PAUL FOLINO-GALLO
BARRISTER AT LAW

BUILDING AND CONSTRUCTION CASES 2022

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2022

PAUL FOLINO - GALLO

B A R R I S T E R - A T - L A W

THIRD FLOOR WENTWORTH CHAMBERS

180 PHILLIP ST SYDNEY NSW 2000

PH: 8915 2810

FAX: 8815 9585

EMAIL: PFOLINO-GALLO@WENTWORTHCHAMBERS.COM.AU

TABLE OF CASES

1. *12 Bridge Street Epping Pty Ltd atf 12 Bridge Street Epping Unit Trust v D.R. Design (NSW) Pty Ltd* [2022] NSWSC 866
2. *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd* [2022] NSWSC 1706
3. *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)* [2022] NSWSC 1368
4. *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* [2022] NSWCA 82
5. *Canterbury-Bankstown Council v Payce Communities Pty Ltd* [2022] NSWCA 74
6. *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2022] NSWSC 1487
7. *Cosmo Cranes & Rigging Pty Ltd v EQ Constructions Pty Ltd* [2022] NSWDC 6
8. *Equa Building Services Pty Ltd v A& H Floors 2 Doors Australia Pty Ltd* [2022] NSWSC 152
9. *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2022] NSWSC 394
10. *Forte Sydney Construction Pty Limited v N Moit & Sons (NSW) Pty Limited* [2022] NSWCA 186
11. *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd* (in liq) [2022] NSWSC 624
12. *Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2022] NSWSC 1775
13. *Invictus Development Group Pty Limited v Versatile Fitout Pty Limited* [2022] NSWDC 477
14. *James v Jandson Pty Ltd* [2022] NSWSC 1686
15. *Keegan v Ballast Point Ltd* [2022] NSWCA 179
16. *Krolczyk v Winner t/as J Winner Building Services* [2022] NSWCA 196
17. *Life Structures Pty Ltd v Burton* [2022] NSWCATAP 272
18. *McNab Building Services Pty Ltd v Demex Pty Ltd* [2022] NSWSC 1441
19. *McNab Building Services Pty Ltd v Demex Pty Ltd (No 2)* [2022] NSWSC 1496
20. *Morris v Leaney* [2022] NSWCA 95
21. *Nicolas Criniti Pty Ltd (in Liquidation)* [2022] NSWSC 1149
22. *O'Rourke v Beechwood Homes (NSW) Pty Ltd* [2022] NSWCATCD 116
23. *Onslow v Cullen* [2022] NSWSC 1257
24. *Piety Constructions Pty Ltd v Hville FCP Pty Ltd* [2022] NSWSC 1318
25. *Rialto Sports Pty Limited v Cancer Care Associates Pty Limited* [2022] NSWCA 146
26. *Renbar Constructions Pty Ltd v Sader; Sader v Renbar Constructions Pty Ltd* [2022] NSWSC 172
27. *Strata Plan 92450 v JKN Para 1 Pty Ltd & Anor* [2022] NSWSC 958
28. *The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd* [2022] NSWSC 1123

29. *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659
30. *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* [2022] NSWSC 1002
31. *Warburton v County Construction (NSW) Pty Ltd* [2022] NSWSC 941
32. *Warburton v County Construction (NSW) Pty Ltd* [2022] NSWSC 1281
33. *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505

12 Bridge Street Epping Pty Ltd atf 12 Bridge Street Epping Unit Trust v D.R Design (NSW) Pty Ltd [2022] NSWSC 866

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 28 June 2022

BUILDING AND CONSTRUCTION – adjudication determination under Building and Construction Industry Security of Payment Act 1999 (NSW) – adjudication application by architect against developer - where developer informed adjudicator that it had not been served with adjudication application – where adjudicator invited submissions as to date and manner of service of adjudication application – whether adjudicator had power to do so – consideration of s 21 of the Act – whether developer's response to adjudicator's invitation constituted an adjudication response

Facts

In February 2020, the plaintiff (the "**Developer**") and the first defendant (the "**Architect**") entered a contract for a development project in Epping. On 30 March 2022, the Architect served a payment claim of $123,428.25 on the Developer. Following this, on 13 April 2022, the Developer responded with a payment schedule indicating $nil owed. On 22 April 2022, the Architect submitted an adjudication application to enforce its payment claim.

On 5 May 2022, the Developer emailed the adjudicator, asserting non-receipt of the adjudication application. The adjudicator responded the same day, inviting submissions from both parties regarding the service details of the adjudication application and acceptance notification. Deadlines were set: submissions by 1:30pm on 6 May 2022, and any responses by 4:30pm on the same day.

Both the Architect and Developer submitted their respective materials on 5 and 6 May 2022. On 26 May 2022, the adjudicator issued a determination directing the developer to pay the architect $105,847.00. Subsequently, on 2 June 2022, the Developer initiated proceedings challenging this determination.

The central issue in this matter revolved around whether the adjudicator had the authority under the SOP Act to:

- Issue directions to the parties to make submissions;
- Shorten the submission deadlines;

- Limit the Developer's timeframe to provide an adjudication response.

Decision

The Court dismissed the proceedings, upholding the validity of the adjudication determination. Justice Stevenson held that, as the adjudicator responded sensibility and timeously to the Developer's email, that it had not received the adjudication application, and gave the Developer a chance to make submissions, there was no lack of procedural fairness. His Honour found that under section 21(4)(a) of the SOP Act, the adjudicator was within rights to request further written submissions upon receipt of initial submissions from both parties. The developer's email of 5 May 2022 was therefore considered a submission, rejecting the notion that 'further written submissions' could only follow an adjudication response.

It was further found that Section 21(4)(b) of the SOP Act empowered the adjudicator to set deadlines for additional submissions. Accordingly, Stevenson J ordered that the Developer's claim be dismissed with costs.

BCFK Holdings Pty Ltd v Rork Projects Pty Ltd [2022] NSWSC 1706

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 December 2022

BUILDING AND CONSTRUCTION – service of payment claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) – where payment claim delivered to office of superintendent – where delivery to superintendent not effective service – where payment claim subsequently came to notice of respondent – where respondent served payment schedule asserting service of payment claim not effective – whether the provisions of the Act enlivened – whether respondent should be taken then to have been served – where claimant then served second payment claim – where adjudication proceeded on basis of that second payment claim

BUILDING AND CONSTRUCTION – adjudication – whether adjudicator had jurisdiction – whether s 13(1C) of the Building and Construction Industry Security of Payment Act engaged – proper construction of s 13(1C) of the Act – whether s 13(1C) of the Act permits service of only one payment claim after termination of a construction contract – whether adjudicator failed to exercise jurisdiction – reasons given by adjudicator

MISLEADING OR DECEPTIVE CONDUCT – whether s 18 of the Australian Consumer Law engaged – whether by service of its payment schedule plaintiff represented that payment claim not validly served – whether defendant relied on any such representation to make its decision not to proceed to adjudication based on that payment claim

Facts

BCFK Holdings Pty Ltd (the "**Principal**") and Rork Projects Pty Ltd (the "**Builder**") entered into a construction contract for a childcare centre in Balmain which was terminated on 12 May 2022.On 12 July 2022, the Builder delivered a payment claim to the project's superintendent (the "**First Payment Claim**"). The superintendent lacked authority to accept service under the contract. Shortly after, the superintendent informed the Principal's sole director of the delivery.

Accordingly, on 18 July 2022, the superintendent shared a link containing the First Payment Claim to the sole director of the Principal, who accessed it around that time. Subsequently, the principal served a payment schedule (the "**First Payment Schedule**"), arguing that the first payment claim was invalid

under the SOP Act as it was not served directly on the principal, who holds liability for payment under section 13(1). The First Payment Schedule also addressed whether the claim constituted a 'final' payment claim per the contract terms.

Following legal advice, the Builder opted not to pursue adjudication on the First Payment Claim due to doubts about its proper service under the SOP Act. Instead, on 20 August 2022, the Builder served a new payment claim (the "**Second Payment Claim**") on the Principal, who responded with a payment schedule (the "**Second Payment Schedule**").

The dispute proceeded to adjudication, resulting in an adjudicator's decision favouring the Builder, awarding $685,915. The Principal contested this decision on various grounds, asserting that the Second Payment Claim was invalid, as the First Payment Claim had been effectively served when it came to the Principal's attention.

Decision

Relying on the precedent established in *Piety Constructions Pty Ltd v Hville FCP Pty Ltd* [2022] NSWSC 1318, the Court determined that the Principal's obligations under the SOP Act were engaged once the First Payment Claim came to the attention of the authorised recipient. Accordingly, the Court found that the First Payment Claim was effectively served on 18 July 2022 when the sole director accessed the documentation.

Furthermore, the Court interpreted section 13(1C) of the SOP Act, which stipulates that only one payment claim can be submitted after termination of a construction contract. Given the contract's termination on 12 May 2022, and the court's finding that the First Payment Claim was served on 18 July 2022, the Builder was not permitted to submit the Second Payment Claim. Consequently, the adjudicator lacked jurisdiction to rule on the matter, leading to the nullification of the adjudication decision.

The Court rejected the Builder's claim of misleading and deceptive conduct by the Principal, finding no substantial impact on the Builder's decision not to proceed with adjudication on the First Payment Claim. Instead, the Court emphasised that the Builder's legal counsel's advice had primarily influenced this decision, not the Principal's conduct.

Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 12 October 2022

BUILDING AND CONSTRUCTION – where no valid development consent or construction certificate in relation to building works – whether defence of illegality available in relation to claim for breach of statutory duty under s 37 of the Design and Building Practitioners Act 2020 (NSW) – whether managing director and project site supervisor of builder capable of being persons for the purposes of s 37 of that Act

PRACTICE AND PROCEDURE – whether cross-claimant should have leave to amend Cross-Claim List Statement – where cross-claimant seeks to introduce claim for breach of statutory duty under s 37 of the Design and Building Practitioners Act 2020 (NSW) – whether leave should be refused because of availability of defence of illegality – whether amendment should be disallowed against proposed individual cross-defendants because they are not persons for the purposes of s 37 of that Act – whether amendment should be disallowed on the basis of prejudice to the proposed cross-defendants

Facts

Boulos Constructions Pty Ltd (the "**Builder**"), as the plaintiff and cross-defendant, undertook the construction of the Three Rivers Regional Retirement Community project commissioned by Warrumbungle Shire Council (the "**Council**"), the defendant and cross-claimant. The Builder commended legal proceedings on 6 November 2018, seeking compensation for unpaid work. In response, the Council filed a cross-claim citing approximately 300 defects across various locations within the project.

Recently, the Council sought to amend its Cross-Claim List Statement under section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the "**Design Act**"), targeting several parties including the Builder, Mr. Brian Boulus (Managing Director of the Builder), and Mr. Bradley McCarthy (Project Site Supervisor). Mr. Boulus and Mr. McCarthy, however, had not yet been formally named as cross-defendants.

Section 37(1) imposes a duty of care on those who carry out construction work to exercise reasonable care in avoiding economic loss caused by defects. The Council's amendment aimed to include Mr. Boulus and Mr. McCarthy under this duty of care.

The Builder opposed the amendment, arguing that the duty of care under section 37 should be narrowly construed. It contended that "persons" subject to this duty should only include those directly carrying out construction work, not those acting as agents for others. The Builder feared that a broad interpretation could potentially subject thousands involved in large-scale projects to unwarranted liabilities, adversely impacting the construction industry.

Decision

A critical issue before the court was whether Mr. Boulus and Mr. McCarthy could be classified as "persons" under section 37 of the Design Act. The Builder argued against this classification, asserting that their roles did not fit the statutory definition.

However, the Council argued that both individuals exercised significant control over the construction work. Mr. Boulus, as Managing Director, oversaw project delivery staff, supervised work quality, engaged subcontractors, and influenced company operations. Mr. McCarthy, as Project Site Supervisor, managed and coordinated construction activities, directing subcontractors under his supervision.

Justice Stevenson interpreted the statutory definition of "person" under section 37 broadly, referencing section 36(d) of the Act which includes supervision, coordination, and substantial control over construction activities. The court concluded that this expansive definition encompassed individuals like Mr. Boulus and Mr. McCarthy who exerted considerable influence over the project.

The Builder raised concerns about potential conflicts between section 37 duties and provisions under the *Corporations Act 2001* (Cth), particularly regarding directors' obligations. Sections 119, 124, 516, and the definition of "a company limited by shares" were cited as points of contention.

Justice Stevenson ultimately dismissed these concerns, finding no conflict between the Design Act's duties and corporate governance laws. The court reasoned that imposing automatic duties on company directors under section 37 did not undermine corporate autonomy, but rather, reinforced accountability in construction-related activities.

The court's decision affirmed a broad interpretation of "person" under section 37 of the Design Act, encompassing influential roles in construction beyond direct practitioners. It underscored the Act's intent to impose duties of care on those exercising significant control over construction projects.

Furthermore, the ruling clarified that such duties do not conflict with corporate governance principles, emphasising adherence to statutory obligations in construction law.

BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd [2022] NSWCA 82

Coram: Ward P, Leeming, White, Brereton JJA, Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 3 June 2022

BUILDING AND CONSTRUCTION – adjudication – payment claim – existence of "one contract" rule – whether entitlement to serve payment claim must arise under one contract – whether "one contract" rule conditions validity of payment claim

CONTRACTS – construction – where contract provided that each work order constituted a new agreement – whether there was one or multiple construction contracts – characterisation by parties not determinative – other provisions inconsistent with each work order constituting new agreement

STATUTORY INTERPRETATION – jurisdictional constraints on function of adjudication – whether express constraints augmented by implied condition statutory context – focus on work performed under construction contract – no requirement that claim identify source of entitlement – reference to putative entitlements – legislative purpose – facilitation of money flow to subcontractors – *Building and Construction Industry Security of Payment Act 1999* (NSW), Pts 2, 3

Facts

BSA Advanced Property Solutions (Fire) Pty Ltd, acting as the subcontractor, and Ventia Australia Pty Ltd, the head contractor, were parties to a fire asset maintenance subcontract. This arrangement allowed the head contractor to issue 'work orders' to the subcontractor for specific tasks. According to the subcontract, each work order issued was supposed to create a distinct and separate agreement between the parties for the execution of the designated work.

The subcontractor submitted a payment claim seeking payment for services performed under multiple work orders. Subsequently, the subcontractor filed an adjudication application under the applicable legislation based on this payment claim. The adjudicator rendered a decision in favour of the subcontractor.

The head contractor contested the adjudicator's decision, arguing that the underlying payment claim was invalid because it sought payment under more than one construction contract.

Decision

The Court of Appeal upheld the appeal, determining that the payment claim pertained to only one construction contract based on the interpretation of the relevant subcontract terms. The provision in the contract stipulating that each work order constituted a separate contract was deemed inconsistent with other clauses within the same contract. The mere labelling of work orders as separate contracts did not dictate the legal relationship between the parties. Instead, the courts needed to assess the actual legal consequences of issuing a work order.

Additionally, in obiter dicta, the Court of Appeal indicated that there is a strong argument against the existence of a 'one contract' rule. This rule, which suggests that a payment claim must relate to work conducted under a single construction contract, was deemed inherently implausible. The court expressed several concerns regarding the purported 'one contract' rule:

- Previous court decisions relied upon to support this rule had limited precedential value due to reasons such as the issue being obiter dicta or the rule being accepted without challenge in the specific case.
- The legislative focus on entitlement to payment for construction work rather than the specific contractual source of the obligation to carry out that work.
- The definition of 'construction contract' under the legislation encompassing both formal contracts and other types of arrangements.
- The vague scope and application of the 'one contract' rule in diverse commercial arrangements for supplying goods and services.
- Imposing such a rule as a precondition for jurisdiction could lead to increased litigation and court intervention, potentially undermining the legislative objective of facilitating cash flow in the construction chain and mitigating subcontractor insolvency risks.

Canterbury-Bankstown Council v Payce Communities Pty Ltd [2022] NSWCA 74

Coram: Meagher, White, Brereton JJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 19 May 2022

BUILDING AND CONSTRUCTION – contract – whether claimed variations within contractual scope of work – builder's margin – GST – no question of principle

Facts

In this case, the Court of Appeal addressed a dispute over variations in the construction of a community centre between Canterbury-Bankstown Council and Payce Communities Pty Ltd.

The background involved Payce agreeing to construct a library and community centre in exchange for council land, initially under a Voluntary Planning Agreement, which evolved through subsequent agreements, including the Umbrella Agreement and the Fit Out Agreement. Disputes arose over design changes and associated costs, with Payce claiming significant amounts for variations, which were contested by the Council. An adjudicator had initially determined a sum payable to Payce, which the Council partially settled. Payce then sought further damages in court, resulting in a complex series of claims and counterclaims.

The primary judge awarded Payce a significant sum for the variations, but the Council appealed, challenging the inclusion of the builder's margin and other allowances. The Council challenged several of the variations that were allowed by the primary judge. Those challenges were largely unsuccessful. The one challenge that was successfully brought related to the builder's margin. Simply put, the Court of Appeal found that it was open for the primary judge to make the findings he did on the variation claims.

The Council also challenged the finding that Council was liable to pay Dasco (the Builder) a Builder's margin, through Payce. The issue on appeal turned on two questions.

- Was Payce liable to pay Dasco a 10% margin in respect of the variations over the prices the subcontractors charged Dasco ;and
- Did Dasco charge Payce such a margin?

Expert evidence of Mr Daubney suggested that it is industry practice that each entity in the supply chain is entitled to recover a margin.

The Council submitted that there was no evidence to support the instruction to which Mr Daubney referred in the joint report that Dasco was entitled to charge and had charged an allowance of 10% for its cost of managing the varied work.

Payce submitted that the valuation exercise for the primary judge in relation to the allowance of the margin was a discretionary one based upon the construction of cl 36.4 of the Fit Out Agreement.

The Court of Appeal held that the issue does not concern the reasonable amount for profit and overheads, that is, Payce's profit and overheads, but whether a reasonable price includes a margin that Dasco could charge Payce and did charge Payce.

The question as posed by the Council is not whether Dasco was entitled to charge a 10% margin on direct costs, but whether it did so. The question was ultimately decided by reference to whether Payce has established that Dasco had ini fact charged Payce the 10&% margin. If that question was answered in the negative, then it would be rendered unreasonable to price the variations under clause 36.4 for an amount that the Builder did not charge.

The Court further held that the onus was on Payce to establish what was a reasonable price for the variations and if the reasonable price included a margin charged by Dasco, to prove that Dasco charged that margin.

The Court held that even if this issue should have been pleaded in the defence, this was an issue which the Council should have pleaded so as to avoid taking Payce by surprise, the issue was plainly raised in the joint experts' report.

The Cross Appeal brought by Payce in respect of the primary judge's rejection of claims for reimbursement of consultancy fees was rejected by the Court of Appeal. The Court of Appeal contended that, for this ground to succeed, clause 9.7 of the Umbrella Agreement would have to be rewritten as the entitlement did not arise from an available construction of that clause.

Ceerose Pty Ltd v A-Civil Aust Pty Ltd [2022] NSWSC 1487

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 2 November 2022

BUILDING AND CONSTRUCTION – adjudication determination – subcontractor entitled to some $190,000 – adjudicator makes finding for which neither contended – contractor seeks to quash determination and Grosvenor or Brodyn stay –suggested serious question has only modest prospects where no suggestion that finding was wrong and finding likely irrelevant – evidence to support stay slight – reluctant to continue interim injunction to permit contractor to obtain evidence to support stay in absence of serious question to be tried as to jurisdictional challenge – balance of convenience did not favour extension of injunction as, although the monies were in Court, the subcontractor was deprived of cashflow.

Facts

Ceerose Pty Ltd applied to extend an interim injunction restraining A-Civil Aust Pty Ltd from enforcing a judgment and garnishee order related to a construction contract dispute. A-Civil, directed by George Matta and Salim Matta, with their father Nasser Matta also involved, undertakes excavation, demolition, and earthworks. From September to December 2021, Ceerose and A-Civil entered into contracts for three building sites in Alexandria, York Street Sydney, and Elizabeth Bay. In March 2022, they signed a subcontract for excavation work at the Alexandria site for $2,840,210, including provisions for retention monies up to 5% of the subcontract sum, to be reduced and released upon practical completion.

Relations deteriorated rapidly. On 30 May 2022, A-Civil claimed $3,556,466.80 for York Street, followed by $360,000 for Elizabeth Bay. Ceerose responded with a payment schedule indicating nil for Elizabeth Bay and claiming $895,565.50 for York Street. Subsequent adjudication applications and responses were filed by both parties. Ceerose terminated contracts for Alexandria and York Street on 1 July 2022. Ceerose's project managers provided cost estimates for remaining works, indicating significant sums for completion.

On 29 July 2022, A-Civil claimed $709,940.74 for Alexandria, including contract works, variations, and release of retention monies. Ceerose's payment schedule on 12 August 2022 claimed A-Civil owed $3,221,374.40 and denied release of retention monies due to unmet contractual requirements. Following further adjudication submissions, determinations for Elizabeth Bay and York Street were issued, prompting Ceerose to commence similar court proceedings.

On 26 August 2022, A-Civil lodged another adjudication application for Alexandria, with Ceerose responding on 6 September 2022. The adjudicator issued a determination on 27 September 2022, awarding A-Civil $152,700.79 plus GST, and noted that Clause 5.4, regarding retention monies, was void. Ceerose proposed to pay the adjudicated amount into its solicitor's trust account pending further proceedings, which A-Civil rejected. An adjudication certificate and judgment for $189,297.53 were issued, followed by a garnishee order.

Ceerose commenced proceedings on 14 October 2022, securing interim restraints against the garnishee order and judgment enforcement. Ceerose sought to quash the adjudication determination, claiming procedural unfairness as the adjudicator invalidated Clause 5.4 without party submissions. Ceerose also sought a Brodyn/Grosvenor stay, citing a significant likelihood of rights impairment if the adjudicated amount was paid to A-Civil.

Decision

The court had to determine if there was a serious issue to be tried regarding Ceerose's claim for an order in the nature of certiorari. The court noted that neither party had submitted to the adjudicator that Clause 5.4 was invalid. The adjudicator's decision, perceived as procedural unfairness by Ceerose, was challenged. However, the court found that Ceerose had difficulties in proving this significantly impacted the outcome, as the adjudicator's primary basis for releasing retention monies was the contract's termination.

The court also considered Ceerose's application for a Brodyn/Grosvenor stay, assessing evidence of A-Civil's financial stability. The court found the evidence insufficient to prove A-Civil was in financial difficulties caused by the non-payment and noted that Ceerose had not advanced substantive proceedings for any of the sites. Ceerose's serious allegations against A-Civil's statutory declaration were unsupported by concrete evidence.

Considering the balance of convenience, the court concluded that the interim restraints hindered A-Civil's cash flow, conflicting with the Act's intent for prompt payment to subcontractors. The judgment sum, held in court, did not aid A-Civil's business operations. Given the modest strength of Ceerose's substantive case and the Act's philosophy of "pay now, argue later," the court favored releasing the funds to A-Civil. Consequently, the interim injunctions were not extended, and the adjudicated amount was ordered to be paid to A-Civil.

The court had to determine if there was a serious issue to be tried regarding Ceerose's claim for an order in the nature of certiorari. The court noted that neither party had submitted to the adjudicator that Clause 5.4 was invalid. The adjudicator's decision, perceived as procedural unfairness by Ceerose, was challenged. However, the court found that Ceerose had difficulties in proving this significantly impacted the outcome, as the adjudicator's primary basis for releasing retention monies was the contract's termination.

The court also considered Ceerose's application for a Brodyn/Grosvenor stay, assessing evidence of A-Civil's financial stability. The court found the evidence insufficient to prove A-Civil was in financial difficulties caused by the non-payment and noted that Ceerose had not advanced substantive proceedings for any of the sites. Ceerose's serious allegations against A-Civil's statutory declaration were unsupported by concrete evidence.

Considering the balance of convenience, the court concluded that the interim restraints hindered A-Civil's cash flow, conflicting with the Act's intent for prompt payment to subcontractors. The judgment sum, held in court, did not aid A-Civil's business operations. Given the modest strength of Ceerose's substantive case and the Act's philosophy of "pay now, argue later," the court favored releasing the funds to A-Civil. Consequently, the interim injunctions were not extended, and the adjudicated amount was ordered to be paid to A-Civil.

Cosmo Cranes & Rigging Pty Ltd v EQ Constructions Pty Ltd [2022] NSWDC 6

Coram: Abadee DCJ
Court: District Court of New South Wales
Date: 8 February 2022

BUILDING AND CONSTRUCTION - two disputed payment claims issued - no payment schedules served within time - whether disputed payment claims claimed work under two or more construction contracts - whether, by reason of not serving payment schedules, respondent is prevented from asserting invalidity in payment claims

PRACTICE AND PROCEDURE - application for summary judgment - proceeding featured mixed claims of debt sourced under *Security of Payment* legislation, and alternative claims for breach of contract and a *quantum meruit* - respondent asserts work defective and involved delay - respondent pleads set-off (in statute and in equity) in answer to all claims and cross-claims for unliquidated damages - whether arguable equitable set off may arise against debt claim sourced in statute

Facts

In April 2018, Cosmo Cranes & Rigging Pty Ltd (the "**subcontractor**") entered into agreements with EQ Constructions Pty Ltd (the "**builder**") to provide crane hire and related services. The subcontractor asserted the existence of three agreements: an initial hire agreement for a tower crane, later modified to a 'Maeda' mobile crane; a separate agreement for another Maeda crane; and an agreement for a brick cage, either as a variation to the hire agreement or as a distinct agreement. The builder acknowledged these separate agreements but disputed the variations pertaining to the original hire agreement.

Between April 2018 and April 2021, the subcontractor submitted multiple payment claims under the *Building and Construction Industry Security of Payment Act* ("**the Act**"), all of which were paid by the builder. However, in May and June 2021, the subcontractor filed two payment claims totalling $399,678, including amounts claimed as retention money held by the builder. The builder did not pay these claims nor provide payment schedules.

The subcontractor sought recovery of these outstanding amounts under the Act and alternatively claimed damages for breach of contract and restitution. It applied for summary judgment to enforce its rights under the Act.

The builder opposed the application, arguing that the payment claims were invalid because they encompassed work under multiple contracts (i.e., the hire agreement, Maeda crane agreements, and brick cage agreement). Additionally, the builder contended that by combining statutory and common law claims in the same proceeding, the subcontractor waived certain rights under the Act, including preventing the builder from raising defences related to the construction contracts.

Decision

The court acknowledged the builder's reasonable argument that multiple construction contracts may have been involved in the performed work. While recognising that the Act restricts the builder's defences to a statutory debt claim, the court emphasised that a valid payment claim under the Act cannot aggregate work under more than one contract.

