



NCAT
NSW Civil &
Administrative Tribunal
Consumer and Commercial Division

NOTICE OF ORDER

Rachel De Freitas
mjbirch@birchpartners.com.au

File No: HB 17/17507
Quote in all enquiries
eNumber: 34706EH98

Application to the Tribunal concerning RACHEL DE FREITAS - SCOPE BUILDING PTY LTD

Applicant: Rachel De Freitas
Respondent: SCOPE BUILDING PTY LTD

On 09-Jul-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 FLOOR 6 SUITE 8 402 Chapel Road BANKSTOWN NSW 2200 Australia is to pay Rachel De Freitas C/- Birch Partners Lawyers PO BOX 532 HURSTVILLE BC NSW 1481 Australia the sum of \$24,671.86 immediately.

Reasons:

- \$24,671.86 Damages for cost of performing work that was not performed in breach of orders of the Tribunal dated 10 November 2016.

3. The Tribunal orders that the respondent pays the applicant's costs of the renewal proceedings in Matter HB 17/17507, such costs to be agreed or assessed pursuant to the provisions of the Legal Profession Uniform Application Act 2014.

REASONS

1. The matter was listed for hearing at the Tribunal in Sydney on 7 July 2017. Mr Birch, Solicitor, appeared for the applicant ('the homeowner'). The homeowner was also present at the Tribunal, and gave oral evidence. The homeowner's expert, Mr Bournelis, was also present at the Tribunal. There was no appearance by the respondent ('the builder').

Procedural Background

Section 62 (2) of the Civil and Administrative Tribunal Act 2013 provides the following:
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Level 14 Civic Tower, 66 Goulburn Street, SYDNEY NSW 2000
GPO Box 4005, SYDNEY NSW 2001
ccdsydney@ncat.nsw.gov.au
Direct Ph: 9307 6496 Toll free Ph: 1300 006 228 Fax: 9307 6301
www.ncat.nsw.gov.au

2. The proceedings were listed for hearing by way of a renewal of proceedings under Schedule 4 Clause 8 of the Civil and Administrative Tribunal Act 2013 ('the NCAT Act') due to the builder allegedly failing to comply with work orders made by the Tribunal on 10 November 2016. The renewal proceedings filed on 11 April 2017 seeks damages, interests and costs.

3. The previous proceedings in Matters HB 16/09509 and HB 16/16622 involved a claim by the builder for unpaid monies under the contract; and a cross application by the homeowner for damages due to defective and incomplete works. Both parties were legally represented in those proceedings, and both parties engaged building consultants as experts. A joint Scott Schedule was prepared by the experts. On 10 November 2016, the Tribunal made consent orders in Matter HB 16/16622. Relevantly, those orders adopted the joint Scott Schedule, with the builder to perform work and rectify defects in accordance with the joint Scott Schedule in 4 stages. The first stage was to be completed by 23 December 2016. The second stage was to be completed by 30 January 2017. The third stage was to be completed by 28 February 2017. The final stage was for the builder to provide the owner with an occupation certificate, which was to occur on or before 31 March 2017. The parties agreed there was no order as to costs. The orders also contain a consent notation, that the homeowner would make 4 progress payments to the builder, the first commencing on 30 November 2016 in the sum of \$15,000.00. The builder's claim in Matter HB 16/09509 was withdrawn on 10 November 2016, with no order as to costs.

4. This matter was listed for directions on 1 May 2017 before Senior Member Goldstein. Mr Birch appeared for the homeowner. The builder did not appear at the directions hearing. The matter was set down for hearing. Mr Birch stated that he informed Senior Member Goldstein that the evidence of the homeowner was the evidence in the earlier proceedings, and the further report of Mr Bournelis dated 6 April 2017. The further report of Mr Bournelis was annexed to the renewal application filed with the Tribunal. That report also referred to some items of "further defects" (i.e. issues separate to the items set out in the joint Scott Schedule the subject of the work orders made on 10 November 2016). Senior Member Goldstein noted that such items were not part of the renewal application. The homeowner has taken separate proceedings in respect of those alleged further defects in Matter HB 17/19496, and separate directions have been made in those proceedings, with Matter HB 17/19496 being listed for directions before me on 7 July 2017, in addition to the renewal application being listed for hearing.

