



Civil and Administrative Tribunal New South Wales

Case Name: Peter Hanna v Nelson Semaan, Badr Habib, George Semaan, Fawaz Habib and Fadi Habib

Medium Neutral Citation: [2014] NSWCAT

Hearing Date(s): 16 – 20 June 2014

Date of Decision: 24 March 2015

Jurisdiction: Consumer and Commercial Division

Before: G Meadows, Senior Member

Decision: Badr Habib is to pay the amount of \$265,765.00 to the applicant within 60 days of the date of these orders.

Catchwords: Home Building – defective works; Home Building – delay damages; Home Building - variations

Legislation Cited: *Civil & Administrative Tribunal Act 2013*
Home Building Act 1989

Category: Principal judgment

Parties: Peter Hanna—applicant
Nelson Semaan, Badr Habib, George Semaan, Fawaz Habib and Fadi Habib —respondents

Representation: Applicant: Mr Allan
1st respondent- Mr Young
2nd-4th respondent- Mr Walton
5th respondent- No appearance

File Number(s): HB 10/16205

Publication Restriction: Nil

REASONS FOR DECISION

- 1 Mr Peter Hanna and his wife purchased a house from Mr Badr Habib in 2005. The house was completed in about 2003 or 2004. It had a number of obvious minor defects and the price was reduced in negotiations between Mr Hanna and Mr Habib.
- 2 Over the next three years, further very serious defects became obvious requiring urgent action. The house appeared to be unsafe. Mr Hanna and his family moved out of their home in 2009. After the urgent (but temporary) action just mentioned, no further work has been done to rectify the house. It remains uninhabitable.
- 3 Mr Hanna at first made a claim against Mr Nelson Semaan who he thought was the builder. He eventually joined Mr Habib as a respondent and also two of Mr Habib's children, Mr Fawaz Habib and Mr Fadi Habib, as they were also on the title to the property when he purchased it in 2005. Then he joined Mr George Semaan (Nelson's brother) because it was alleged by Mr Habib that in fact George was the builder. Apart from Mr Fawaz Habib and Mr Fadi Habib, the remaining three respondents during the course of these proceedings have all denied being the builder (or owner-builder) and assert one or more of the other two is or are the builder(s).
- 4 There was no written building contract. In May 2012 I found that Mr Habib and both Mr Nelson and Mr George Semaan were all builders for the purposes of these proceedings. Still nothing has been done to rectify the premises and still Mr Hanna and his family cannot live in their home.
- 5 For the reasons which follow, I find that Mr Habib, Mr Nelson Semaan and Mr George Semaan are severally and jointly liable to compensate Mr Hanna for the cost of rectifying defective works in the subject premises. I find those defective works will require a sum not less than \$500,000.00 to rectify.
- 6 It would be more accurate to state that I would like to make orders based on those findings but there are further difficulties.

- 7 Sadly, Mr Nelson Semaan died following the hearing as the result of pancreatic cancer. The evidence had all been taken by that time. No application has been made by the applicant in relation to Mr Nelson Semaan’s demise, such as amending the name of that party to the Estate of the Late Nelson Semaan. Those acting for Mr Nelson Semaan have written to the Tribunal seeking dismissal of any claim against Mr Nelson Semaan on the basis that he is deceased.
- 8 In addition, on the first day of the substantive hearing, 16 June 2014, the Tribunal received a facsimile from Mr George Semaan stating that he cannot defend the claim as he has been a bankrupt since 16 July 2012. That date is about two months after the preliminary decision referred to in paragraph 4 above although it is not suggested that decision led to Mr George Semaan’s application for bankruptcy. The facsimile had attached to it a “Notification of Bankruptcy – Debtors Petition”, stating the date of bankruptcy to be 16 August 2012. No application has been made by the owner in relation to s 58(3) of the *Bankruptcy Act* (Cth) (BA) and to the best of my knowledge no consent has been provided by the Court for these proceedings to continue against Mr George Semaan.
- 9 Section 58(3) of the BA is in the following terms:

58 Vesting of property upon bankruptcy—general rule

(1) ...

...