The Court found that determining the existence of multiple contracts was a factual issue. It noted that the subcontractor's evidence did not conclusively establish a single construction contract, especially considering the subcontractor's assertion of alternative separate agreements.

Moreover, the court addressed a novel legal argument regarding the interplay between statutory and common law claims under the Act. It concluded that it would be premature to preclude the builder from further developing this argument, highlighting the complexity of the legal issues involved.

Ultimately, the court dismissed the subcontractor's motion for summary judgment, indicating that a deeper examination was necessary to resolve both the factual disputes and the intricate legal complexities raised by the parties.

This decision underscores the importance of accurately delineating construction contracts in payment claims under the Act and navigating the interaction between statutory and common law rights in construction disputes.

Equa Building Services Pty Ltd v A&H Floors 2 Doors Australia Pty Ltd [2022] NSWSC 152

Coram: Hammerschlag J
Court: Supreme Court of New South Wales
Date: 22 February 2022

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act) ss 4(1), 8, 13(1), 17(2), 22, 31 – Challenge to an adjudication determination on the grounds that there was no jurisdiction because a payment claim had not been served and, separately, that the Adjudicator denied the plaintiff procedural fairness

Facts

Equa Building Services Pty Ltd (the "**Developer**") engaged Rockinghorse Construction Pty Ltd (the "**Construction Manager**") to oversee a development project. Subsequently, the construction manager engaged A&H Floors 2 Doors Australia Pty Ltd (the subcontractor) to perform flooring work. After a dispute arose, the developer terminated the construction manager's contract. The subcontractor then undertook the work directly for the developer without a formal contract in place.

The subcontractor filed a payment claim with Mr. Gregory, an employee of the Arden Group (believed to be the developer's representative). The adjudicator ruled the service of the payment claim valid, a decision contested by the developer under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**the Act**"), citing jurisdictional issues and lack of procedural fairness.

Decision

The Court upheld the developer's challenge and invalidated the adjudicator's decision on two main grounds:

1. The Court disagreed with the adjudicator's finding that the payment claim was validly served. It determined that the service did not meet the requirements of section 31(d) of the Act, as it was not directed to a person specifically nominated by the developer to receive payment claims. The belief that Mr. Gregory was a representative of the developer was deemed insufficient, especially since he was not directly employed by the developer. Additionally, sending a hard copy of the payment claim to the incorrect address (54 Crosby Road instead of 56 Crosby Road) was held not to constitute valid service.
2. Even if the payment claim had been validly served, the court ruled that the adjudicator's decision would still be quashed due to procedural fairness concerns. The Court found that the adjudicator

had made a finding that the developer assumed contractual obligations without affording the developer an opportunity to respond. This was considered a denial of procedural fairness and an instance of the adjudicator acting beyond the scope outlined in section 22(2) of the Act, which defines the matters adjudicators may consider. The adjudicator's disregard for the submissions of the parties further undermined procedural fairness.

The Court found in favour of the developer, overturning the adjudicator's decision. The case highlights the critical importance of adhering to procedural requirements and ensuring fairness in adjudication processes under the Act.

Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq) [2022] NSWSC 394

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 5 April 2022

CORPORATIONS – remedies – where liquidator of company assigned rights to plaintiff on basis that fruits of success ultimately be paid to liquidator after payment of plaintiff's costs – where finding earlier made that directors declared dividend in breach of s 254T of the Corporations Act 2001 (Cth) – where finding earlier made that declaration of dividend and writing off of shareholder loan voidable transactions for purposes of s 588FF of that Act – finding made of amount due by company to the plaintiff – nature of remedies that should be awarded to plaintiff – whether remedies should extend beyond requiring directors and parties into whose hands proceeds of dividends flowed to pay plaintiff the amount found to be due by the company to the plaintiff

BUILDING AND CONSTRUCTION – further findings concerning matters not decided in primary judgment

Facts

On 22 December 2021, judgment was delivered in the case *of Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)*. The court addressed several issues and identified two clerical errors in the judgment: an incorrect reference to a section of the Corporations Act and an incorrect mention of "Atlas" instead of "the Directors." These errors will be corrected in the published judgment.

Decision

The primary findings included that Fitz Jersey was entitled to "Other Costs," which were substantiated but previously overlooked in terms of the Directors' entitlement to these costs. The court decided to grant Fitz Jersey the full amount for these costs as no contest was raised about the Contract's justification for them.

Regarding the Early Completion Bonus, the court determined Atlas's entitlement but left the exact calculation to be resolved based on whether a five-day or five-and-a-half-day week should be used.

The court also addressed the Dividends and Shareholder Loans. It found that the Directors breached their duties by declaring and paying dividends, and writing off Shareholder Loans improperly. Fitz Jersey was found to have overpaid Atlas by approximately $2.1 million. The remedies included orders

for equitable compensation and damages for various parties involved, totalling specific sums plus pre-judgment interest. Fitz Jersey was entitled to recover the entire amount of the Dividends and the funds traceable to them, with the relief being tailored to prevent double or multiple recoveries.

The final relief orders included payments by the Directors and other defendants, such as Mr. Yazbek and Mr. Sweeney, to Fitz Jersey, as well as other equitable compensations related to the dividends and Shareholder Loans. The court specified limits on recovery to avoid double recovery of post-judgment interest.

Forte Sydney Construction Pty Limited v N Moit & Sons (NSW) Pty Limited [2022] NSWCA 186

Coram: Ward P, Meagher and Gleeson JJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 23 September 2022

CONTRACTS — Formation — Acceptance of offer — Acceptance by conduct — Where the parties each propounded draft documents — Where neither party expressly accepted the draft provided by the other party — Where respondent commenced works — Whether respondent by its conduct accepted the contract propounded by the appellant

CONTRACTS — Formation — Subsequent conduct — Where appellant sought variation of the works ostensibly in accordance with contract provisions — Extent to which subsequent conduct is relevant to questions of formation

Facts

This case involved a contractual dispute between Forte (the head contractor) and Moit (the excavation subcontractor). Forte sought to engage Moit for excavation, anchor and shotcrete work at a site in Ryde, and received (and rejected) various quotes from Moit for the proposed works. On 21 May 2018, Forte provided its own subcontract to Moit with its own terms. On the same day, Moit provided a "Final Tender Submission" to Forte with its newest quote for the proposed works. Forte then provided Moit a revised "contract" for execution. Moit commenced the works on 25 May 2018 and completed its works on the Ryde site in November 2018.

The dispute concerns the relevant document governing the parties' contractual relationship, namely, whether the Subcontract propounded by Forte on 21 May 2018, or the Final Tender Revision propounded by Moit on the same day, provided the contractual basis for the works carried out by Moit between May 2018 to November 2018. This was an important consideration as each of the putative contracts would have differing consequences as to the parties' entitlement to amounts claimed out of the retention amount held by Forte, and Moit's entitlement to various sums under the two agreements, including for variation claims.

The primary District Court judge found that, as Moit had not accepted Forte's version of the subcontract, Moit's "**Final Tender Revision**" was the relevant contract which governed the works. This decision was appealed by Forte to the NSW Court of Appeal.

Decision

The NSW Court of Appeal allowed Forte's appeal, accepting that the Subcontract propounded by Forte was the relevant contract that governed the works, as Forte rejected the Final Tender Revision by way of providing its own amended Subcontract which contained terms inconsistent with those in the Final Tender Revision. Justice Ward posited that a reasonable bystander would regard the conduct of Moit in commencing the works as signalling to Forte that the offer embodied in the Subcontract had been accepted.

The Court further held that although Forte's subcontract specified the means and time for acceptance (which Moit did not comply with), it did not mean that Forte's offer had lapsed. Furthermore, Forte's acceptance of a variation by Moit (made according to the tender revision) did not constitute an admission.

Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 19 May 2022

BUILDING AND CONSTRUCTION – malicious damage to property – action for trespass – standing of plaintiff to bring action for trespass – whether plaintiff had exclusive possession of the property – whether plaintiff entitled to recover loss for damage to the reversion – measure of damages for damage to the reversion – whether second defendant caused the malicious damage – whether second defendant carried out construction work for the purpose of the Design and Building Practitioners Act 2020 (NSW) – whether second defendant acted in breach of his statutory duty of care under that Act in relation to that construction work

Facts

Goodwin Street Developments Pty Ltd (the "**Plaintiff**") owns land in Jesmond, New South Wales, where it contracted DSD Builders Pty Ltd (the "**First Defendant**") to construct three residential boarding houses for university student accommodation. Mr. Daniel Roberts, the husband of the First Defendant's sole director, was named as the Second Defendant in his personal capacity for his supervisory role in the construction works.

Disputes arose during the project concerning late payments, defective works, and delays, leading to a suspension of construction. Accordingly, the Plaintiff terminated the contract on 19 March 2018, and commenced legal proceedings against the First Defendant in August 2018. The Plaintiff claims that Mr. Roberts caused the damage to the buildings, removed the materials, fixtures and fittings that had been incorporated into the buildings, and acted in breach of his statutory duty of care under s 37 of the *Design and Building Practitioners Act 2020* (NSW) ("**the Act**"), to avoid economic loss caused by identified defects in the buildings on the Land arising from that construction work. The Plaintiff claims some $586,000 from Mr Roberts on account of the first claim, being the cost of making good the damage caused to the site in March 2018; and some $300,000 from Mr Roberts being the cost to rectify the building defects. There is no dispute about these figures.

The central issue was whether Mr. Roberts' activities constituted "construction work" under section 37 of the Act, despite the specific nature of the buildings (boarding houses) involved.

Decision

The Court ultimately held that Mr. Roberts did, indeed, cause damage and removed material on the site, and furthermore, carried out “construction work” for the purposes of s 36 of the Act, acting in breach of his duty of care under s 37 of the Act.

The Court came to this conclusion by interpreting various statutory terms. It clarified that the definition of "building work" under section 4(1) of the Act, which pertains to specific building classes, does not limit the application of section 37. Further, it was found that section 36(2) and the broader definition of "building" in section 36(1) extend the statutory duty of care in section 37 to cover "construction work," including supervision and project management related to boarding houses.

Mr. Roberts’ failure to rectify defects constituted a breach of the duty of care imposed by section 37, which aims to prevent economic loss stemming from construction defects.
Despite contractual possession by the builder, the plaintiff retained a reversionary interest in the land, allowing for legal action in trespass due to the damage caused.

Accordingly, the Court upheld the plaintiff’s claims against both defendants, affirming that Mr. Roberts' actions fell under the definition of "construction work" as per the Act. This decision underscores the Act's application to a broad spectrum of construction activities, ensuring accountability for defects and economic losses arising from construction projects.

Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) [2022] NSWSC 1775

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 21 December 2022

CONTRACTS – contract for civil works – proper construction – where subcontractor in breach of contract failed to pay secondary subcontractors – whether principal thereby entitled to withhold payment on basis that funds reasonably required to meet contingent loss or damage – where payments of payment claims by principal to subcontractor provisional and on account only – whether principal entitled to de-certify previously certified provisional payments – whether an implied term of the contract that principal act reasonably and in good faith – whether principal acted in breach of obligation to act in good faith in de-certifying previously certified provisional payments – whether principal under subcontract entitled to terminate subcontract – measure of damages recoverable – whether principal has established quantum of its loss

BUILDING AND CONSTRUCTION – whether principal under subcontract entitled to terminate subcontract – measure of damages recoverable – whether principal has established quantum of its loss
BUILDING AND CONSTRUCTION – where principal required to take over construction works – where principal incurred greater costs than subcontractor – principles to be applied when assessing damages claimed by a principal who completes work after the default of the subcontractor

CORPORATIONS – insolvency – whether subcontractor became insolvent by reason of principal's conduct in breach of contract – whether subcontractor was insolvent at all times from October 2012 – unfair preferences claim – alternate claim brought in circumstances where non-payment of certified amounts not found to be in breach of contract – whether withholding of monies amounts to unfair preferences for the purposes of s 588FA of the Corporations Act 2001 (Cth) – whether conduct characterised as a retention or set-off

Facts

In around 2012, Santos Limited initiated the Santos GLNG project, which focussed on the extraction, compression, and transportation of coal seam gas in Southern Queensland. Part of this project was carried out in the Roma region,. The objective of the project was to convert coal seam gas into a

transportable form, sending it via pipeline to a site in Gladstone for further processing into liquefied natural gas for export to Asia.

Fluor Australia Pty Ltd ("**Fluor**") was appointed as the head contractor. Fluor subcontracted the "Roma Hub" work to McConnell Dowell Constructions (Aust) Pty Ltd ("**MDC**"), who then subcontracted the civil works to Reed Constructions Australia Pty Ltd ("**Reed**") on 30 November 2011. Reed subcontracted that work many secondary subcontractor. Apart from supervisory work, Reed itself did not work on the site, otherwise than through subcontractors Before Reed went into voluntary administration, the contract was novated to Heavy Plant Leasing Pty Ltd ("**HPL**") in June 2012. HPL also became insolvent in February 2013, leading to termination of the contract on 14 March 2013.
Multiple payment claims and certificates were issued before contract termination, including

1. Payment Claim 14A ("**PC14A**"), claimed on 21 December 2012, for $10.022M
2. Payment Claim 15 ("**PC15**"), claimed on 4 February 2013, for $12.341M

Previously, MDC had certified several earlier payment claims for various work items. However, in February 2013, Fluor informed MDC that it was not convinced HPL had completed the claimed work. Clause 10.2 of the contract allowed MDC to consider any disputes, claims, set-offs, or defences from Fluor regarding HPL's performance when assessing HPL's entitlement to payment.

