



**NCAT**  
**NSW Civil &**  
**Administrative Tribunal**  
Consumer and Commercial Division

## **NOTICE OF ORDER**

RACHEL DEFREITAS  
mjbirch@birchpartners.com.au

File No: HB 17/19496  
Quote in all enquiries  
eNumber: 35914JB00

### **Application to the Tribunal concerning RACHEL DEFREITAS - SCOPE BUILDING PTY LTD**

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Applicant: RACHEL DEFREITAS  
Respondent: SCOPE BUILDING PTY LTD

On 29-Aug-2017 the following orders were made:

1. The Tribunal is satisfied that service of notice of the hearing has been duly served on the respondent and the Tribunal considers justice requires the matter be dealt with in the absence of the party.
2. SCOPE BUILDING PTY LTD C/- Suite 8, Level 6 402 Chapel Road BANKSTOWN NSW 2200 Australia is to pay RACHEL DEFREITAS 26A Brickworks Avenue THIRROUL NSW 2515 Australia the sum of \$41920.45 immediately.

Reasons:

- \$41920.45 Cost of rectification of defective residential building work.

3. The Tribunal orders that the respondent pays the applicant's costs of and incidental to the proceedings, such costs to be agreed or assessed under the Legal Profession Uniform Application Act 2014.

### **REASONS**

1. This dispute has a long history. The procedural history of the matter is set out in detail in the written reasons dated 9 July 2017 in Matter HB 17/17507. In essence, the original proceedings (involving an application by the builder for unpaid monies under the contract and cross application by the homeowner for damages for incomplete and defective work) were settled by way of a consent work order on 10 November 2016. The builder failed to comply with the work order, and renewal proceedings were taken in Matter HB 17/17507. The renewal proceedings were listed for hearing, and the builder failed to appear. The renewal proceedings were heard on 7 July 2017. On 9 July 2017, I made orders in the renewal proceedings that the builder pay the homeowner \$24,671.86 for the cost of completing the work that should have been completed by the builder pursuant to the work order. I also ordered the builder pay the homeowner's costs of the renewal proceedings.

Section 62 (2) of the Civil and Administrative Tribunal Act 2013 provides the following:

Any party may, within 28 days of being given notice of a decision, request the Tribunal provide a written statement of reasons for its decision. The request should be, in writing, addressed to the Registrar.

2. At the renewal hearing, directions were also made in this matter (HB 17/19496) for the filing and serving of documents, and this matter was also listed for hearing. This matter involves 6 fresh defects that the builder's expert, Mr Bournelis, discovered when he attended the property in March 2017 to inspect the property and prepare a further report in respect of the defective work that had not been rectified by the builder. The supplementary report of Mr Bournelis is dated 6 April 2017. Mr Bournelis also prepared a revised Scott Schedule which was attached to his report of 6 April 2017, setting out the nature of the defect; scope of works to rectify; and cost of rectification.
3. In this matter, the reasons are to be read in conjunction with my reasons dated 9 July 2017, and the factual findings made in the renewal proceedings. The homeowner relied upon the evidence that had been filed and served in the earlier proceedings, and Mr Birch informed the Tribunal that the supplementary report of Mr Bournelis dated 6 April 2017 was served by attaching it to the application which was filed with the Tribunal.
4. The matter was listed for hearing at the Tribunal in Sydney on 21 August 2017. Mr Birch, Solicitor, appeared for the applicant ('the homeowner'). The homeowner also appeared in person. The homeowner's expert, Mr Bournelis, also appeared. The builder had not filed and served any expert or lay evidence in the renewal proceedings, nor in these proceedings.
5. There was no appearance by the builder. Mr Birch informed the Tribunal that he had performed an updated ASIC search on the builder on 20 August 2017. That search had shown that the builder had changed the registered office address from Suite 8, Level 6, 402 Chapel Road Bankstown NSW 2200 to 4A Manuka Crescent Bass Hill NSW 2197 (the address of the director, Mr Kis). However, the change of registered office address did not occur until 1 August 2017. The ASIC search did not indicate the respondent was in liquidation, administration, or de-registration.
6. The Tribunal's file contained a notice of hearing dated 19 July 2017 addressed to Suite 8, Level 6, 402 Chapel Road Bankstown NSW 2017 giving notice of the time, date and place of the hearing on 21 August 2017. There was nothing on the Tribunal's file to indicate that notice had not been received, such as the letter being 'returned to sender'. Previous notices had been sent to that address, and not 'returned to sender'.
7. Under Section 109X (1) (a) of the Corporations Act 2001, documents may be served on a company if they are sent by post to the registered office of the company. On the basis of the usual practice of the Tribunal regarding the sending of hearing notices, I am satisfied that as of the date the hearing notice was sent, and the date it was received (the document being deemed to be received 4 business days after the date it was sent, by reason of Section 76 of the Interpretation Act 1987), the registered office of the respondent was Suite 8 Level 6, 402 Chapel Rd Bankstown NSW 2017.
8. Being satisfied that the notice of hearing had been sent to the registered office of the respondent, and in circumstances where there had been no previous appearance by the respondent in these proceedings or in Matter HB 17/17507, I am satisfied that the respondent was aware of the hearing, and had a reasonable opportunity to appear. I am satisfied the matter proceed ex parte, in accordance with Regulation 35 of the Civil and Administrative Tribunal Rules 2014.

