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BUILDING AND CONSTRUCTION CASES 2020

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2020

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Oikos Constructions Pty Ltd (t/as Lars Fischer Construction) v Ostin & Anor

[2020] NSWCA 358

Coram: Basten, Macfarlan and White JA

Court: New South Wales Court of Appeal

Date: 24 December 2020

BUILDING AND CONSTRUCTION – Contract – Home Building Act 1989 (NSW) – Statutory warranties – whether contract confined to negotiated scope of works or expanded to include other works by virtue of the implied statutory warranties – whether building in breach of statutory warranties

CONTRACTS – Remedies – Damages – where loss claimed would have been suffered if contract had been properly performed

Facts:

Homeowner and builder Mr Amodeo built a house which had waterproofing defects and eventually sold the property to Mr and Mrs Simons. Following this, Ostin & Anor ('**the Respondents'**) entered in a contract for sale of property with the Simons', agreeing to purchase the house on the condition that the Simons' arrange for remediation works to fix the waterproofing defects. The Simons' engaged Oikos Constructions Pty Ltd ('**the Appellant'**) to undertake the necessary remedial works on the property ('**works contract**'), and the sale was completed following the Appellant's completion of the works.

Following the Appellant's completion of the rectification works, the waterproofing issues continued. The Respondent commenced proceedings against the Appellant in the District Court of NSW, claiming that the Appellant had breached statutory warranties implied into the works contract under s 18B of the *Home Building Act 1989* (NSW) ('**HBA**'). Under s 18D of the HBA, these statutory warranties also extended to the Respondents.

First Instance

The District Court of NSW found that the appellant had breached certain statutory warranties in relation to works performed. A significant aspect of his Honour's reasoning was his finding that the works contract's purpose was preventing water ingress, as opposed to being confined to rectifying the issues identified in the scope of works.

The Appeal

The Appellant appealed to the NSW Supreme Court of Appeal. In particular, the Appellant claimed that the warranties implied by section 18B of the HBA could not expand the scope of the work contracted to be done, and that on this basis, it had not breached the works contract. Ultimately, this was rejected by the Court of Appeal, and it found that builders are not able to contract out of the s 18B warranties by agreeing to a narrower scope of work. For example, the Court of Appeal pointed out that a builder could not avoid the operation of the warranty in section 18B(1)(b) that materials supplied by the builder be "good and suitable" by specifying sub-standard materials in the scope of work in the contract. However, the Court of Appeal found that s 18B did not have the effect of expanding warranties in the works contract to include a warranty that the rectification works would fix the waterproofing defects. The Court of Appeal determined that:

- S 18B(1)(e) implied a warranty that the Rectification Works would, to the extent of the work conducted (or to be conducted) under the Works Contract, result in a dwelling that was fit for occupation as a dwelling
- S 18B(1)(f) implied a warranty that the Rectification Works would be reasonably fit for the specified purpose for which the work was required, or the result that the person for whom the work was done (Simons) wanted to achieve, if that purpose or result was made known by Simons to Oikos
- S 18B(1)(e) and (f) could therefore expand the scope of work required to be done, but only if Simons had expressly made it known to Oikos the particular purposes for which the work was required or the result that Simons desired the work to achieve

Decision:

Part of the orders proposed were as follows:

1. Appeal allowed in part.
2. Set aside the orders entered in the District Court on 20 November 2019.
3. In lieu thereof direct entry of judgment for the respondents against the appellant in the sum of $35,548.58.

Carmelita Paolucci v Makedyn Pty Ltd

[2020] NSWSC 1871

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 17 December 2020

BUILDING AND CONSTRUCTION — Contract – the Plaintiff (a landowner) and the Defendant (a developer) entered into a contractual arrangement by which the Plaintiff would sell her property to the Defendant for \$3.5M of which \$2.5M was payable in cash and which included an agreement that the Defendant would on completion of the development reconvey to the Plaintiff two lots (which later became three lots) with completed dwellings constructed on the lots – a "Sunset Clause" provided that the contract could be rescinded by either party "at any time" after 24 May 2017; registration of the relevant subdivision plans was achieved by May 2018. The parties then fell into a dispute concerning the dimensions of the residences required by the Reconveyance Contract to be constructed – issues which arose were: (1) whether the Defendant was in breach of the Reconveyance Contract in failing to complete the construction and reconveyance; (2) whether specific performance or an order for partial specific performance was available; (3) whether the Defendant had a contractual right of rescission pursuant to the Sunset Clause (cl 32.1.4 of the Reconveyance Contract); (4) whether the limitation on damages in cl 32 of the Reconveyance Contract was limited to rescission; (5) whether the reference in cl 30.1 of the Reconveyance Contract to 241.54m^2 was a reference to the size of the Duplex or to the two residences forming part of the Duplex –Held: (1) the dimensions of 241.54m^2 is a reference to the total area of the Duplex rather than a reference to each residence; (2) the Defendant was in breach of the requirement to provide a layout plan for the House and the Duplex but this breach was rectified in late 2018; (3) the Defendant was not otherwise in breach of the Reconveyance Contract. The long delay in registration of the relevant plans of subdivision was not the fault of the Defendant. The Defendant had not wilfully and deliberately failed to achieve completion of the contract and non-completion was a consequence of the dispute about dimensions; (4) the limitation on damages was not limited to rescission; (5) specific performance or partial specific performance not available because the Defendant by failing to complete was not in breach of the contract and is willing and able to complete the Reconveyance Contract.