On 16 February 2013, MDC issued a notice of 'breach of contract' to HPL, stating that HPL had failed to pay its subcontractors. MDC warned HPL that under clause 25.2 of the contract, it could retain any payment due to HPL to cover any contingent claims or expenses resulting from HPL's contractual breaches.

On 25 February 2013, HPL issued payment claim ("**PC16**") for $27.133M. Also on this date, HPL became insolvent. On 28 February 2013, MDC and HPL met to discuss the amounts due to HPL's subcontractors. They agreed that:

1. If HPL could prove the amount owed to its subcontractors was less than the outstanding contract amount, MDC would pay HPL the sum owed to its creditors.
2. Once proof of payment to HPL's creditors was provided, MDC would pay the remaining balance to HPL.

Receivers were appointed to HPL on 14 March 2013. On 21 March 2013, MDC terminated the contract and completed the civil works using HPL's subcontractors. MDC sought to recover losses allegedly suffered as a result of this. HPL claimed that MDC was in breach of the contract, arguing that MDC

had no right to 'de-certify' previously certified payments and that MDC breached the implied term of acting reasonably and in good faith.

The issue in dispute then was whether MDC was entitled to:

1. Reverse previously certified (but not paid) amounts;
2. Retain monies for contingent claims; and
3. Terminate the contract due to HPL's insolvency and breach of contract.

Decision

The court held that under clause 10 of the contract, certified amounts paid to HPL were provisional and did not constitute evidence of the work's value or satisfactory completion. This allowed MDC to reconsider and reverse previously certified and paid amounts. Clause 10.2 entitled MDC to take into account Fluor's disputes or withholdings when assessing the work done by HPL.
It was also found that, under clause 25.2, MDC was entitled to retain amounts as stated in Certificate 16, and it was not in breach of the contract. While there is yet no authority that mandates a duty of good faith in all commercial contracts, there is a recognised obligation for certifiers, assessors, and administrators of construction contracts to act reasonably and in good faith. MDC's assessment of PC16 was found to be in good faith, as MDC:

1. was entitled to 'take into account' such matters as necessary when considering the value of the work; and
2. had no obligation to make payments to HPL's subcontractors, but exercised its powers under the contract to do so anyway.

The court found that MDC was justified in retaining amounts to cover potential claims and that HPL waived any breach claims related to retention by agreeing to the February arrangement. MDC was also entitled to terminate the contract due to HPL's insolvency and substantial breach of contract in failing to pay its subcontractors.

HPL's claims for breach and wrongful termination were dismissed. MDC was entitled to damages equivalent to the additional costs incurred in completing the civil works minus what MDC would have paid HPL if the contract had been performed as agreed.

Invictus Development Group Pty Ltd v Versatile Fitout Pty Ltd [2022] NSWDC 477

Coram: Abadee DCJ
Court: District Court of New South Wales
Date: 17 October 2022

BUILDING AND CONSTRUCTION – dispute between head contractor and sub-contractor – whether there was a defect in the appearance of bowing on stairs after works - whether sub-contractor failed to comply with direction to repair defect within a stipulated timeframe – whether right to issue a direction was an essential term or intermediate term in the subcontract - whether any such failure gave rise to an express right in the contractor to terminate or amounted to a repudiation – whether contractor's termination lawful – whether sub-contractor elected to terminate for contractor's repudiation by wrongful termination

DAMAGES – contractor claim for damages for breach of contract – compensation for cost of rectifying defective work – whether, upon termination of the contract, contractor entitled to retain sums withheld under contract – whether contractor entitled to keep monies accrued under provision for retention and damages for breach by sub-contractor

PRACTICE AND PROCEDURE – building disputes – the Court's expectations of practitioners to consider and raise with the Court the desirability of orders for joint expert conferences and reports well in advance of hearing

Facts

Versatile Fitout Pty Ltd ("**Versatile**"), the head contractor for a Sydney Airport construction project, engaged Invictus Development Group Pty Ltd ("**Invictus**") as a subcontractor to handle formwork and concrete work for stairs. The contract between the parties was valued at $161,240. On 1 March 2018, Versatile terminated the contract, asserting that the stairwork completed by Invictus was defective, causing the stairs to bow. Invictus claimed that the termination was unlawful, and accordingly, constituted repudiation. Subsequently, on 26 March 2018, Invictus issued an invoice for $17,117 ("**Invoice 2423**") which Versatile refused to pay.

Versatile cross-claimed, seeking damages for its rectification costs, and citing defects and a failure to rectify as justification for its termination.

Decision

It was found that Versatile's email directive to rectify was clear, specifying that the stairs needed correction. Accordingly, the Court dismissed Invictus' argument that the directive was invalid for not detailing the methodology for the rectification. The Court stated that the head contractor need not specify how the rectification should be performed, as the subcontractor's expertise inherently includes identifying problems and devising solutions.

The Court then turned its consideration to whether Versatile's termination based on Invictus's non-compliance was lawful. Judge Abadee examined if the directive was an essential term (where any breach permits termination) or an intermediate term (where only serious breaches allow termination).

The Court concluded that the failure to comply with the directive was a breach of an intermediate term and not severe enough to justify termination. Therefore, without an express right to terminate and failing to establish repudiation by Invictus, the Court ruled that Versatile's termination was unlawful and amounted to a repudiation of the subcontract, entitling Invictus to damages.

James v Jandson Pty Ltd [2022] NSWSC 1686

Coram: Adams J
Court: Supreme Court of New South Wales
Date: 12 December 2022

BUILDING AND CONSTRUCTION – NCAT – Appeal of NCAT Appeal Panel decision – application to extend time for this appeal refused – summons dismissed – statutory warranties as to residential building work – breach of statutory warranty – whether new contract entered into or original contract varied – offer and acceptance – consideration – forbearance to sue – completion date of building works – leave to appeal finding of facts – interpretation of s 3B *Home Building Act 1989* (NSW)

Facts

On 23 March 2009, a homeowner and the Plaintiff, James, entered a contract with a builder, Jandson Pty Ltd ("**Jandson**"), to construct a residential dwelling. Shortly after moving in, the homeowner discovered water leakage in part of the property. Nearly nine years later, on 28 June 2018, the homeowner commenced proceedings against the builder for breaching the statutory warranties under section 18B of the Home Building Act 1989 (the "**HB Act**").

At first instance, the NCAT Senior Member found that correspondence between the parties in 2017, including offers and counter-offers regarding the scope of rectification works, constituted a "separate, new contract" under the HB Act. This new contract triggered a fresh warranty period, entitling the homeowner to relief under the HB Act. Consequently, NCAT ordered the builder to carry out various rectification works. The builder appealed this decision to the NCAT Appeal Panel.

The Appeal Panel examined the evidence, which included various submissions about the communications and actions of both parties. Key points included:

- A site meeting on 15 August 2017, where the homeowner claimed an agreement on the rectification scope was reached, while the builder disagreed.
- The builder was granted site access by the homeowner's solicitor to carry out some remediation, which the homeowner saw as confirmation of the agreement.
- On 24 August 2017, the builder made a counteroffer, which the homeowner claimed was accepted, although the homeowner could not pinpoint the exact acceptance date during cross-examination.

After reviewing the evidence, the Appeal Panel concluded that the Senior Member had incorrectly determined that the builder's correspondence and conduct, along with the homeowner's responses, constituted a new contract under the HB Act. Thus, they ruled that the homeowner was time-barred from seeking any relief under the HB Act.

The homeowner appealed to the NSW Supreme Court, arguing that an agreement was reached in 2017 based on several factors:

1. The builder's offer on August 24, 2017, outlining a scope of remediation works.
2. The homeowner's solicitor receiving the builder's offer.
3. The homeowner not suing the builder at that time.
4. The homeowner allowing the builder continued access to the site.

The homeowner contended that these actions demonstrated an agreement from an objective standpoint, which the Appeal Panel failed to consider properly.

The main legal issue before the Court in this instance was whether the communications and actions between the parties in 2017 constituted a new building contract under the HB Act, thereby triggering a new warranty period.

Decision

The NSW Supreme Court dismissed the homeowner's appeal, agreeing with the Appeal Panel that there was no evidence of a new contract being formed in 2017. The Court held that the factual circumstances did not satisfy the objective requirements for establishing a new agreement. Consequently, the homeowner was time-barred from seeking relief under the HB Act, as the original warranty period had expired. The Court emphasised that a new agreement for rectification work must be clearly and objectively established to initiate a new warranty period under the HB Act.

Keegan v Ballast Point Pty Ltd [2022] NSWCA 179

Coram: Stevenson J
Court: Supreme Court of New South Wales, Court of Appeal
Date: 13 September 2022

BUILDING AND CONSTRUCTION – residential building contract – where general conditions of contract provided for making by builder of monthly payment claims – where special conditions appointed architect to administer contract on owner's behalf, including by assessing and certifying builder's payment claims – whether owner's obligation to pay and builder's entitlement to payment only in respect of amounts certified as due and payable by architect

Facts

This case involved the interpretation of a cost-plus residential building contract. The dispute arose from a contract entered into on 23 June 2017 between Keegan (the "**Owner**") and Ballast Point Pty Ltd (the "**Builder**") for alterations to a property. The contract utilised a Master Builders Australia ("**MBA"**) standard form, which included both general clauses and special conditions. Notably, Special Condition 3 stipulated that the appointed architect would administer the contract on behalf of the owner, assessing and certifying the builder's payment claims.

The builder initiated proceedings against the owner in the District Court, claiming additional payments for work completed under the contract and a builder's fee. The owner argued that under Special Condition 3, the architect's role was exclusive in assessing and certifying payment amounts. Consequently, the owner asserted that they were only obligated to pay amounts certified by the architect, which they had already done.

At first instance, the District Court ruled in favour of the Builder, determining that the Owner's payment obligations under Clause 17 were not contingent on the architect's certification. This decision was then appealed to the Court of Appeal.

Decision

On appeal, the central issue was whether the Owner was obligated to make payments only after the architect had certified these claims.

The Court of Appeal upheld the lower court's decision, dismissing the appeal. It concluded that Special Condition 3 did not explicitly or implicitly establish certification by the architect as a condition

precedent to the builder's entitlement to payment. The owner's interpretation of Special Condition 3 conflicted with the contract's clear terms regarding payment for work performed and additional provisions allowing the owner to terminate the architect's administration role without appointing a replacement.

The Court interpreted the special conditions to mean that the architect acted as an agent for the owner in assessing and certifying payment claims, rather than creating a payment framework limiting the owner's payment obligations only to architect-certified claims.

Moreover, the Court clarified that for certification by a third party to constitute a condition precedent to an owner's obligation to pay a contractor under a contract (and restrict payment to certified amounts), the contract must explicitly state such conditions. This interpretation follows established precedents where third-party certification has been similarly construed.

Krolczyk v Winner t/a Winner Building Services [2022] NSWCA 196

Coram: White, Kirk JJA, Griffiths AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 5 October 2022

BUILDING AND CONSTRUCTION – Contract – Whether contract existed – Whether respondent engaged as either builder or supervisor – Alleged partly written and partly oral contract – No contract in existence

BUILDING AND CONSTRUCTION – Defective work – Duty to mitigate loss – Whether appellants acted reasonably to mitigate loss

Facts

The Appellants, the Krolczyks, were the registered proprietors of a property in Windsor, where they intended to carry out renovation works. They engaged Mr. Winner, their nephew, who was a licensed builder and qualified quantity surveyor, to assist with the project. Mr. Winner contributed by performing some of the work, helping with the development application ("**DA**"), and organising additional tradespeople.

By 2016, defects in the renovation work were identified. The Krolczyks argued that Mr. Winner should be considered the primary builder for the project and thus liable under section 18B of the Home Building Act 1989 (NSW) for warranties and guarantees (the "**HB Act**"). Mr. Winner contended that he had helped as a favour to his relatives and that the Appellant itself was a licensed builder, and therefore had shared responsibility.

The trial judge, Judge Olsson SC, determined that Mr. Winner had not assumed the role of "the Builder" or supervisor for the project. The judge found there was a narrower agreement where the parties simply assisted each other. Consequently, Mr. Winner's liability was limited to the work he directly performed. Although some liability was attributed to Mr. Winner, the judge awarded indemnity costs against the Krolczyks because Mr. Winner had previously offered to settle the matter via a Calderbank offer.

Decision

The NSW Court of Appeal upheld the primary judge's finding that Mr. Winner could not be characterised as "the Builder" or supervisor under the HB Act. Therefore, his liability was limited to the defective work he directly participated in (specifically the wall framing work). The Court of Appeal found no error in the primary judge's interpretation and use of evidence.

Life Structures Pty Ltd v Burton [2022] NSWCATAP 272

Coram: Ellis SC SM, Currie SM
Court: NSW Civil and Administrative Tribunal, Appeal Panel
Date: 23 August 2022

BUILDING AND CONSTRUCTION – Whether s 18G of the *Home Building Act* 1989 (NSW) operated to render void or read down a contractual provision

APPEAL – Whether decision against the weight of the evidence – whether to grant leave to appeal

Facts

The Appeal Panel heard an appeal involving Life Structures Pty Ltd (the "**Contractor**") concerning allegations of defective building work. The Contractor raised four grounds of appeal, with particular focus on Ground 1.