(3) *Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:*

(a) *to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or*

(b) *except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.*

“Court”, pursuant to the BA, is the Federal Court, the Federal Circuit Court, the High Court or in some circumstances, the Family Court. In my opinion, commencing the hearing and presenting evidence against the bankrupt is “a

fresh step” in these proceedings and there is no evidence that the Court’s consent has been obtained.

- 10 However, that is not the end of the matter. The section above refers to “provable debt” which is defined in s 82 of the BA:

82 Debts provable in bankruptcy

(1)...

(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

A claim for compensation pursuant to s48A(2) of the *Home Building Act 1989* (HB Act) is a claim for unliquidated damages. As stated above, there is no contract in relation to the building works and therefore I find this claim is not provable in bankruptcy. The claim cannot therefore proceed against Mr George Semaan.

Nomenclature

- 11 For reasons which should be clear in the paragraphs above, it is necessary to consider in some detail how I should refer to the various parties.
- 12 In these reasons I refer to Mr Hanna as “the owner”, and to Nelson Semaan, Badr Habib and George Semaan as “the builders”.
- 13 In addition, the sons of Badr Habib (Mr Fawaz Habib and Mr Fadi Habib) are also parties on the basis that they were on the title of the property when it was purchased by the owner and a claim of misleading and deceptive conduct is maintained against them. The three Habib parties were represented by the same counsel and solicitor at the hearing, Mr Walton and Ms Lebovic respectively. When considering their joint liability, if any, I will refer to them, with no disrespect intended, as “the Habibs”.
- 14 The owner submits that on occasion Mr Badr Habib, as the alleged prime mover in the construction of the premises and their sale to the owner, was

responsible for certain decisions or actions. On those matters I refer to Badr Habib as “Mr Habib”. I do not ever refer to Mr Fawaz Habib or Mr Fadi Habib as “Mr Habib”. The context should make clear whether I intend to refer to Mr Badr Habib separately as a “builder” and to “the Habibs” jointly.

- 15 I note that the parties’ legal representatives refer to the parties variously as “first respondent”, “second respondent” and so on. This nomenclature does not always agree with the name of the matter on Tribunal documents, nor with the nomenclature adopted by other parties. I have attempted to be vigilant when analysing the evidence and submissions of the parties to ensure proper naming of each party where required.

Background

- 16 The factual background, the history of these proceedings and the legal submissions are all complex and require some careful summarising in order to easily follow the reasons below. I state “careful” because the following summary is taken from a variety of sources, some of which, as is usual in litigation, do not agree with other sources. I have attempted to be astute in noting where it appears the facts are agreed and where they are in dispute.

Construction of the Subject Premises

- 17 In about 2002 Mr Badr Habib owned a block of land at “ ... ” Place, Sylvania bearing the unlucky number “13”. The premises are situated to the east of Tom Ugly’s Bridge in a very picturesque area of southern Sydney where the Georges River flows past Wooloware Bay into Botany Bay. The site overlooks the water and has views generally to the east or south east. It is contiguous with the suburb “Sylvania Waters” of recent television fame.
- 18 When Mr Habib purchased the property there was “an old one storey brick house” thereon and he decided to demolish that building and erect a new one. In order to obtain sufficient finance, Mr Habib states that he needed his sons Fawaz and Fadi to “provide security” for the loan. Apparently for that purpose, they were on title as owners. Mr Habib also obtained security from his

daughter, although she did not become an owner of the property. When applying for finance, the Habibs stated the purpose of the loan was for investment.

