oral and written submissions made on behalf of the parties;
 - * The concessions made by the respondent's director Mr Chand at the hearing on 30 September 2015;

* The affidavit of Sunil Chand dated 1 December 2015 and

* The decision made by the Appeal Panel.

Issues

1. The issues to be determined in this application are:

* Do the applicants have no entitlement to damages because, since the Tribunal originally made orders, they have sold the property?

* If the sale of the applicants' property does not preclude the applicants from being awarded damages, what is the appropriate quantum of damages in respect of the three disputed items (that is, rectification of the driveway / garage slab, the external brickwork and floor tiles and stairs in the entry foyer)?

* What orders should be made?

Consideration

Do the applicants have no entitlement to damages because, since the Tribunal originally made orders, they have sold the property?

1. It is not in dispute that the applicants' sold the property, with the sale settling on 28 September 2015. This is supported by the affidavit of Sunil Chand dated 1 December 2015.

2. The respondent's primary submission in respect of quantum is that the applicants are not entitled to damages because they have suffered no loss. In relation to this, the respondent submitted that:

* The applicants have separated and sold the home that is the subject of the proceedings.

* There is no evidence before the Tribunal of any loss, other than the assessed value put on the defects by the applicants' expert Mr Craig of MC Southern Consulting Pty Ltd.

* There is no evidence before the Tribunal of payment for rectification of those defects, that the sale price of the property was reduced due to the value of the defects or that the applicants identified the defects to the purchasers of the property.

* The applicants' claim must therefore fail.

* To award a sum of money to the applicants would unjustly enrich them.

1. In response, the applicants submit that:

* The sale of the property does not affect their right to monetary compensation in respect of losses which accrued as a result of the respondent's failure to rectify the works it agreed to undertake as a result of the consent orders made on 17 October 2013.

* The applicants' losses crystallised at the time the respondent failed to complete the rectification works.

* The fact that the rectification work will not be carried out does not preclude the applicants from claiming damages.

1. In general terms, the primary measure of damages in relation to a contract for the performance of building work, is the cost of rectifying defective or incomplete work. This is because, by receiving money in substitution for performance, a claimant is put in the position it would have been in had the contract been performed. The possibility that rectification work will not be carried out does not preclude recovery of the cost of rectification work: *Bellgrove v Eldridge* 90 CLR 613; *Ruxley Electronics & Construction v Forsyth* [1995] 3 WLR 118. However, recovery of the cost of rectification work is subject to the rectification work being necessary and reasonable. If it is not, then the measure of damages is the diminution in the value of the property. If there is no diminution in value, the claimant recovers nothing.
2. Sale by the claimant of the subject property does not of itself displace the entitlement to damages according to the rectification measure: *Westpoint Management Ltd v Chocolate Factory Apartments Ltd*; *Chocolate Factory Apartments v Westpoint Finance & Ors* [2007] NSWCA 253, per Giles JA at [49] (*Chocolate Factory*)
3. In respect of the relevance of a sale of the property, in *Chocolate Factory* Giles JA cited Gibbs J in *Director of War Service Homes v Harris* [1968] Qd R 275 (FC) who said at 278 that sale did not affect the plaintiff's accrued right to rectification damages, although the fact of sale "might be one of the circumstances that would have to be considered in relation to the question whether it would be reasonable to effect the remedial work". In that case, Gibbs J stated at 278-9 that, assuming it would be reasonable to do the work -

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

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

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

1. I am not satisfied in this case that the applicants' sale of the property means that rectification is not reasonable or that the cost of rectification is not the appropriate measure of damages.
2. As noted above, on 17 October 2013 the Tribunal made consent orders requiring the respondent to carry out rectification work. The rectification work was to be carried out by 18 November 2013. In their substantive application the applicants sought an order for payment of damages in the sum of \$62,222.36. Had the respondent not agreed to a work order and the substantive application been heard, it would have been open to the Tribunal to make an order for damages at that time.
3. The scope of the agreed rectification work was specified in the consent orders; that is, "the six items contained in the scope of works as set out in the MC Southern Consulting Report signed by the parties and placed with the papers". There was, at the time the consent orders were made, no dispute that there were defective works. Further, at that time it was reasonable for the respondent to undertake rectification of the defective work. Had that not been the case, the respondent would not have consented to the work order. Further, had the respondent not agreed to the work order and the Tribunal had heard the application, there is nothing to suggest that it would have been unreasonable for the Tribunal to award damages in the form of rectification costs.

4. On the material before me, I conclude that the respondent didn't undertake the works in accordance with the orders not because it was unreasonable for rectification work to be done, but because of a dispute about the manner of rectification. The proceedings were renewed when the agreed scope of work was not completed. On renewal of the application, the Tribunal had the power to make any other appropriate order as it could have made when the matter was originally determined. This includes the power to award damages.
5. The respondent's appeal to the Appeal Panel was unsuccessful other than in respect of issues impacting on the quantum of damages. No argument was put that rectification was not reasonable and the proceedings were remitted the Tribunal to determine quantum only.
6. The sale of the property did not occur until after the respondent had agreed to undertake rectification work and had not complied with consent orders that he undertake the work. Further, the sale only occurred after the Appeal Panel made a decision and had remitted the proceedings to the Tribunal for re-hearing. While the sale of the property presumably means that the applicants will do no further rectification work, the sale of the property is not what prevented the undertaking of rectification work. At least one reason rectification work was not done prior to the sale of the property is the respondent's failure to comply with the consent order made on 17 October 2013.
7. While I accept that there are cases in which the sale of a property, either of itself or in combination with other factors, makes rectification unreasonable, I am not satisfied that the sale of the applicants' property in September 2015 falls within that category. I am satisfied that the principle enunciated in *Bellgrove v Eldridge* is the appropriate principle to apply to damages in this case, notwithstanding the sale of the property and whether or not the applicants themselves undertook rectification work prior to the sale. I find that the applicants are entitled to damages equalling the reasonable cost of undertaking rectification work.