The Contractor contended under Ground 1 that the Tribunal erred in law by interpreting clauses 36.2(c) and (e) of the Housing Industry Association's ("**HIA**") standard contract in light of section 18G of the Home Building Act 1989 (NSW) (the "**HB Act**").
Clause 36.2 of the HIA contract, titled 'Risk', stipulated that the builder is not liable for;

- Loss or damage to the owner's property left on site;
- Any defect in the existing building, except to the extent caused by the builder's lack of reasonable care;
- Damage to ceilings, limited to repair excluding repainting;
- Damage to paths, gardens, driveways, trees, lawns, and landscaping;
- Restoration of areas affected by building works.

Section 18B of the HBA outlines statutory warranties, while section 18G renders provisions restricting these warranties void. The HIA contract includes a severance clause allowing clauses to be adjusted to comply with legal requirements.

At first instance, the Tribunal found that clauses 36.2(c) and (e) limited the owner's right to damages under statutory warranties, contrary to section 18G. The contractor argued that the Tribunal incorrectly applied Cappello, asserting the clauses were valid under "freedom of contract". The owner countered that clause 36.2 restricted statutory warranty rights under section 18G.

Decision

The Appeal Panel upheld the Tribunal's decision, finding no error of law and denying leave to appeal. The Panel discussed compensation principles for breach of statutory warranties and negligence, citing *Haines v Bendall* [1991] HCA 15 and *Bellgrove v Eldridge* [1954] HCA 36. It noted clause 36.2(c) narrowed liability and limited compensation to repair without repainting.

Regarding clause 36.2(e), the Panel determined it restricted claims where replacement, not repair, was appropriate, thus limiting statutory warranty rights. The Panel concluded that clauses 36.2(c) and (e) could be read down as done in Cappello, but refrained from a broad ruling, noting that the operation of the clause in each case will depend upon the particular circumstances. Clause 36.2(b) similarly limited statutory warranties and could be read down, while clause 36.2(a) likely contravened section 18G by removing statutory warranty rights.

Other challenges to the decision were related to evidentiary findings made by the Tribunal at first instance. The Appeal Panel referred to the oft-cited decision of *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10], where the Appeal Panel held that it does not simply provide a losing party in the Tribunal below with the opportunity to run their case again.

McNab Building Services Pty Ltd v Demex Pty Ltd [2022] NSWSC 1441

Coram: Black J
Court: Supreme Court of New South Wales
Date: 24 October 2022

BUILDING AND CONSTRUCTION — Adjudication — Natural justice — Where the adjudicator applied a conversion factor in his determination which was not raised by the parties and to which the parties did not have an opportunity to make submissions — Whether there was a breach of procedural fairness in the adjudicator's application of that conversion factor

Facts

In January 2021, McNab Building Services Pty Ltd ("**McNab**") subcontracted Demex Pty Ltd ("**Demex**") entered into a subcontract for earthworks and asbestos-contaminated land remediation in Tweed Heads, NSW. On 31 May 2022, the Demex submitted a payment claim of $2.8 million for work up to 3 March 2022. The claim included a table detailing material volumes and various supporting documents. Notably, some documents referenced material weight rather than cubic metres, contrary to the subcontract terms which specified payment based on volume.

On 15 June 2022, McNab responded with a payment schedule contesting the amounts claimed, proposing no payment and asserting a counterclaim of $1,348,654.64 against the subcontractor. This led to an adjudication application filed by Demex on 29 June 2022.

On 28 July 2022, the adjudicator determined the progress payment due to the subcontractor as $1,390,882.42.

In the adjudication, Demex argued for payment based on trucking dockets without specifying how weight records should be converted to volume, as required by the subcontract terms. The adjudicator decided to use the trucking dockets but went further by applying conversion factors to translate weight into cubic metres. These factors were not part of the subcontractor's submission and were not challenged by either party during the adjudication process.

The core issue was whether the adjudicator had denied McNab procedural fairness by applying conversion factors to convert weight measurements of materials into volume measurements, which were not raised or agreed upon by the parties.

Decision

The Court found that the adjudicator's decision to use these conversion rates, without seeking further submissions, resulted in a denial of procedural fairness. Justice Black concluded that ensuring procedural fairness would have been straightforward and would not have unduly delayed the process.

According to His Honour, fairness required the adjudicator to disclose the proposed conversion methodology to both parties, allowing them a brief opportunity to comment before finalising the determination. The calculation method adopted by the adjudicator was pivotal to the outcome favouring the subcontractor.

Justice Black noted that providing procedural fairness might have led to a different approach by the adjudicator.

McNab Building Services Pty Ltd v Demex Pty Ltd (No 2) [2022] NSWSC 1496

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 4 November 2022

BUILDING AND CONSTRUCTION – adjudication determination – subcontractor entitled to $470,000 – adjudicator stated parties "in complete agreement" on state of completion and value of works – whether adjudicator failed to consider contractor's submissions – Building and Construction Industry Security of Payment Act 1999 (NSW) s 22(2)(d) – contractor relies on 2 pages of a 55 page determination – best to read the entire document – "complete agreement" followed from earlier findings – adjudicator considered but did not accept contractor's submissions – no jurisdictional error.

Facts

In the case of *McNab Building Services Pty Ltd v Demex Pty Ltd* [2022] NSWSC 1441 (see above), the plaintiff, McNab Building Services Pty Ltd, sought to have an adjudication determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) declared void. The adjudicator had determined that Demex Pty Ltd was entitled to the full payment claim of $472,297.33 for work performed at a site in Tweed Heads. McNab argued that the adjudicator had failed to consider all relevant matters required under section 22(2) of the Act, did not provide procedural fairness, and did not properly value the work. Specifically, McNab claimed that the adjudicator neglected to consider McNab's payment schedule and submissions.

The principles at issue included the requirement for adjudicators to consider all mandatory factors in their decision-making process and that a failure to do so could result in jurisdictional error, rendering the determination void. The adjudicator must also exercise their discretion to weigh evidence and make a determination based on the facts and submissions before them.

In this case, McNab contended that the adjudicator's determination was flawed due to an oversight of their payment schedule and an incorrect interpretation of a previous payment schedule, which was allegedly treated as agreement between the parties. Demex countered that the adjudicator had properly considered all submissions and found McNab's objections to be based on disagreements over factual findings rather than jurisdictional errors.

Decision

Ultimately, the court found that the adjudicator had indeed thoroughly considered the materials provided by both parties. The adjudicator's decision to accept Demex's claim and reject McNab's objections was based on a detailed analysis of the evidence and submissions. Consequently, the court concluded that there was no basis for declaring the adjudication determination void.

Morris v Leaney [2022] NSWCA 95

Coram: Payne, White, Beech-Jones JJA
Court: Supreme Court of New South Wales
Date: 17 June 2022

PROFESSIONAL NEGLIGENCE – architect – respondent was engaged as architect for appellant's home renovations – appellants indicated initial budget of $300,000 which was later revised to $600,000 – respondent provided "opinion on probable cost" of $590,000 excluding GST and other items in April 2015 for preliminary design – further additions to design thereafter – appellants engaged builder who commenced work on cost plus basis in December 2015 – falling out between parties and appellants continued with builder – by June 2016 substantial increase in costs and some aspects of design not pursued – renovations cost $780,000 but only increased value of house by $330,000 – appellants sued for false and misleading representation about cost of renovations and breach of contractual and tortious duty to advise about cost – appellants claimed damages on a no transaction basis namely that if known that cost would have exceeded $600,000 would not have undertaken renovations – trial judge rejected appellants evidence of express representations about cost of renovations – trial judge upheld contract and tort claim but only awarded nominal damages – whether trial judge's approach to damages was erroneous – whether trial judge's findings warranted finding that respondent obliged to advise appellants that renovations could not be undertaken for $600,000 – whether appellants would not have undertaken renovations if they had been so advised – held – trial judge's approach to damages erroneous – however not able to conclude that had respondent not breached his contractual and tortious duties then appellants would not have undertaken renovations – appeal dismissed

Facts

Mr. and Mrs. Morris hired architect Mr. Leaney to design extensive renovations for their home, which included an extension, pool, tennis court, and sauna. Initially, they had a budget of $300,000. However, Mr. Leaney informed them that their ambitions could not be met within that amount. In April 2015, Mr. Leaney provided an estimated cost of $590,000 for a preliminary design, excluding GST and additional items.

Consequently, the Morrises adjusted their budget to $600,000. By October 2015, a builder estimated the renovation costs between $550,000 and $600,000, excluding the pool, sauna, tennis court, driveway, and other works. In December 2015, the Morrises hired another builder on a cost-plus basis. By June

2016, the builder informed them that the total cost would exceed $1,000,000. Ultimately, the renovations cost the Morrises $780,000, but the value of their home increased by only $330,000.

The Morris's sued Mr. Leaney for breach of contract and negligence, alleging that he misled them about the feasibility of their renovation plans within their budget. They also sued for breaching section 18 of the Australian Consumer Law, alleging that his assurance in April 2015 that their renovation goals could be met within the $600,000 budget was misleading and deceptive conduct.

At first instance, the District Court found Mr. Leaney in breach of duty for failing to advise the Morris's adequately but ruled that they did not suffer actual loss. The court reasoned that the Morris's received precisely what they paid for and that they had not demonstrated they were any worse off due to the breach.

During the trial, there were several factual disputes about the meetings between the Morrises and Mr. Leaney. The primary judge sided with Mr. Leaney, rejecting Mrs. Morris' claim that the $600,000 was their maximum and final budget. Therefore, the judge found no breach of section 18.

However, the judge found Mr. Leaney negligent for not advising the Morrises about the feasibility of their budget and timeline. Despite this, the judge did not specify what advice should have been given or determine whether the Morrises would have abandoned the renovations if properly advised. Their evidence regarding their potential actions if advised was deemed inadmissible under section 5D of the *Civil Liability Act 2002* (NSW).

The judge concluded that by October 2015, the Morrises should have known that their renovation plans would likely exceed $600,000, if not $800,000. Despite the breach of duty, the judge determined that the Morrises did not suffer any loss as they received what they paid for and were not worse off due to the architect's breach. They were awarded only nominal damages for breach of contract.
The Morrises appealed to the Court of Appeal.

Decision

The Morris's appealed the decision on two main grounds:

1. **Loss Determination:** They argued that had Mr. Leaney not breached his duty, they would not have proceeded with the renovations, and therefore they should be entitled to damages reflecting the difference between their renovation costs and the increase in their home's value.
2. **Causation:** They contended that their loss was AUD$451,000, calculated as the difference between their renovation costs and the increase in property value.

The Court of Appeal examined what the Morrises would have done if Mr. Leaney had properly advised them about the feasibility of their budget and the suitability of the cost-plus contract they entered with the builder.

The Court referred to the builder's quotes, noting that by October 2015, it was nearly impossible for the Morrises to achieve their goals within the $600,000 budget. The Court found no evidence that the Morrises relied on the architect’s failure to advise, as they were aware the budget would be exceeded but chose to proceed regardless.

The Court of Appeal concluded that factual causation could not be established because the only way for Mr. Leaney to discharge his duty was to advise the Morrises in writing to obtain an estimate from a qualified professional. The Court found no evidence that the Morrises would have sought such advice if given, as they were eager to commence construction. Even if they had sought advice, there was no evidence to suggest that the outcome would differ from the builder’s quote. Thus, the appeal was dismissed.

In the matter of Nicolas Criniti Pty Ltd (in Liquidation) [2022] NSWSC 1149

Coram: Hammerschlag CJ in Eq
Court: Supreme Court of New South Wales
Date: 29 August 2022

CORPORATIONS ACT – Corporations Act 2001 (Cth) s 553(1) – Building and Construction Industry Security of Payment Act 1999 (NSW) (the SOP Act) ss 3, 8, 19, 20 and 23 – where plaintiff lodges proof of debt based on its alleged statutory entitlement under the SOP Act and at the relevant date does not yet have an adjudication determination – where liquidator rejects the proof of debt and the plaintiff appeals – HELD – circumstances giving rise to the debt relied upon have not arisen – appeal dismissed

Facts

Zadro Constructions Pty Ltd (the "**Builder**") was hired by Nicolas Criniti Pty Ltd (the "**Developer**") in May 2017 to construct a residential apartment building in Westmead, NSW. During the construction phase, the builder initiated an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (the "**SOP Act**"), leading to the following events:

- **31 October 2019**: Develop issued a payment schedule stating nil payment.
- **14 November 2019**: Builder submits adjudication application.
- **20 November 2019**: Adjudicator accepts appointment.
- **22 November 2019**: Developer enters voluntary administration.
- **6 December 2019**: Adjudicator issues determination in favour of the builder.
- **24 February 2020**: Developer is wound up by creditors' resolution.
- **16 March 2021**: Builder lodges a proof of debt based solely on the 4 December 2019 adjudicator's determination.

The liquidator of the developer wholly disallowed the builder's proof of debt, arguing that no valid debt existed under the SOP Act as of the relevant date of winding-up under section 553 of the *Corporations Act 2001* (Cth). Subsequently, the Builder commenced proceedings to appeal the rejection of its proof of debt.

Both parties agreed that the critical date was 22 November 2019 (the date of the Developer's voluntary administration), which preceded the adjudicator's determination on 4 December 2019. However, they disagreed on the implications:

- The liquidator contended that the debt under the SOP Act only arises upon the adjudicator's determination, hence no debt existed as of the winding-up date.
- The Builder argued that the debt arose either upon entering the construction contract (entitling the Builder to progress payments under section 8 of the SOP Act) or upon serving the payment claim, payment schedule, and adjudication application.