- 19 The following description of how the premises came to be constructed is given largely by Mr Habib and is one of the main issues in contention in these proceedings, not only from the point of view of the owner, but also from the points of view of Mr Nelson Semaan and Mr George Semaan.
- 20 Mr Habib and Mr George Semaan were friends from childhood. Mr Semaan's father taught Mr Habib at school. At the time of deciding to demolish the old building and construct a new home on the premises, Mr Habib states that Mr George Semaan was a licensed builder. He approached Mr George Semaan who agreed to be the builder of the premises. According to Mr Habib, the agreement was that he, Mr Habib, would purchase all the necessary materials and that Mr George Semaan was going to "inspect the building job and tell the contractors and myself what we needed to do".
- 21 Mr Habib next states that Mr George Semaan introduced him to Mr Nelson Semaan and to Mr Gus Srouf from Green Line Developments Pty Ltd. Mr Srouf became the architect for the building and he selected Mr Salame from Delta Design and Constructions Pty Ltd. to "make" the engineering plans (although Mr Nelson Semaan was himself a structural engineer by profession). Mr Habib then states that he was introduced to Mr Youssef El-Masri by either Mr George Semaan or Mr Srouf and Mr El-Masri was retained as the private certifier.
- 22 There was no building contract nor, apparently, any written agreement of any kind between Mr Habib, Mr George Semaan or Mr Nelson Semaan or any other person in relation to the building works. Mr Nelson Semaan obtained a home owners warranty insurance certificate in his name as the builder on 07 October 2004, that document stating that the date of the contract was 14 August 2004. Mr George Semaan was shown as the builder on the Construction Certificate.

- 23 It is submitted by the Habibs that at all relevant times both Mr George Semaan and Mr Nelson Semaan held builder's licenses under the *Home Building Act 1989* ("the Act").
- 24 The sequence of events and the parts played by the various people referred to above was the subject of much argument and evidence and will be referred at some length below. I emphasise that the bare facts set out in the previous few paragraphs are taken from Mr Habib's statement although generally speaking there is no real dispute about the facts themselves, rather the disputes relate to the legal significance of the facts.
- 25 The next chapter commences in 2005. In that year, depending on whose version of events is accepted, either the owner approached Mr Habib or Mr Habib approached the owner and they discussed the subject premises, now completed and offered for sale. However it occurred, it is agreed that the owner attended the premises on more than one occasion to inspect the house. It is also agreed that the owner, although interested in purchasing the property, had some concerns about visible defects, chiefly cracks in masonry, concrete or rendering. Over a period of time the owner and Mr Habib negotiated an agreement that the price of the home would be reduced by \$400,000.00 to \$1,500,000.00 and, at least according to the owner, that Mr Habib would rectify the defects complained of by the owner. The latter allegation is denied by Mr Habib. The sale went ahead, the document of sale including a provision that the owner acknowledged he was purchasing the property "as is" with defects and would make no claim in relation thereto against the Habibs. The certificate of HOW insurance referred to above was also provided to the owner, after the sale contract was signed. In addition, also **after** the sale contract was signed, the owner obtained what was basically a "pre-purchase" inspection report from a building consultant.
- 26 By 2008 further significant deterioration had occurred including defects which possibly, in the opinion of the owner, made the premises unsafe for occupation or that they would soon become unsafe for occupation. The owner approached Mr Habib for assistance and Mr Habib, in short, denied

responsibility on the basis that Mr Nelson Semaan was the responsible builder and the premises were insured. The owner attempted to locate Mr Nelson Semaan at the address provided by Mr Habib, without success. The owner obtained a structural report from Capital Engineering Consultants which suggested there were major defects in the dwelling. The report is dated 14 October 2008.

- 27 On 22 October 2008, the owner lodged an application with the Office of Fair Trading (OFT) against Mr Nelson Semaan. It appears that Mr Nelson Semaan was located by OFT, but the OFT application could not be resolved. Therefore, the owner commenced this application in the Consumer Trader and Tenancy Tribunal (CTTT), initially against Mr Nelson Semaan only on 30 March 2010.
- 28 By 22 July 2010 the owner, in undertaking investigations in relation to the application and in particular to the preliminary issue of whether Mr Nelson Semaan was actually the builder, sought to join the previous owners of the premises, being the Habibs. The Habibs were formally joined as respondents by Member O’Keeffe at a directions hearing on 10 August 2010.
- 29 The owner continued his investigations and on 24 August 2010 wrote to the Tribunal seeking to join Mr George Semaan to the proceedings. I added Mr George Semaan as a respondent at a directions hearing on 20 September 2010.