What is the appropriate quantum of damages in respect of the three disputed items (that is, rectification of the driveway / garage slab, the external brickwork and floor tiles in the entry foyer)?

1. The respondent agreed that it was liable for the following:

* Garage rectification: \$6124.80,

* Microwave oven cupboard rectification: \$561

1. The respondent also agreed to pay the cost of the applicants' expert witness in the sum of \$2860.
2. Accordingly the total agreed costs amount to \$9545.80.
3. As noted above, in accordance with a Scott Schedule prepared by Mr Craig of MC Southern Consultancy Pty Ltd in the original proceedings the disputed items are:

* The driveway and garage slab;

* The external brickwork and

* Lipping to floor tiles including associated steps.

1. The respondent has filed no expert evidence of the cost of rectifying these three items. I am satisfied that it had the opportunity to do so, both in the substantive proceedings, prior to the Tribunal originally making a decision on the renewal application and subsequent to the remittal of the matter to the Tribunal. The applicants have provided the only evidence on quantum.
2. Since the proceedings were remitted, two documents have been filed on behalf of the applicants in relation to quantum: the Scott Schedule prepared by the applicants' expert witness in the original proceedings (filed on 8 March 2016) and another Scott Schedule (dated 8 April 2016) which was filed by the applicants' expert witness on 14 April 2016.
3. In the original Scott Schedule, the applicants' expert witness costed rectification of the disputed items as follows:

* Driveway slab: \$2640

* External brickwork: \$6169.81

* Lipping to floor tiles and associated steps: \$2838

1. The total for these items is therefore \$11,647.81. According to the Scott Schedule, the costings for the individual items are as set out in MC Southern Consultancy Pty Ltd's report, which was filed by the applicants.
2. In the 8 April 2016 Scott Schedule, the applicants' expert witness costed rectification of the disputed items as follows:

* Drive / concrete slab: \$2805

* External brickwork: \$5445

* Entry foyer: \$3135

1. While the description of the defect is slightly different, I accept that these are the same defects described in MC Southern Consultancy's original report (which formed the basis of the consent order) and the Scott Schedule referred to in [61] above. The total for the three items is \$11,385. According to the new Scott Schedule, the costings are "as per the Neumann quote"; that is, the JA Neumann Pty Ltd quotation relied on by the Tribunal in its first decision in the renewal proceedings.
2. Mr Craig gives no reason why he has changed the opinion originally expressed in his expert report and reflected in the earlier Scott Schedule and adopted the figures in the JA Neumann Pty Ltd quotation. The failure to do so creates difficulty in assessing damages, given that the

applicants have provided two different costings for the same defects. However, the Tribunal is not relieved from the duty of assessing damages merely because damages cannot be assessed with certainty: *Howe v Teefy* [1927] NSWStRp 41; (1927) 27 SR (NSW) 301 (1 July 1927).

3. In the absence of quantum evidence from the respondent, I have concluded that the appropriate basis for determining the quantum of damages for the disputed items is the JA Neumann Pty Ltd quotation. This is because a quotation given by someone who is actually prepared to carry out work will in many cases be the most reliable indicator of the true cost of remedial work: *Landy v Benteigh Homes Illawarra* [2011] NSWCTTT.
4. I note that while the JA Neumann Pty Ltd quotation costs two of the disputed items at a higher amount than the expert report and the original Scott Schedule prepared by Mr Craig, the third item has a lower costing and the total cost is marginally lower than originally estimated by Mr Craig.
5. The total of the three disputed items as set out in the JA Neumann Pty Ltd quotation (\$11,385) plus the amount conceded by Mr Chand at the hearing on 30 September 2015 (\$9545.80) amounts to \$20,930.80, which is the sum the Tribunal originally ordered the respondent to pay the applicants and which the respondent has in fact paid to the applicants. I find that the applicants have established an entitlement to damages in this sum.

What orders should be made?

1. Once the Appeal Panel had set aside the money order made by the Tribunal on 2 April 2014, the respondent was entitled to restitution of the moneys it paid to the applicants in compliance with the Tribunal's order: *Production Spray Painting and Panel Beating Pty Limited & Ors v Newnham & Ors* [No 2] (1991) 27 NSWLR 659; *TCN Channel Nine Pty Limited v Antoniadis* [No 2] (1998) 44 NSWLR 682; *Hume v Walton* (No 2) [2005] NSWCA 458.
2. It is common ground that the applicants did not repay the moneys to the respondent.
3. In these circumstances, while I am satisfied that the proceedings should be finalised by the making of a money order in favour of the applicants, I have determined that the operation of the money order should be stayed pending restitution of the moneys originally paid under the 2 April 2014 order. If the applicants repay the sum of \$20,930.80 to the respondent, the stay will be lifted. The applicants will be unable to enforce the order I have made in the remitted proceedings until this occurs. If they do not repay the moneys to the respondent, the order will be stayed indefinitely.

Orders

1. I make the following orders:
 1. A further hearing is dispensed with pursuant to s 50(1)(c) of the Civil and Administrative Tribunal Act 2013

2. The respondent is to pay the applicants the sum of \$20,930.80 immediately.
3. Order 2 is stayed until the applicants make restitution to the respondent of the sum of \$20,930.80 paid to them by the respondent in compliance with the money order made by the Tribunal on 2 April 2014, which order was set aside by the Appeal Panel on 29 July 2015.

K Rosser

Senior Member

Civil and Administrative Tribunal of NSW

12 July 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: 05 October 2016

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