The issue before the Court was whether the adjudication determination could be used to prove the debt in the winding-up, given that the determination was made after the Developer entered voluntary administration.

Decision

The appeal was dismissed, affirming that, as of the relevant winding-up date of the Developer, the circumstances necessary to create a debt had not occurred because the adjudicator's determination had not yet been made.

The Court analysed the purpose and application of the SOP Act, concluding:

- Serving a payment claim, payment schedule, and making an adjudication application are procedural steps preceding an adjudicator's determination and do not in themselves establish a debt.
- The Adjudicator's determination is the event that triggers an enforceable debt under the SOP Act.

Therefore, while section 8 of the SOP Act grants builders a statutory entitlement to receive progress payments, the right to recover such payments (and thus create a debt) only materialises upon an adjudicator's determination.

The Court also clarified that the builder's statutory entitlements under the SOP Act are distinct from its contractual rights under the construction contract. Consequently, the Builder could still assert its entitlements under the construction contract in the Developer's winding-up, separate from its claims under the SOP Act.

O'Rourke v Beechwood Homes (NSW) Pty Ltd [2022] NSWCATCD 116

Coram: Robertson SM
Court: NSW Civil and Administrative Tribunal
Date: 19 May 2022

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Statutory warranties – Warranty that works will be carried out with due care and skill – Whether approval of plans by Council absolves builder from responsibility to ensure adequate provision is made for the dispersal of stormwater

Facts

In May 2018, the owner engaged Beechwood Homes (NSW) Pty Ltd (the "**Builder**") to design and construct a house on his property near a lagoon. The contract required the Builder to provide hydraulic stormwater details from an engineering firm and to construct a stormwater drainage system according to those specifications. The Builder obtained conceptual plans from an engineering firm, which were reviewed by the local council when issuing the construction certificate for the property.

In February 2020, the house suffered flood damage during a severe storm event. The owner brought proceedings in the NSW Civil and Administrative Tribunal, alleging that the Builder breached the statutory warranty under section 18B(1)(a) of the *Home Building Act 1989* (NSW) (the "**HB Act**") by failing to carry out the stormwater works with due care and skill. The owner sought an order for rectification of the stormwater system or compensation for the builder's breach of statutory warranties. The Builder argued that it was not liable for deficiencies in the stormwater system because it had been approved by the local council.

Decision

The Tribunal sided with the owner based on expert evidence, which highlighted significant design and construction flaws in both the minor and major stormwater systems. The Tribunal concluded that the Builder breached the warranty in section 18B(1)(a) of the HB Act, which requires work to be performed with due care and skill, by failing to provide a properly designed stormwater system capable of managing flooding risks.

The Builder relied on evidence from its engineers that they were not responsible for providing 'construction certified' or 'work as executed' plans, and that approval by the local council implied the

conceptual plans were suitable for construction. However, the Tribunal found that council approval did not absolve the builder of its responsibility to ensure the stormwater system was adequate.

Under section 48 of the HBA, the Tribunal ordered the Builder to undertake remedial work identified by the owner's expert for the minor stormwater system. Regarding the major stormwater system, the owner's expert recommended raising the floor level to prevent flood risks, aligning with industry standards. However, the Tribunal determined that raising the floor level was not feasible at this stage and instead directed the builder to implement alternative measures suggested by the owner's expert to mitigate future flooding risks.

The Tribunal applied the principle from *Bellgrove v Eldridge* [1954] HCA 36 that damages for building defects should cover the costs of necessary rectification. Despite acknowledging that raising the floor level was the optimal solution, it deemed this impractical and opted for alternative mitigating measures as the appropriate remedy.

Onslow v Cullen [2022] NSWSC 1257

Coram: Adamson J
Court: Supreme Court of New South Wales
Date: 19 September 2022

BUILDING AND CONSTRUCTION — *Home Building Act 1989* (NSW) — Statutory warranty — Proceedings for breach — where contract extracted statutory warranties — where proceedings for minor defect brought after two years — where magistrate found limitation periods in s 18E did not apply — where prefatory words "to the extent required by the *Home Building Act*" used — held to incorporate limitation period

APPEALS — Procedural fairness — where party made concession in case summary prepared in accordance with practice note — where magistrate disregarded concession — held to constitute a denial of procedural fairness

APPEALS — Procedural fairness — Failure to give reasons — where preliminary ruling made subject to any authorities being brought to magistrate's attention — unorthodox approach — failure to address principal submissions of one party in reasons

APPEALS — from Local Court to Supreme Court — where grounds involved statutory interpretation and denial of procedural fairness — where held to involve questions of law — leave not required

Facts

Onslow (the "**Builder**") and Cullen (the "**Owners**") entered into a standard Housing Industry Association ("**HIA**") form contract for renovations and additions in January 2016. The contract included a clause replicating the statutory warranties under section 18B(1) of the *Home Building Act 1989* (NSW) (the "**HB Act**"), prefaced by the words: "To the extent required by the Home Building Act, the builder warrants that…"

The Builder failed to complete the works, leading the Owners to commence proceedings in the NSW Civil and Administrative Tribunal, which were later transferred to the Local Court. The Owners sought damages for breach of contract, including the express warranties in the contract. These warranties mirrored the statutory warranty under section 18B of the HB Act, which the HB Act mandated to be included in the contract according to section 7(2)(f). According to the Owners' interpretation, their claim

for breach of the contractual warranties fell under a six-year limitation period as provided by section 14(1)(a) of the *Limitation Act 1969* (NSW).

The owners argued that their claim was for breach of contract, where the contractual terms closely resembled the warranties in section 18B, rather than importing the statutory warranties and other provisions from Part 2C of the Act. Hosking LCM held that by incorporating the statutory warranties into the contract, the Builder lost the protection of section 18E of the HB Act. Consequently, the Owner was entitled to sue for breach of contract within the six-year limitation period under the Limitation Act 1969 (NSW). The Court's rationale was as follows:

- The Builder agreed to provide warranties that mirrored the statutory warranties in section 18B of the Act.
- Since the Builder did not incorporate the limitation in section 18E of the HB Act into the contract, his warranties were not subject to that limitation.
- A claim for breach of statutory warranty differs from a claim for breach of contract.
- Because the warranties were explicitly stated in the contract, the Owners' claim constituted a breach of contract (or breach of contractual warranty) rather than a breach of statutory warranty.

The Builder appealed this decision to the Supreme Court of NSW. The key issue on appeal was whether the contract's inclusion of the statutory warranties extended the limitation period to six years, contrary to the two-year period for non-major defects specified in the HB Act.

Decision

The Supreme Court determined that the statutory warranties were clearly intended not to be subject to any limitation period other than that stated in section 18E of the HB Act. It highlighted that the warranty clause in the contract contained the qualifying statement: "To the extent required by the Home Building Act, the builder warrants that:", supporting the argument that the two-year limitation period for defects other than major defects specified in the HB Act should apply, rather than the six-year limitation period for breach of contract.

The Court concluded that adopting the lower court's interpretation of the clause would disadvantage builders who complied with section 7(2)(f) of the HB Act by expressly including the warranties implied by section 18B into the contract, compared to those who did not. Consequently, a builder who did not expressly include the warranties would be entitled to rely on section 18E of the HB Act, whereas one who did include them would not.

Ultimately, it was held that the contract should be interpreted in light of the HB Act, where expressly including the mandated warranties should not extend their applicability beyond the HB Act's baseline.

The Supreme Court further determined that there was no practical distinction, in these circumstances, between an action for "breach of statutory warranty" and an action for "breach of contract" to support the lower court's interpretation. While Part 2C of the HB Act may be characterised as consumer protection legislation, the limitation periods aim to provide certainty to both owners and builders. This is consistent with section 18G of the HB Act, which aims to safeguard the rights of a "person" under the HB Act, a reference found not to be limited solely to owners, but potentially inclusive of builders as well.

Piety Constructions Pty Ltd v Hville FCP Pty Ltd [2022] NSWSC 1318

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 29 September 2022

BUILDING AND CONSTRUCTION – where payment schedule under Building and Construction Industry Security of Payment Act 1999 (NSW) served using Procore electronic information exchange system – whether provision in building contract concerning electronic service of documents engaged – whether payment schedule provided within 10 day limit in s 14 of the Act – whether electronic service deemed to occur at 9.30am on day following electronic receipt – where developer had actual notice of payment schedule on the evening of receipt – whether plaintiff builder entitled to recover claimed amount under s 15 of the Act

Facts

On 2 May 2022, Piety Constructions served a payment claim to Hville via the Procore platform, an electronic information exchange system used by the project participants. Hville responded by issuing a payment schedule through the same platform on 16 May 2022, at 6:30 pm, the last business day for serving the payment schedule within the 10-business day period stipulated by the B*uilding and Construction Industry Security of Payment Act 1999* (NSW) ("**SOP Act**").

On 16 May 2022 at 6:30pm, the builder's senior project officer received an email notification via Procore containing a link to the payment schedule, which was less than one third of the payment claim. Between 6:30pm and 8:10pm on the same day, the officer accessed and reviewed the Procore notification, payment schedule, and other accompanying documents.

The core issue was whether Hville's payment schedule was served within the 10-business day period required by the SOP Act or if it was considered out of time because it was submitted after 4:30 pm, as dictated by the contract. Piety argued that, according to Clause 7.12 of the contract, any notice delivered electronically after 4:30 pm was deemed to be served at 9:30 am the next business day. Hville contended that this clause was void under section 34 of the SOP Act, which prevents contractual terms from restricting or modifying the Act's provisions.

It was undisputed that the officer had reviewed the notification, including the payment schedule, on the evening of 16 May 2022.

Decision

Justice Stevenson ruled in favour of Hville, determining that the payment schedule was served on time. The Court found that Clause 7.12 was void as it attempted to modify the SOP Act's provisions, which prioritise actual receipt of documents over any contractual deeming provisions. Justice Stevenson emphasised that if a document is accessed and viewed on the day it is sent, it should be considered as served on that day for the purposes of the SOP Act. He noted that adhering to the contractual deeming provision would lead to a result divorced from reality and could have significant financial consequences.

The Court also emphasised that the actual occurrence of events must take precedence to prevent legal conclusions from being divorced from reality. If a document has been received and brought to the attention of the intended recipient, it is considered served or provided, irrespective of compliance with optional procedural requirements.

Rialto Sports Pty Limited v Cancer Care Associates Pty Limited [2022] NSWCA 146

Coram: Bell CJ, Macfarlan and Gleeson JJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 10 August 2022

CONTRACTS – construction – whether vendor's covenant to construct building in a proper and workmanlike manner was only a "best endeavours" obligation – whether vendor is liable under covenant for incomplete or defective work by builder – where covenant did not merely require compliance with physical description of the building according to approved plans

CONTRACTS – construction – whether good workmanship covenant merged on completion – absence of express statement that the covenant survived completion – primary obligation to convey title merged upon completion – nature of subject matter of secondary obligation as to good workmanship – where performance of covenant could not be investigated prior to completion – where occupation certificate is not determinative of performance

CONTRACTS – damages – whether lot owners can claim damages in respect of proportionate share of cost to rectify common property – where damage to common property is infringement of lot owner's proprietary interest in common property as equitable tenant in common – whether lot owners can recover costs of rectification where works have not been undertaken

CONTRACTS – assignment – whether assignment of chose in action was effective – whether assignee had genuine, substantial pre-existing commercial interest in the suit – whether claim is time barred where plaintiff substituted – where effect of substitution order under UCPR, r 6.32 placed substituted plaintiff in same position as party replaced

APPEAL – orders on appeal – building case – whether appropriate relief is remitter for retrial or reference out to referee – where reference out is the most efficient and timely option

Facts

Rialto Sports Pty Limited ("**Rialto**") developed a four-storey commercial strata building with 27 units at the Kingsway, Miranda. In early to mid-2014, Rialto entered into "off the plan" contracts of sale for some units before the building was completed in October 2014. Post-completion, defects were

discovered, including issues with the building's façade cladding. The cladding used was an aluminium composite panelling ("**ACP**") with a high polyurethane content, which is now banned.

In January 2016, the builder engaged by Rialto went into liquidation. The building's façade was constructed using ACP with 87% polyurethane content, now banned for such buildings. In 2018, four unit owners initiated separate proceedings against Rialto, focusing primarily on the use of defective cladding and inadequate waterproofing. These defects led to a significant special levy being imposed by the owners' corporation to cover rectification costs. The District Court found in favour of the unit owners, prompting Rialto to appeal to the Court of Appeal.

The primary issue in these claims was the use of ACP cladding and defective waterproofing on the façade. In August 2020, the owners' corporation imposed a $660,000 special levy to fund the cladding's removal and replacement. The total claim for defects in the common property was $1.35 million. The claims were initially heard in the District Court of New South Wales, based on the unit sale contracts. Rialto appealed the District Court's decision to the Court of Appeal, arguing that the judge failed to provide adequate reasons for the decision. Rialto advanced other arguments on the appeal.

The "off the plan" contracts contained construction obligations in varying terms. One contract stated: The building in which the said unit is situated is during construction and shall be constructed by the vendor in a proper workmanlike manner in accordance with the plans and specifications approved by the Sutherland Council. Two other contracts stipulated that, before completion, the vendor must cause the construction and completion of the building in a proper and workmanlike manner in accordance with the Development Consent.