The Builder

- 30 I have already found that the evidence proves that Mr Habib, Mr Nelson Semaan and Mr George Semaan should each be characterised as one of the builders of this dwelling. It is not possible to determine just what works were performed by each individual. It is not possible because each of the three has been extremely vigilant in denying any responsibility and seeking to explain away or avoid any of the evidence which may suggest that any individual of the three should be characterised as a builder. In doing so, of course, they have succeeded in rendering it impossible to state with certainty that this one

or that one was a hands-on builder, or a supervisor or a project manager or performed some other role or roles. It is necessary, therefore, to give some indication of what the role of each was, at a minimum.

- 31 I find Mr Habib was the moving force in relation to obtaining finance, organising the design and planning of the works and arranging the supply of contractors and materials. In that regard, he was acting as a builder, albeit not licensed to do so. He was in fact an owner who was also one of the builders of the dwelling, although not an owner/builder as defined by the Act, as he did not hold an owner/builder's permit.
- 32 At all relevant times, I find that Mr George Semaan and Mr Nelson Semaan each held a builder's licence. Mr Nelson Semaan did not hold such a licence at the beginning of the building works or at least in 2003, but he did hold such a licence by the time he obtained the insurance referred to in the following paragraph.
- 33 I find that Mr Nelson Semaan obtained Home Owners Warranty Insurance and that he was nominated as the builder on the certificate. As the documentary evidence makes clear, this certificate was obtained by Mr Nelson Semaan and therefore he nominated himself on the certificate, as the builder. I reject the Habibs' submission that Mr Nelson Semaan is shown as the builder simply because Mr George Semaan arranged for Mr Nelson Semaan to obtain the certificate. Mr Nelson Semaan was a professional engineer and also held a builder's licence: I do not accept that he was simply told to attend an insurer to obtain HOW insurance and because he was doing that task named himself as the builder. I find it not credible that someone with his education and experience would not realise the significant importance of that document and the significance of being named as the builder. Instead, I have concluded that he was content to be named as the builder because that is what he was, or rather, he was one of the builders. I am also satisfied that he attended the site if not regularly, at least often enough to be aware of the progress of the building works. I am fortified in that conclusion, as submitted by the owner in the "Closing Submissions for the Applicant" filed on 16 July

2014 (“closing submissions”) at paragraphs 24 and 25 and as supported strongly by the tendered documents referred to in the footnotes on page 8 of those submissions. In particular, the application form completed, I find, by Mr Nelson Semaan, to obtain HOW insurance suggests Mr Nelson Semaan was very familiar with the dwelling as built, although not as designed or as approved.

- 34 I find Mr George Semaan was stated as the builder on the Notice to Commence Building Work. I find that Mr Habib obtained from Mr George Semaan advice in relation to the building works because of Mr George Semaan’s experience as a builder. Mr George Semaan’s later involvement in the proposed rectification of the dwelling (for example, in 2010 when he attended a site meeting with the owner, Mr Habib and Mr Srour) and his willing participation in the rectification work, so much as it can be characterised in that fashion, of propping up the overhanging concrete roof at the rear of the premises. Mr George Semaan also signed the waterproofing certificate, apparently in blank.

Completion of the Roof

- 35 This application is not about a jurisdictional issue relating to the date of completion of the building works but nevertheless the completion date is an important issue in relation to the main defect: the concrete roof including the rear overhang.
- 36 I accept the submissions of the owner under the headings “Imagining a house”, “Change of plan” and “An under-designed roof” at pages 2 to 5 of the closing submissions. Those submissions are strongly supported by the tendered documents referred to in the footnotes on those pages. It is abundantly clear that that the roof as designed was not built. Instead, I find that on the balance of probabilities based on the evidence included in those documents that Mr Habib, Mr George Semaan and Mr Nelson Semaan decided to alter the roof design so as to create a trafficable area from which to

enjoy the views in a fashion likely similar to, if not exactly as described, in the submissions at paragraph 15.

