



Building Disputes - Don't DIY

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It's probably fair to say that you wouldn't ask your builder to give you legal advice (and you definitely wouldn't ask us to build your house).

However, we regularly see disputes between builders and home owners where both parties have failed to get legal advice at an early stage and have attempted to resolve matters themselves. Often, despite their best intentions, the parties will do more damage than good.

A recent matter heard in the NSW Supreme Court¹ is an example where both parties, but in this case mainly the homeowners, adopted positions that were wrong – and where early legal advice would have most likely resulted in a better outcome.

Background Facts

The Cohens, the homeowners, and the builder, Zanzoul, entered into a building contract in 2013 under which Zanzoul agreed to knock down the Cohen's home and build a new multi-level house.

In 2015, Zanzoul issued five progress claims (similar to invoices) to the Cohens. The Cohens only part paid some of these progress claims.

The Cohens claimed that Zanzoul's work was incomplete and defective and refused to make further payments. Zanzoul said that he was willing to rectify the work but only if the Cohens paid the progress claims.

As is often the case in these types of matters, there were lots of emails, phone calls and conversations between the Cohens and Zanzoul where both parties tried to communicate their alleged rights under the contract.

Repudiation

Every (decent) contract will set out what a party has to do if they disagree with a progress claim, invoice or request for payment. In this case, the Cohens adopted a position which was entirely inconsistent with what they agreed to do under the contract. By failing to follow the required process to dispute the progress claims (which they rightfully could have done), the progress claims became due and payable.

The Court found that the Cohens, in continually and wrongfully refusing to pay the progress claims when they were due, demonstrated that they no longer intended to be bound by the contract. In legal terms this means that the Cohen's repudiated the contract.

When one party repudiates a contract, the contract is not automatically terminated; it will only come to an end when the other party accepts the repudiation. Zanzoul accepted the Cohen's repudiation and the contract was therefore terminated.

Consequences

With the contract terminated, the parties were no longer required to perform their obligations under the contract. However, the parties could still rely on the contract to protect their rights that had accrued up to its termination.

The Court found that both parties had accrued rights before the contract was terminated; the Cohens had the right to recover damages from Zanzoul for the allegedly defective work and Zanzoul had the right to recover monies owed to him.

What does this case mean for me?

At the end of the day, both parties 'won' – Zanzoul was ordered to pay the Cohens for the defective work, whilst the Cohens had to pay the outstanding progress claims. Ultimately though, both parties suffered the stress of litigation, which was only finalised in August 2020, and had to pay considerable legal costs.

If you are a party to a building contract, it is important that you understand your legal position before you take any action. Had the Cohens understood their rights under the contract and taken the right steps to dispute the progress claims, the matter may well have been resolved by the parties without going to court and at less personal and financial cost.

If you are a homeowner or builder unsure of your rights under a building contract, please contact [Chris Kintis](#) on 02 8235 1251 or your usual ClarkeKann contact.

¹ Cohen v Zanzoul trading as Uniq Building Group [2020] NSWSC 592