Rialto argued that the contracts required them to ensure the building's construction but did not mandate Rialto to build it personally. They claimed their obligation was to use "best endeavours" to have the building constructed properly, which they fulfilled by engaging a builder. Rialto also highlighted the contracts' narrow timeframe for unit holders to claim defect rectifications. Rialto contended that since individual unit holders did not own the common property, it was unreasonable to suggest Rialto warranted the building's façade to them. Additionally, they argued that individual unit owners could not claim defects in common property, as this was a loss suffered by the body corporate.

Rialto argued that their obligation to construct in a workmanlike manner ended upon the property transfer, based on the legal principle of merger in land sale and transfer contracts. This principle seeks finality at the time of sale and transfer, where specific clauses may survive completion. However, the contracts did not explicitly state that the obligation to construct in a workmanlike manner would survive completion.

Decision

The Court agreed that Rialto was not obligated to personally carry out the construction. However, it rejected Rialto's claim that engaging a builder fulfilled their obligation under the sales contracts. Rialto was still responsible for ensuring the building was constructed in a workmanlike manner.

Regarding the common property argument, the Court stated that individual unit holders were directly affected by defects in the common property and had suffered losses due to the imposed levy for façade repairs. On the merger argument, the Court held that the right to enforce the vendor's construction obligation was collateral to the conveyance and did not merge upon completion.

With these liability issues resolved, the Court of Appeal referred the case to an expert to determine the appropriate methods for rectifying the façade and water ingress, and to assess the quantum of any remedial work, including defects in individual apartments.

Renbar Constructions Pty Ltd v Sader [2022] NSWSC 172

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 25 February 2022

CONTRACTS – general contractual principles – construction – interpretation of critical terms of the contract – whether compliance with a contractual mechanism for claiming progress payments was a condition precedent to payment of the entire contract sum – implied terms – necessary to give business efficacy to the contract – contractor entitled to payment of unpaid contract sum on completion of works

CONTRACTS – breach of contract – forms of breach – amount of damages calculated as a result of defective work and delay – whether defective work and 141 week delay amounted to "substantial" breaches – whether contract validly terminated

BUILDING AND CONSTRUCTION – determination of the cost of construction of the work
EQUITY – whether estoppel by convention available – no mutual assumption adopted – no sufficient detriment to party seeking estoppel.

Facts

This dispute centred around payments under a Cost Plus Contract for the demolition and construction of a residential dwelling. The defendant, Dr. Mark Sader, entered into a contract with Renbar Constructions Pty Ltd ("**Renbar Constructions**") in July 2014 for the works on his property. The contract stipulated that the builder was entitled to progress payments upon providing written progress payment claims at specified times.

Renbar Constructions failed to provide progress payment claims that complied with the contractual terms. Despite this, Dr. Sader made several payments totalling $1,690,432. The dispute arose post-completion, with Renbar claiming entitlement to additional payment.

In 2017, a meeting between the parties revealed that the estimated project cost had escalated to over $3 million. The building was eventually handed over to the owner in mid-2018 without a final payment claim. Subsequently, the Renbar Constructions submitted two additional payment claims (13 and 14), which Dr. Sader refused to pay. Following the Dr. Sader's termination of the contract due to alleged defective and incomplete work, the Renbar Constructions resubmitted payment claims 13 and 14, prompting rejection on the grounds of the contract's termination.

An expert surveyor assessed the fair and reasonable cost of the work performed to be $3,504,290. Dr. Sader argued that Renbar was not entitled to any further payment beyond what had already been paid, due to the non-compliant progress claims.

The primary issue was whether Renbar was entitled to payment despite not providing compliant progress claims.

Decision

The court found in favour of Renbar, determining that the builder was entitled to payments on a cost-plus basis, minus specific amounts and losses by the defendants. Justice Stevenson noted that nothing in the contract precluded the builder's entitlement to be paid other than by monthly progress payments and that clause 13 did not discharge the owner's obligation to pay for the works carried out.

Clause 2.2 of the contract obligated the owner to pay for the 'building works' as defined by the total 'cost of the building works.' However, the contract did not explicitly provide for progress claims submission or the consequences of non-compliance with such provisions. In this lacuna, the court inferred an implied term that entitled the builder to payment for work executed, regardless of progress claim procedural deficiencies. The owner was required to make payment within a reasonable time after completion of the work, accompanied by adequate details of the work performed. The court applied the BP Refinery test, affirming the reasonableness and equity of the implied term, essential for the effective operation of the contract without imposing additional burdens on the owner beyond those stated in clause 2.2.

The court observed that Dr. Sader and his wife were actively involved in the decisions regarding the construction and should have understood that these decisions increased the costs. The decision underscored the risks and uncertainties when parties fail to adhere strictly to contractual procedures and highlighted the potential for progress payment claims to be accepted implicitly, indicating an intention to make payment despite non-compliance with contract requirements.

Strata Plan 92450 v JKN Para 1 Pty Ltd [2022] NSWSC 958

Coram: Black J
Court: Supreme Court of New South Wales
Date: 19 July 2022

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW*)* — Statutory warranty — Proceedings for breach — Where the plaintiff owners corporation seeks a range of relief relating to allegedly combustible cladding on a residential unit block — Where the parties seek the determination of several separate questions — Whether the cladding complied with the Building Code of Australia with respect to combustibility — Whether any statutory warranties were breached in relation to the cladding — Whether the plaintiff suffered assessable loss recoverable against the defendants.

Facts

The Owners Corporation of a 28-storey residential building located in Parramatta initiated legal proceedings against the developer, JKN Para 1 Pty Ltd, and the Builder, Toplace Pty Ltd. The dispute revolved around the installation of allegedly combustible aluminium composite panels ("**ACP**") as cladding on the building. The Owners Corporation contended that this cladding was in breach of the statutory warranties under section 18B of the *Home Building Act 1989* (NSW), as it did not comply with the Building Code of Australia ("**BCA**") at the time of installation.

The building in question, which comprised 133 lots, was constructed with ACP cladding known as Vitrabond FR. This cladding was identified to contain 35-40% polyethylene, making it combustible. The Owners Corporation argued that the cladding did not meet the Deemed-to-Satisfy ("**DtS**") provisions of the BCA, which required that external walls in a Type A construction be non-combustible. Additionally, they sought damages amounting to approximately $5 million for the removal and replacement of the cladding.

Both parties agreed on certain facts:

1. The ACP cladding installed was Vitrabond FR.
2. The core of the ACP cladding contained predominantly 35-40% polyethylene.
3. The ACP cladding was a banned product under the *Building Products (Safety) Act 2017* (NSW) ("**BPSA**") at the time of the proceedings, although it was not banned at the time of installation.

However, there was significant dispute over whether an Alternative Solution, as provided for under the BCA, could have been used to demonstrate compliance with the BCA's performance requirements despite the cladding's combustibility. The Owners Corporation's expert, Allan Harriman, relied on a

CSIRO test certificate to assert that the cladding was combustible. However, this certificate pertained to a different Vitrabond product, which compromised the credibility and reliability of his evidence.
The builder and developer maintained that the presence of the ACP cladding did not pose an undue risk of fire spread, particularly given the fire protection measures in place within the building. They further argued that compliance with the BCA could be achieved through an Alternative Solution, which had not been disproven by the Owners Corporation.

Decision
The Court determined that the ACP cladding did not comply with the DtS provisions of the BCA, which require that external walls in Type A constructions must not be combustible, as defined by the BCA. Critical to this finding was the absence of testing that could establish the combustibility of the ACP cladding in accordance with the relevant BCA standards.

Regarding compliance with the BCA through an Alternative Solution, the Court found that no such solution was prepared before the issuance of the construction certificate or subsequently. Despite this finding, the Court noted that this did not support the Owners Corporation in their claim for significant relief. They failed to show that an Alternative Solution was unavailable at the relevant time or currently to support their claims. Crucially, the Owners Corporation did not provide evidence regarding the combustibility rate of the ACP cladding, or the potential fire spread risks due to its use.

The Court rejected the argument that the ACP cladding was inherently unsuitable for its intended purpose because it is now banned under the BPSA. The Court emphasised that the prohibition of a previously permissible product by legislation does not automatically make it unsuitable historically or currently. It acknowledged that societal norms could change, and legislative bodies can implement protective measures, including product bans, regardless of the product's previous or potential suitability. Consequently, the Court determined that the Owners Corporation could not justify the need for expensive rectification works:

- The Owners Corporation only proved a breach of the BCA regarding the failure to implement an Alternative Solution at the relevant time.
- They did not establish the impracticability of implementing an Alternative Solution at that time or currently.
- They did not demonstrate whether the ACP cladding met the AS1530.1 standard for combustibility or its performance in a fire scenario.

On the balance of probabilities, the Owners Corporation failed to establish the BCA breach or the statutory warranty breaches, leading to the defendants' non-liability for damages. The Owners

Corporation was directed to cover the costs associated with resolving the separate questions and the hearing.

The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd [2022] NSWSC 1123

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 24 August 2022

PRACTICE AND PROCEDURE – proposed amendment to Technology and Construction List Statement – whether amendment will introduce new causes of action under the Home Building Act 1989 (NSW)

BUILDING AND CONSTRUCTION – residential building work – whether separate causes of action for each breach of the statutory warranties under the Home Building Act 1989 (NSW) – whether single cause of action for all breaches of those statutory warranties or for each individual statutory warranty – application of Onerati principle

STATUTORY CONSTRUCTION – construction of statutory warranties under the Home Building Act 1989 (NSW) – whether separate cause of action for each breach of the statutory warranties under the Home Building Act 1989 (NSW) – whether single cause of action for all breaches of those statutory warranties or for each individual statutory warranty – application of Onerati principle

Facts

In this matter, the Owners Corporation, managing a strata title development in Haymarket with 286 residential apartments and associated parking and storage spaces, brought a case against Parkview Constructions Pty Ltd, the Builder. The development was designed and constructed by the Builder under a contract made on 26 September 2012 with the Developer, The Quay Haymarket Pty Ltd. The strata plan was registered on 1 September 2014, and the building work was completed with a final occupation certificate issued on 15 December 2014. The work performed by the Builder qualified as "residential building work" under the *Home Building Act 1989* (NSW) ("**HBA**").

The Owners Corporation initiated these proceedings on 26 August 2016, within the relevant time limitations set by the HBA. Initially, the Owners Corporation alleged 85 defects in the common property, attributing each to the Builder's breach of statutory warranties under sections 18B(a)-(f) of the HBA. It was agreed that, under sections 18C and 18D of the HBA, the Owners Corporation, as the Developer's successor in title, was entitled to the benefit of these statutory warranties and the same rights against the Builder as the Developer.

On 16 July 2021, the Owners Corporation filed a Notice of Motion, later amended on 9 February 2022 and granted leave on 11 August 2022. The motion sought to amend the List Statement to add a claim against the Builder for breach of statutory warranty under section 37 of the *Design and Building Practitioners Act 2020* (NSW) ("**DBP Act**"), include claims regarding new defects related to the building's external façade, glass window coatings, and stair pressurisation systems under sections 18C and 18D of the HBA, and withdraw the initial claims for the 85 defects, which had either been rectified or were no longer pursued.

The Builder opposed the inclusion of further defects on the grounds that:

- Each new defect represented a new cause of action.
- Each new cause of action sought further claims for breaches of statutory warranties.
- The limitation period for bringing claims under the statutory warranties had expired since the commencement of the proceedings.
-

Three key issues were identified for determination:

1. Whether individual defects breaching the statutory warranties constitute separate causes of action.
2. Whether the "*Onerati* principle" would prevent the addition of further defects in a section 18B statutory warranty claim brought by a successor in title under sections 18C and 18D.
3. Whether each of the six statutory warranties under section 18B(1) represents six separate causes of action or a single collective right, meaning a breach of any warranty constitutes a breach of section 18B(1) as a whole.

The *Onerati* principle, from *Onerati v Phillips Constructions Pty Limited (In Liq)* (1989) 16 NSWLR, holds that there is one cause of action for breaching a contractual promise to perform works in a good and workmanlike manner, preventing subsequent proceedings for different defects even if those defects were not apparent during the first proceedings.

In November 2006, Parliament aimed to limit the *Onerati* principle in certain circumstances by inserting section 18E(2) into the HBA via the Home Building Amendment (Statutory Warranties) Bill 2006. Section 18E(2) allows for enforcing the same warranty for different deficiencies in the same work if:

- The other deficiency existed when the work was completed.
- The person did not know, nor could reasonably be expected to have known, of the other deficiency when the warranty was previously enforced.

- The proceedings to enforce the warranty for the other deficiency were brought within the relevant limitation period.

Decision

Justice Stevenson ruled in favour of the Owners Corporation, allowing them to add the new defects to their existing claim. He clarified that each breach of the statutory warranties represents a single cause of action, not a separate cause of action for each defect. Therefore, the newly discovered defects were considered further particulars of the original claim. Essentially, subject to the exceptions created by sections 18D(2) and 18E(2) of the HBA, the *Onerati* principle does apply to claims for breaches of these statutory warranties.

The effect was to permit the amendments to the statutory warranty claim, despite the limitation period having passed, because the motion was filed after the proceedings commenced but before the limitation period expired.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 24 May 2022

BUILDING AND CONSTRUCTION – Design and Building Practitioners Act 2020 (NSW) – proper construction of definition of "construction work" – proper construction of "otherwise having substantive control over the carrying out of any work" – proper construction of s 37(1) – whether "person" includes the "owner of the land in relation to which the construction work is carried out"

Facts

This case involved a dispute between the Owners Corporation of a North Sydney strata development and both Pafburn Pty Ltd (the "**Builder**") and Madarina Pty Ltd (the "**Developer**"). Notably, Pafburn owned all the shares in Madarina, with Mr. Antonios Obeid and Mrs. Maria Obeid serving as directors and shareholders of Pafburn, while Mr. Obeid was the sole director of Madarina.