- 37 I also find that the change of design and change of purpose of the roof occurred late in the project and was undertaken without appropriate or indeed any input from the architect, an appropriately qualified and independent engineer or the certifier. None of those three person were aware of the new design and change of purpose. Neither was the Council and approval had to be obtained after the fact. The certifier's final occupation certificate did not include the roof. Although the roof, in my opinion, almost immediately commenced to fail, as there were marked cracks by the time the owner had the property inspected at or soon after signing the contract to purchase the home in 2005, the extent of the failure was not obvious by that stage, or rather it is more precise to say the roof continued to fail until by 2008 it was obvious that, in layperson's terms, the whole roof was in the process of cracking into two pieces at or near the point of the overhang.
- 38 By 2010 it was obvious urgent action was required to prevent the overhanging portion from cracking right off and that is why the two props were hurriedly installed by Mr Habib and Mr George Semaan in that year. However, well before that period, the cracking process had caused the waterproofing to fail and hence the water problems internally became obvious before the full extent of the roof failure was known.
- 39 In my opinion, Mr Habib, Mr George Semaan and Mr Nelson Semaan were all involved in the construction works in 2004, all had some input into the decision to change the roof as designed and all took part in the changing of the works to continue the concrete roof slab past the rear wall and overhanging the rear balcony, without taking any steps to ensure the concrete slab as designed (appropriately for its original purpose) would be strong enough to withstand the obvious extra stress. As noted above, Mr Nelson Semaan in particular was aware of the roof as built when he applied for HOW insurance.

Liability of Fadi and Fawaz Habib

- 40 The owner's basis for alleging misleading and deceptive conduct is that in applying for the finance for building the subject works, it was intended that the premises would be re-developed in trade and commerce for profit, the loan application stating that it was for a business or investment purpose. The owner submits it was never intended by Mr Habib as a family residence for himself. This statement was repeated on the later loan application, being that for "... Macquarie Street, Granville. As Mr Fawaz and Mr Fadi Habib were parties to those transactions, they are also responsible for engaging in misleading and deceptive conduct.
- 41 However, even if that allegation is correct, I cannot find evidence of misleading and deceptive conduct by Mr Fadi or Mr Fawaz Habib towards the owner. I therefore dismiss the claim against Mr Fadi and Mr Fawaz Habib

Defective Works

- 42 There is no real dispute as to the list of defective works between the three experts retained by the parties. There is, of course, a very wide variation in the preferred methods of rectification and the costs of rectification.
- 43 I make the following findings in relation to defective works, method of rectification and reasonable cost.

Item	Rectification	Cost
Roof slab failure	The roof at the rear of the premises originally was designed to finish at or near the rear wall, without any overhang. That is how the plans were approved. The roof originally (beyond the rear wall) consisted of a circular or semi-circular metal structure. By September 2004, Mr Habib sought approval to remove the metal roof but by then a concrete overhang was	\$117,675.00

	<p>already in place. A letter from Mr El-Masri, the principal certifier, written to the Council and in evidence, sought to clarify that Mr El-Masri had nothing to do with the erection of the replacement roof. Mr El-Masri refused to certify the roof. Without being able to decide precisely who and when made the decision to erect the replacement roof, I am satisfied it must have been done on the decision of Mr Habib—no-one else could have been responsible for such a decision. It was a deliberate decision to make this major amendment to the works for the purpose of including a roof terrace as a selling point (noting it had always been intended to sell the house after completion). This is demonstrated by listing the house for sale with a roof terrace as shown in the letter from the Council to Mr Habib, dated 01 October 2004.</p> <p>There is no doubt the roof has catastrophically failed. It has cracked at or near the point where it crosses the rear wall. It does not seem to be in contention that the reason for the failure is insufficient reinforcement. The original reinforcement was sufficient for the roof as originally designed, but not to support the cantilevered overhang.</p> <p>For the reason just stated, I reject the opinion of Mr Nasr in relation to the method of rectification and I note the agreement on the proposed rectification between Mr Price for the owner and Mr</p>	
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	<p>Kriticos for Mr Habib.</p> <p>I also accept the opinions of Mr Price in relation to the reasonable costs of rectification. Mr Habib submits that Mr Price is, first of all, a builder and not an engineer, and secondly that Mr Price is semi-retired. I agree with both of those factual submissions but they do not affect Mr Price's experience and the reasoned analysis behind his costings. Mr Price may perhaps be at a disadvantage in relation to technical engineering issues but his report is in relation to rectification and the reasonable costs for that. In fact, as I understand the evidence from all the parties, and as noted above in paragraph 43, there is no real dispute in relation to the nature of the defects. These comments should be borne in mind in relation to my consideration of the items below. In this instance, I allow Mr Price's figure of \$117,675.00. (I note preliminaries, overheads etc. will be considered below).</p>	
<p>Lounge Room water damage</p>	<p>Mr Kriticos and Mr Price generally agree that construction of the balcony probably damaged the waterproof membrane. There is a marked difference between Mr Price and Mr Kriticos in relation to hourly rates for labour.</p> <p>Mr Price explains his rates as based on what rates would apply in the industry. Mr Kriticos seems to base his rates on what he believe he could obtain. I prefer the</p>	<p>\$35,450.00</p>