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## JURISDICTION

9. For the same reasons set out at paragraph 11 of the written reasons dated 9 July 2017 in Matter HB 17/17507, I am satisfied the dispute involves "residential building work" and proceedings have been commenced within the limitation period set out in Sections 48K of the Home Building Act 1989 ('the HBA').

10. In respect of the claim for defective work arising from Mr Bournelis' inspection of the property in March 2017, I am satisfied that proceedings for defects have been commenced within 2 years of the date of practical completion of the work within the meaning in Section 3B of the HBA, on the basis of the evidence of the homeowner at paragraph 112 of her affidavit dated 6 April 2016.

11. Accordingly, it is unnecessary for the Tribunal to make findings whether or not the defects are "major defects" or non-major defects under Section 18E (1) (b) of the HBA. Proceedings for the further defects have been commenced within the limitation period for statutory warranties under Section 18B of the HBA

## BREACH OF STATUTORY WARRANTY

12. Under Section 18B(1)(a) of the HBA, there is an implied warranty in all contracts to perform residential building work that the work will be performed with reasonable care and skill, and in accordance with the plans and specifications in the contract.

13. The supplementary report of Mr Bournelis dated 6 April 2017 sets out (commencing at page 18 of the report, and also set out in the Scott Schedule annexed to the report) the further defects he found at the inspection on 10 March 2017. The report sets out why Mr Bournelis asserts that work has not been performed with reasonable care and skill. There is no evidence of the builder to oppose the expert report of Mr Bournelis. Mr Bournelis gave evidence, and explained orally why the defects were not able to be detected at his earlier inspection, and why they were not part of the earlier proceedings in the Tribunal.

14. On the basis of the evidence of Mr Bournelis, I am satisfied that the items of work set out at pages 18 to 21 of his supplementary report dated 6 April 2017, and Items 24 to 30 of the Scott Schedule annexed to the report have been performed by the builder without reasonable care and skill in breach of Section 18B (1) (a) of the HBA.

## SECTION 48MA OF THE HBA

15. For the same reasons as set out at paragraph 21 of the written reasons dated 9 July 2017 in Matter HB 17/17507, I am satisfied that an order that the builder perform rectification work is not the preferred outcome. Further, the homeowner provided with the application filed with the Tribunal a license search with NSW Fair Trading in respect of the builder, which shows the builder's license has expired. It is not appropriate that the Tribunal order an unlicensed builder to perform rectification work.

## RES JUDICATA

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16. Mr Bournelis explained in oral evidence why the further defects were not apparent at his earlier inspection, and I am satisfied they were not claimed in the earlier proceedings. No issue estoppel or res judicata applies in the circumstances of this matter (Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; 147 CLR 589).

## DAMAGES

17. For the same reasons as set out in paragraph 20 of the written reasons dated 9 July 2017 in Matter HB 1717507, I am satisfied the contract has been discharged by reason of repudiation by the builder, with the homeowner having elected to accept the repudiation and terminate. Accordingly, the homeowner may claim damages in the proceedings.

18. The relevant principle to apply in respect of assessment of damages is the well-established principle in Bellgrove v Eldridge [1954] HCA 36; 90 CLR 613, that damages are to be assessed on the basis of the cost of the rectification work to produce conformity with the contract, unless the method of rectification is unnecessary or unreasonable. The method of rectification will only be unreasonable in "fairly exceptional circumstances (Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8 at [15]; Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd [2017] NSWCA 27 at 186; Barwick v Shetab [2017] NSWCATAP 127 at [88])

19. Mr Bournelis has set out the method of rectification in the Scott Schedule, and his opinion on the cost of rectification. There is nothing to indicate the scope of works for rectification is unnecessary or unreasonable. Mr Bournelis assesses the cost of rectification (including builder's margin) for items 24 to 30 in the Scott Schedule as \$38,159.50, and with a GST component this comes to \$41,920.45.

20. I am satisfied that the cost of rectification of the defects identified in the supplementary report of Mr Bournelis is \$41,920.45 and the builder is to pay the homeowner this amount.

## COSTS

21. The homeowner seeks an order for costs of and incidental to the proceedings on the ordinary basis. The amount in dispute in these proceedings exceeds \$30,000.00, and by reason of Regulation 38 of the Civil and Administrative Procedure Rules 2014, a costs order can be made without special circumstances under Section 60 of the Civil and Administrative Procedure Act 2015. Cost orders are to compensate a successful party for the expense of taking proceedings, and there is no reason why the homeowner should not be awarded costs of the proceedings. Accordingly, the builder is to pay the homeowner's costs of and incidental to the proceedings.

**G Sarginson**  
Tribunal Member  
**29/08/17**

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