5. According to Mr Birch, Senior Member Goldstein stated that the Tribunal Registry had been in contact with the Solicitors of the builder who acted in the earlier proceedings, who did not indicate they had instructions to act for the builder in the renewal proceedings. Information on the Tribunal's file indicates an officer of the Tribunal Registry telephone the Solicitors for the builder on 24 April 2017, and the officer was told the Solicitors had not received instructions from the builder to act for the builder in the renewal proceedings. Mr Birch stated that he had not made any contact with the former Solicitors for the builder in respect of the renewal proceedings, or corresponded with them regarding the hearing date, and could not inform the Tribunal whether or not they continued to act for the builder.

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6. The Tribunal's file contained notice of hearing addressed to the builder. The notices of hearing were sent to the principal place of business and registered office of the builder, as set out in an ASIC search the homeowner had filed with the renewal application. Mr Birch provided a further ASIC search performed in the week prior to this hearing, with the details of the builder unchanged. The notice of hearing addressed to the principal place of business as set out in the ASIC search was "returned to sender" but the notice of hearing sent to the registered office was not returned to sender.

7. In circumstances where a corporation has an obligation to keep accurate details with ASIC regarding its principal place of business and registered office, I am satisfied the respondent was notified of the hearing, and had a reasonable opportunity to appear (Regulation 35 of the Civil and Administrative Tribunal Rules 2014). The homeowner was ready to proceed. I am satisfied that, in accordance with the guiding principle of the Tribunal under Section 36 of the Civil and Administrative Tribunal Act 2013, the matter should proceed ex parte.

Jurisdiction of the Tribunal

8. The evidence that each party had filed and served in the previous proceedings makes clear there was a contract to perform residential building work between the parties and it is clear the Tribunal had jurisdiction in the matter by reason of Section 48A and 48K of the Home Building Act 1989 ('the HBA'). There is no issue that the previous proceedings were not commenced within the limitation period under Section 48K of the HBA or that the Tribunal did not have jurisdiction to make the consent orders dated 10 November 2016. The Tribunal had the power to make work orders by reason of Section 48O of the HBA. I am satisfied the Tribunal has jurisdiction in this matter.

Renewal of Proceedings

9. Under Schedule 4 Clause 8 of the NCAT Act, a party may renew proceedings in the Tribunal if work orders have not been complied with, within 12 months of the failure to comply with the order. The renewal application has been filed within the 12 month limitation period.

10. If the homeowner establishes breach of the orders, the Tribunal has the power to make orders that it could have made in the earlier proceedings. The relevant principle is that, when a work order is not complied with, the Tribunal should award damages to put the party in the position it should have been had the work orders been complied with.

Expert Evidence of the Homeowner

11. The homeowner relied upon the expert evidence of Mr Bournelis. Mr Bournelis had re-inspected the property and prepared a further report dated 6 April 2017. A copy of that report had been filed with the renewal application. Mr Bournelis stated that work identified in the joint Scott Schedule had not been completed by the builder, and relatively little work had been performed by the builder subsequent to the orders of 10 November 2016. Mr Bournelis set out in a revised version of the joint Scott Schedule each of the items of work which had not been completed and defects that had not been rectified in accordance with the orders of 10 November 2016 and the costs of engaging a builder to perform the work that should have been performed by Scope Building Pty Ltd.

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12. The report of Mr Bournelis also referred to 7 items of defective work that were not part of the consent orders of 10 November 2016. After such items had been deleted from his report, the total cost of engaging a builder to perform the work that should have been performed by the builder to comply with the orders of the Tribunal dated 10 November 2016 is \$184,671.86.

13. There is no expert evidence of the builder to contradict the evidence of Mr Bournelis, and I accept his evidence, particularly in circumstances where Mr Bournelis has inspected the property both prior and subsequent to the orders of 10 November 2016.

Evidence of the Homeowner

14. The homeowner had sworn an affidavit in the previous proceedings. No further affidavit had been filed and served in the renewal proceedings. However, in circumstances where it was clear from the renewal application that an issue in dispute was whether or not the orders of 10 November 2016 had been complied with, allowing the homeowner to give brief oral evidence was appropriate for the Tribunal to understand what work had been performed, and did not create any procedural unfairness to the builder.