	<p>evidence of Mr Price as based on industry experience. It may be possible to obtain labour at the rates suggested by Mr Kriticos but it is more likely to be difficult to do so. This is especially true in relation to skilled labourers requiring expertise in various tools, as submitted by the owner.</p> <p>I allow \$35,450.00.</p>	
Weep holes	<p>I prefer Mr Price's opinion on the number of weep holes to that of Mr Nasr, noting that Mr Kriticos did not give a number.</p> <p>Mr Habib is very critical of Mr Price's estimate that it would take 2 hours to drill each hole, but I note that even Mr Nasr suggests 1 hour per hole. I note, however, that there is not a great difference between the hourly rate suggested by Mr Price and by Mr Nasr. I do not accept Mr Kriticos's opinion that a much lower paid labourer could be employed for this work.</p> <p>I allow \$12,800.00</p>	\$12,800.00
Brick joints	<p>As with the item above, I note the opinions of all three experts and I note Mr Price's time estimate is much lower than that of Mr Nasr. I will not repeat the arguments in relation to hourly rates. I also note at this point (which applies to each item) the level of detail provided by Mr Price. I allow Mr Price's estimate.</p>	\$7,680.00
Stairs	<p>All experts agree the front and rear stairs are hazardous and need rectification. The stairs are constructed of concrete and in</p>	\$19,600.00

	<p>my view the method of repair, essentially replacement, suggested by Mr Price is preferable to the more piecemeal approach of the other two experts.</p>	
Masonry angles	<p>I will not repeat the submissions of the owner at pp 18&19 of his closing submissions, but I am persuaded that only Mr Price has properly considered this item and has experience in all the materials and methods needed.</p>	\$17,250.00
Roof balustrade	<p>This item may seem controversial, given the abundance of evidence that the roof terrace is illegal. Mr Habib submits that “Mr Hanna wants money from the Respondents to do something he is prohibited by the Council from doing or, alternatively, never intends to do”. What may happen in future is not for me to determine but I am satisfied that the owner paid for a roof terrace and is entitled to receive a roof terrace with proper balustrading. I allow Mr Price’s estimate.</p>	\$8,610.00
Painting	<p>Based on the nature of the works allowed for above, I accept the owner’s claim that the house will require repainting. I note the photographs included in Mr Price’s second report dated 04 April 2013 demonstrate the deterioration of the paint work. Mr Price estimates the cost of painting at \$46,700.00. I was concerned that it could be expected that paintwork would deteriorate in any case, but in my opinion the painting is reasonable as resulting from the repairs.</p>	\$46,700.00

Total	\$265,765.00
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- 44 Badr Habib will be ordered to pay that amount to the applicant.
- 45 No order is made in relation to Nelson Semaan as he is deceased and no order has been made to substitute the estate.
- 46 No order is made in relation to George Semaan pursuant to s58 of the *Bankruptcy Act 1966* (Cth).
- 47 If any party wishes to make an application in relation to costs, that party is to provide written submissions no later than 15 April 2015. In those submissions, the parties are to indicate whether they consent to any costs order being decided on the papers.



G Meadows
Senior Member
Civil and Administrative Tribunal of New South Wales

24 March 2015