The Owners Corporation alleged that both the Builder and the Developer breached their duty of care under section 37(1) of the *Design and Building Practitioners Act 2020* (NSW) (the "**DBP Act**"**)**. Specifically, the Builder was accused of defective construction, and the Developer was charged with engaging in 'construction work,' including supervising and coordinating the building work performed by the Builder.

The Builder and Developer sought to dismiss the proceedings or strike out parts of the claim through a notice of motion.

Decision

In its decision, the court refused to dismiss the proceedings or strike out the list statement. It interpreted the term "construction work" under section 36(d) of the DBP Act to encompass not only the actual supervision or management but also the potential to control how work is executed.

The court indicated that a developer could be deemed to have engaged in "construction work" if they had substantive control over the builder's actions, even without actively exercising that control. Additionally, the court clarified that the duty of care outlined in section 37 is owed to landowners but does not imply a duty of care of the owner to itself.

Developers with substantive control over construction activities must therefore exercise reasonable care to prevent economic loss caused by defects. The court also noted that establishing substantive control is simpler when the developer owns the builder, as opposed to situations where the builder owns the developer.

Stevenson J clarified that under section 37 of the DBP Act, a duty of care is owed to owners of land where construction work occurs. However, when an owner conducts construction work on their own land, the statute does not intend to create a duty of care from the owner to themselves. Hence, the expression "each owner" in section 37(2) excludes an owner who performs the construction work on their own property.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2) [2022] NSWSC 1002

Coram: Stevenson J
Court: Supreme Court of New South Wales
Date: 27 July 2022

CIVIL PROCEDURE – amendment – pleadings – application for leave to file Amended Technology and Construction List Statement – where new building defects alleged – whether defendants prejudiced by proposed amendments

CIVIL PROCEDURE – whether the proceedings should be dismissed as against the developer defendant – whether allegations of fact if proven capable of establishing that developer engaged in construction work for the purposes of the Design and Building Practitioners Act 2020 (NSW)

Facts

The case involved the Owners – Strata Plan No. 84674 (the "**Owners**"), who brought proceedings against Pafburn Pty Limited (the "**Builder**") and Madarina Pty Limited (the "**Developer**"). Importantly:

- The Builder owned all shares in the Developer.
- Mr Antonios Obeid and Mrs Maria Obeid held all shares and were directors of the Builder.
- Mr Obeid was the sole director of the Developer.

The Owners corporation initiated legal proceedings alleging that both the builder and the developer breached the duty of care under section 37(1) of the DBP Act.

Previously, the court determined that under the DBP Act, a 'person' performing construction work includes the landowner and those with substantive control over the work. The central issue in this judgment was whether the assertion in the proposed amended list statement, claiming the developer conducted construction work under section 37(1) of the DBP Act, was clearly untenable, warranting summary dismissal of the proceedings against the developer. The owners corporation argued:

- Mr Obeid, as sole director and controlling figure, contracted and appointed himself as the nominated supervisor for the developer.
- Throughout, the developer supervised, coordinated, and managed the building work.
- Mr Obeid, through his roles, had the power to control the construction process, thus exercising substantive control.

Decision

Justice Stevenson declined to dismiss the proceedings against the developer, emphasizing that termination of an action should be sparingly used and only when the court is unequivocally convinced that the claim cannot succeed.

Regarding the argument that Mr. Obeid, as the sole director and controlling mind of the developer and also the builder's nominated supervisor, actually supervised, coordinated, and project-managed the construction work, Justice Stevenson held that while this might not be definitively proven at this stage, it cannot be conclusively ruled out either.

The court found it plausible that Mr. Obeid, in his dual capacity as sole director of the developer and nominated supervisor for the builder, had the practical ability to dictate how the building work was conducted. This aspect warrants further exploration during the hearing.

Warburton v County Construction (NSW) Pty Ltd [2022] NSWSC 941

Coram: Black J
Court: Supreme Court of New South Wales
Date: 15 July 2022

BUILDING AND CONSTRUCTION — Contract — Damages — Defects — Where plaintiff homeowners initially contracted with the defendant builder for the construction of a residential home — Where parties entered into a second agreement by which the plaintiffs took responsibility for the payment of subcontractors and materials, and the defendants undertook to carry out all the work reasonably necessary to manage and supervise the completion of the works — Where the second agreement also included a mutual release — Where plaintiff alleges there are defects with the construction of the home —Whether defects arose from work done prior to or after the second agreement — Whether defects arising from work done after the second agreement resulted from a failure by the defendant to carry out all the work reasonably necessary to manage and supervise the completion of the works — Whether any statutory warranties under the Home Building Act 1989 (NSW) were breached by the defendants

Facts

The plaintiffs, Mr. Mark Warburton and Mrs. Jacqueline Warburton, sought damages and additional relief from County Construction (NSW) Pty Ltd, including the rectification of an agreement dated 27 February 2017 by altering clause 6.2 to delete specific words. The plaintiffs did not pursue further claims against the second defendant, Mr. Robert Hart, during the hearing. County, in turn, filed a cross-claim for $12,222.23, an alleged unpaid amount from the total $110,000 payable under the Second Agreement, or alternatively, an amount claimed if the contract remained in effect after February 2017. In their Defence to the Cross-Claim filed on 19 December 2019, the Warburtons disputed County's entitlement to the amounts claimed, arguing they could offset damages and other amounts against this payment.

The case centred on a residential construction project in Mosman, NSW, involving the demolition of an existing dwelling and the construction of a new residence. The development application, approved by Mosman Council in 2012, required the installation of an on-site rainwater re-use system and compliance with the Building Code of Australia ("**BCA**"). In October 2015, the Warburtons and County entered into a written cost-plus contract with an estimated project value of $3.5 million. The contract included provisions for a builder's mark-up of 9% of the costs of the work and required County to provide a certificate of insurance under the Home Building Compensation Fund.

County secured insurance for the works at the Contract price on 11 November 2015, and an amended development application approval and construction certificate were issued on 13 November 2015. Construction began around December 2015. Disputes arose between the parties, though the extent is contested. The initial architect and contract administrator, Mr. Vitale, withdrew on 24 June 2016, and Mr. Brincat was appointed to administer the Contract as the owner's agent. He was authorized to instruct the builder on variations and other project-related matters. On 10 October 2016, Mr. Brincat recommended suspending work for a month to secure fixed price quotations and assess claims.
The following issues were to be resolved:

- Whether defects arose from work done after the Second Agreement.
- Whether defects resulted from the defendant's failure to manage and supervise work completion.
- Whether the defendants breached any statutory warranties under the Home Building Act.

Decision

The court found that defects involving paint overspray and speckles on face brickwork were attributable to the painting contractor, Mickemouse. County's obligations under clause 2.1 of the Second Agreement did not include cleaning the brickwork; this responsibility fell on the painting contractor or the Warburtons. Issues with downlights and other lighting inconsistencies were noted, potentially warranting claims against Innuku if it had been a party to the proceedings. Landscaping defects by Land Forms were also noted, but it was unclear if these constituted a breach of County’s obligations under clause 2.1 of the Second Agreement or statutory warranties.

The Warburtons succeeded in their claims against County for three defects and partially for a fourth, as well as their monetary claim, which received minimal hearing time. Most of their claim was dismissed pending agreement or resolution on quantifying damages. The Warburtons were ordered to cover County’s and Mr. Hart’s costs related to the proceedings.

Warburton v County Construction (NSW) Pty Ltd [2022] NSWSC 1281

Coram: Black J
Court: The Supreme Court of New South Wales
Date: 21 September 2022

BUILDING AND CONSTRUCTION — Contract — Damages — Quantification — Quantification of damages for the rectification of defects — Where there is disagreement between expert witnesses as to quantification

Facts

In *Warburton v County Construction (NSW) Pty Ltd* [2022] NSWSC 941, Mr. and Mrs. Warburton claimed that County Construction was liable for several defects in work performed before a second agreement took effect. The court found County Construction liable for certain items but noted that the quantification of damages was challenging due to conflicting expert evidence. The primary judgment identified defects in plumbing and stormwater drainage systems, acknowledging the need for further agreement or submissions on the quantification of related works. The court directed the parties to reach an agreement on the quantification of specific items or to submit further evidence.

Decision

In this instance, the court allowed the parties to agree on the quantification of specific items and made orders accordingly. The court ultimately found that Mr. and Mrs. Warburton were entitled to $224,727.34 in damages. For Item H2, the court accepted the estimated costs of $3,861.00 provided by Mr. Zakos, despite County Construction's objections. For Item H13, the court preferred Mr. Zakos' quantification of $179,458.25, with a 15% discount due to the potential for reduced work scope, resulting in $152,540. The court awarded costs to Mr. and Mrs. Warburton, including ordinary costs for Item H2 and indemnity costs for Item H13 after a settlement offer was unreasonably rejected by County Construction. The court also deferred further comments on costs due to the Warburtons' partial success in their larger claims.

WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2) [2022] NSWSC 505

Coram: Rees J
Court: Supreme Court of New South Wales
Date: 29 April 2022

BUILDING AND CONSTRUCTION – plaintiff to build tunnel under Project Deed – defendants to build tunnel for plaintiff under D&C Deed – 'back to back' contracts – disputes concerning same issue under both contracts treated as "Linked Disputes" – claim concerning contamination determined as "Linked Dispute" adversely to plaintiff and defendants – defendants nonetheless seek contamination costs from plaintiff.

COMMERCIAL ARBITRATION – application for stay – 'tiered' dispute resolution clause requiring negotiation, expert determination then arbitration – expert determination yet to begin – whether arbitration agreement "inoperative" under section 8(1), *Commercial Arbitration Act 2010* (NSW), *New York Convention* and UNCITRAL Model Law – case law review at [95]-[117] – agreement "operative" notwithstanding expert determination yet to occur – *John Holland v Kellogg Brown & Root* not followed at [118]-[120] – proceedings stayed.

Facts

This case addressed a complex dispute arising from the WestConnex M4-M5 Link Tunnels project. This project involved the design and construction of the M4-M5 Link Tunnels, managed through a series of back-to-back deeds: a Project Deed between WCX M4-M5 Link AT Pty Ltd (the "**Asset Trustee**") and Transport for NSW ("**TfNSW**"), and a D&C Deed between the Asset Trustee and Acciona Infrastructure Projects Australia Pty Ltd (the "**Contractor**"). These agreements establish a framework where payments from TfNSW to the Contractor are administered via the Asset Trustee. Importantly, any disputes between the parties are classified as "linked disputes", meaning that resolutions reached apply uniformly to both the Project Deed and the D&C Deed.

The core of the dispute was a disagreement over the "Durability Solution," a set of works required to prevent contamination from a disused rubbish tip. The Contractor asserted that the implementation of the Durability Solution should be treated as a variation to the original agreement, necessitating additional compensation. In contrast, TfNSW contended that the Durability Solution fell within the scope of the initial project requirements and thus did not warrant additional payment. Initially, an expert

determination sided with TfNSW, affirming that the Durability Solution was indeed within the existing project scope.

Following the initial expert determination, a subsequent dispute emerged known as the "Directions Dispute". The Contractor alleged that it had received specific directives from the Asset Trustee to proceed with the Durability Solution as a variation. This direction contradicted TfNSW's stance that the works were already covered under the original scope of the project.

In response to the Directions Dispute, the Contractor sought separate expert determination to challenge the earlier decision that favoured TfNSW's position. However, the Asset Trustee objected, citing jurisdictional overlap with the initial dispute resolution process. This disagreement prompted the Asset Trustee to file a court application seeking an injunction to prevent the Contractor from proceeding with the separate expert determination until the Jurisdiction Dispute was resolved.

The Contractor, in turn, sought to stay the Asset Trustee's application under section 8(1) of the *Commercial Arbitration Act 2010* (NSW) ("**CAA**"), which requires courts to refer matters to arbitration if an arbitration agreement exists, unless the agreement is found to be null, void, inoperative, or incapable of being performed. The Asset Trustee argued that the arbitration agreement was "inoperative" because a notice of dissatisfaction—a condition precedent for arbitration—had not been issued. They relied on the precedent set *in John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451, where a tiered dispute resolution clause was deemed "inoperative" as negotiations, a condition precedent, had not occurred.

Decision

Justice Rees disagreed with the Asset Trustee's interpretation, ruling that the arbitration agreement was not "inoperative" simply because the preliminary steps had not been completed. The Court held that an agreement is not rendered inoperative merely because it has not been exercised yet, and this interpretation would prevent parties from bypassing their contractual obligations. The term "inoperative," as interpreted by the Court, means "ceasing to have effect for the future," which was not applicable here. Justice Rees emphasised that the arbitration process could include preliminary steps like negotiation before the actual arbitration commences.

The Court also addressed the Asset Trustee's reliance on section 17J of the CAA for court-ordered interim measures, determining that such measures should be exercised sparingly and were not justified in this instance. The Asset Trustee's request for an urgent interlocutory injunction to prevent the Contractor from referring the Directions Dispute to expert determination was also denied. The Court

found no urgency, as the expert could determine their own jurisdiction, and the contract envisaged that the parties would bear the costs involved in defending such disputes.