15. The evidence of the homeowner was that she had paid the builder \$15,000.00 on 15 December 2016, pursuant to the agreement noted in the orders of 10 November 2016. The builder had arranged for a representative of the builder to attend the property in the period from 8 December 2016 to early January 2017. According to the homeowner, some minor works had been completed, but Stage 1 of the orders of the Tribunal dated 10 November 2016 had not been completed by the due date of 23 December 2016. None of the work set out in Stages 2, 3, and 4 had been completed.

16. In January 2017 the homeowner stated she had emailed the Solicitor for the builder on a number of occasions to query when the builder would attend and complete the work. According to the homeowner, the Solicitor stated that it was "getting instructions" from the builder. In the absence of a response, the homeowner re-engaged Mr Birch to act for her.

17. According to the oral evidence of the homeowner, and documents of the homeowner in the previous proceedings, the total amount she has paid the builder is \$540,000.00. The original contract price under the written contract was \$700,000.00. No occupation certificate has yet been issued by the private certifier due to the incomplete works, and the homeowner did not inform the Tribunal whether or not she was occupying the property.

Circumstances of Termination of the Contract

18. The consent orders dated 10 November 2016 contain a notation that the parties agreed (at that stage) the contract remained on foot.

19. Mr Birch handed up correspondence between himself and the builder's Solicitors in March 2017 where the builder purported to issue a notice of termination under the contract due to the homeowners failure to make progress payments, and the Solicitor for the homeowner had replied stating that the homeowner was issuing a notice of termination under the contract due to the builder's failure to perform work, or in the alternative, the builder's failure to perform work and wrongful issue of a notice to terminate, was repudiatory conduct.

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20. On the uncontested evidence of the homeowner, I am satisfied that the builder did not comply with the orders of the Tribunal to complete work, and the failure to complete the work in accordance with Tribunal orders while also indicating the builder was not prepared to complete the work was repudiatory conduct (*Shevill v Builder's Licencing Board* (1982) HCA 47. In circumstances where the work had not been completed in accordance with the orders of the Tribunal, there was no contractual obligation of the homeowner to make progress payments to the builder. In any event, the obligation of the builder to comply with the work orders of the Tribunal is separate and distinct from any contractual agreement between the parties regarding progress payments. I am satisfied that the homeowner accepted the repudiation of the contract by the builder, and the contract was terminated prior to the commencement of proceedings on 11 April 2017 and there is no impediment to the homeowner seeking damages by reason of the contract remaining on foot (*Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84).

Section 48MA of the HBA

21. I am satisfied that further work orders (even if the Tribunal has the power to make further work orders in a renewal application) is not the preferred outcome. The builder has failed to comply with the orders made on 10 November 2016 to complete work and rectify defects, and on the evidence of the homeowner only performed minor works. It is not appropriate in those circumstances to make another work order.

Assessment of Damages

22. On the basis of the expert evidence of Mr Bournelis, I am satisfied that the cost of completing work and rectifying defects in accordance with the work orders of the Tribunal dated 10 November 2016 is \$184,671.86. In accordance with the principle of *Robinson v Harman* [1848] Eng R 135; (1848) 1 Ex 850, the unpaid amounts under the contract are to be taken into account when assessing damages (see, for example, *Advanced Brick Systems Pty Ltd v Chen* [2013] NSWCTTT 357 at [51]). Accordingly, after a deduction of \$160,000.00 is taken into account (the contract price for construction of the house being \$700,000.00 and the amount paid by the homeowner being \$540,000.00) the amount of damages for failure to comply with the work orders of the Tribunal dated 10 November 2016 is \$24,671.86.

Supply of Certificates to the Homeowner

23. Mr Birch stated that, in addition to damages, the homeowner sought an order that the builder provide various construction certificates to the homeowner, so that the homeowner can obtain an occupation certificate.

24. The reference in the work orders of the Tribunal to "certificates" is that the builder provide an occupation certificate to the homeowner on or before 31 March 2017. As these proceedings are renewal proceedings, it is the obligation of the homeowner to provide evidence as to the cost of obtaining an occupation certificate (if the cost is separate and distinct from the cost of rectification and completion in the further report of Mr Bournelis) and I am not satisfied it is appropriate in these proceedings to make an order that the builder provide unspecified construction certificates. In circumstances where the work has not been completed by the builder in any event, the builder cannot provide an occupation certificate.

Costs

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

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25. The homeowner seeks legal costs in the proceedings, and Mr Birch submitted that they should be awarded on an indemnity basis. The grounds put forward for awarding costs on an indemnity basis were that (i) the builder had acted "egregiously" in failing to comply with work orders, and had only performed a minimal amount of work under the work orders dated 10 November 2016; and (ii) the homeowner should not have to bear any component of her costs in bringing the renewal proceedings which were caused by the builder failing to comply with orders of the Tribunal.

26. Under Section 60 of the Civil and Administrative Tribunal Act 2013, parties are to bear their own costs unless there are "special circumstances". Under Regulation 38 of the Civil and Administrative Tribunal Rules 2014 ('the NCAT Rules'), the Tribunal may award costs in proceedings in the Consumer and Commercial Division if the amount in dispute in the proceedings exceeds \$30,000.00.

27. These proceedings are renewal proceedings. By reason of Schedule 4 Clause 8 of the Civil and Administrative Tribunal Act 2013, the original proceedings are renewed, not fresh proceedings arising out of a fresh cause of action. The amount in dispute in the original proceedings exceeded \$30,000.00. The amount in dispute in the renewal proceedings exceeded \$30,000.00, as the cost of completing incomplete work and rectifying defects that should have been completed and rectified had the orders of the Tribunal dated 10 November 2016 been complied with exceeded \$180,000.00, and it was only after unpaid monies under the contract was taken into account did the amount of damages calculated drop below \$30,000.00.

28. I am satisfied costs can be awarded in this matter without "special circumstances" being established. In any event, had Regulation 38 of the NCAT Rules not applied, I regard the builder failing to comply with orders of the Tribunal in the circumstances of this matter sufficiently "out of the ordinary" circumstances to make a costs order (CPD Holdings Pty Ltd t/as the Bathroom Exchange v Baguley [2015] NSWCATAP 21 at [29]).

29. Costs are awarded to a successful party in litigation to compensate the party, not to punish the other party (Oshlack v Richmond River Council [1998] HCA 11 at [97]). The Tribunal has the power to award costs on an ordinary basis, or on an indemnity basis. Indemnity costs can be awarded if there is some relevant "sufficient or unusual feature" or "relevant delinquency". The discretion to award indemnity costs should be exercised with caution (Leichardt Municipal Council v Green [2004] NSWCA 341). "Relevant delinquency" means conduct relevant to the proceedings, such as failing to comply with Tribunal directions; conduct that unnecessarily prolongs the litigation; unreasonably rejecting a 'Calderbank' offer; or asserting a cause of action or defence that is frivolous, vexatious, misconceived, or lacking in substance. "Delinquency" does not mean moral delinquency (Liverpool City Council v Estephan [2009] NSWCA 161 at [95]). A party giving a formal warning to the other party that it intends to claim costs on an indemnity basis will make the awarding of costs on an indemnity basis more likely (Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd (1995) 36 NSWLR 242).

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30. I am not satisfied in the circumstances of the matter the homeowner has established costs should be awarded on an indemnity basis. Although it is important that parties comply with orders of the Tribunal, Schedule 4 Clause 8 of the NCAT Act gives the other party the ability to renew proceedings if work orders are not complied with. Whether the builder had complied with only a small amount of the work order (as is the evidence of the homeowner) or most of the work orders, the homeowner would still have to take renewal proceedings. Mr Birch did not provide or refer to any authorities of the Tribunal where an indemnity costs order was made in renewal proceedings by reason of a party failing to comply with work orders. There was no conduct of the builder that prolonged the proceedings, because the builder did not appear at any stage of the renewal proceedings, or serve any evidence. There was no evidence the homeowner had put the builder on notice that costs would be sought on an indemnity basis. I am satisfied the builder should pay the homeowner's costs of the renewal proceedings, but on the ordinary basis rather than on an indemnity basis.

Conclusion

31. The builder is to pay damages of \$24,671.86 to the homeowner immediately in the renewal proceedings; and pay costs of the renewal proceedings as agreed or assessed, on the ordinary basis.

G Sarginson
Tribunal Member
09/07/17

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