LAND LAW — Conveyancing — Contract for sale — Rescission – The Defendant cross claimed seeking permission pursuant to s 66ZS(6) of the ***Conveyancing Act 1919*** (NSW) ("**the Conveyancing Act**") to rescind the Reconveyance Contract and later amended its cross claim to rely on s 66ZS which is the successor to s 66ZL (see s 66ZU).There were long delays in registration of the relevant plans of subdivision. The Reconveyance Contract contained a "Sunset Clause" which permitted either party to rescind if various "Conditional Matters" had not been achieved by a particular date, i.e. 24 May 2017 – Held: (1) cross claim dismissed – rescission by the Defendant should not be permitted pursuant to s 66ZS of the Conveyancing Act because it was not just and equitable to permit the Defendant to rescind.

EQUITY — Equitable remedies — Specific performance – whether an order for specific performance or partial specific performance was available – Held: specific performance or partial specific performance not available because the Defendant was not in breach of the contract and is willing and able to complete the Reconveyance Contract.

EVIDENCE — Privileges — Without prejudice privilege – whether without prejudice correspondence should be admitted – Held: (1) correspondence allowed into evidence – the status of the letter was doubtful but, in any event, if privileged a misleading impression would be created if that content was excluded.

Facts:

Mrs Paolucci (‘**the Plaintiff’**) and Makedyn Pty Ltd (‘**the Defendant’**) entered into a contractual arrangement by which the Plaintiff would sell her property to the Defendant for $3.5M. The contract also included that the Defendant would, on completion of the development, reconvey to the Plaintiff two lots (which later became three lots) with completed dwellings (a “**House**” and a “**Duplex**”) constructed on the lots (“**the Reconveyance Contract**”). Further, a ‘Sunset Clause’ contained in the contract permitted either party to rescind the contract if various “conditional matters” had not been achieved by a particular date.

Makedyn (vendor) and Mrs Paolucci (purchaser) then fell into a dispute concerning the dimensions of the residences required by the Reconveyance Contract to be constructed. The issues that arose may be summarised as follows:

1. Whether the reference in the Reconveyance Contract to 241.54m2 was a reference to the size of the Duplex or to the two residences forming part of the Duplex;
2. Whether the Defendant was in breach of the Reconveyance Contract in failing to complete the construction and reconveyance;
3. Whether the Defendant had a contractual right of rescission pursuant to the Sunset Clause indicated in the Reconveyance Contract;
4. Whether specific performance or an order for partial specific performance was available; and
5. Whether the limitation on damages in the Reconveyance Contract was limited to rescission.

Decision

The Court found in favour of the Defendant and held:

1. The dimensions of 241.54m2 is a reference to the total area of the Duplex rather than a reference to each residence;
2. The Defendant was in breach of the requirement to provide a layout plan for the House and the Duplex but this breach was rectified in late 2018;
3. The Defendant was not otherwise in breach of the Reconveyance Contract. The long delay in registration of the relevant plans of subdivision was not the fault of the Defendant. The Defendant had not wilfully and deliberately failed to achieve completion of the contract and non-completion was a consequence of the dispute about dimensions;

4. Specific performance or partial specific performance not available because the Defendant by failing to complete was not in breach of the contract and is willing and able to complete the Reconveyance Contract; and
5. The limitation on damages was not limited to rescission.

The Plaintiff’s claim and the Defendant’s cross claim were therefore both dismissed.

Boulus Constructions Pty Ltd v Warrumbungle Shire Council

[2020] NSWSC 1847

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 16 December 2020

CIVIL PROCEDURE – pleadings – application for leave to amend List Statement – construction contract – misleading or deceptive conduct – proposed plea that had representations not been made, plaintiff would have submitted higher tender and that "if" defendant accepted that tender plaintiff would have entered contract with a higher price – no allegation as to whether defendant would have accepted the higher tender – whether pleading maintainable

CIVIL PROCEDURE – pleadings – application for leave to amend List Statement – construction contract – proposed pleading that the matters represented were terms of the contract or that contract should be rectified to include such term

Facts:

Boulus Constructions Pty Ltd ('**the Plaintiff'**) entered into a contract with Warrumbungle Shire Council ('**the Defendant'**) to construct retirement units, a community centre and a learning centre for a lump sum of $6.87 million.

At the direction's hearings, the Plaintiff submitted proposed amendments to its Technology and Construction List statement, including the representations as follows:

1. An asbestos certificate (that is, a certificate that the site had been cleared of asbestos) could be supplied to Boulus;
2. Piles of concrete and rubble on the site could be used for road base and construction fill (that is, would be clear of asbestos); and
3. Soil removed from excavation of the footings could also be used on the site (that is, were also clear of asbestos).

The Plaintiff submitted a tender ('**Counterfactual Tender**') on the basis that had the above representations not been made, the Plaintiff would, in effect, have priced the additional service of asbestos removal to arrive at a higher price.

If the Defendant had accepted the Counterfactual Tender, the Plaintiff would have entered into a contract ('**Counterfactual Contract'**) with them based on that tender. Had the Defendant not accepted the Counterfactual tender, there would have been no contract.

The Plaintiff also sought to allege that the Representations became express terms of the contract or, alternatively, that the contract should be rectified to include them.

Therefore, the Plaintiff claimed damages for breach of the Contract and for misleading or deceptive conduct.

<u>Issue of ‘Hypothetical Transaction case’</u>

Justice Stevenson held that in any event, the Plaintiff’s proposed pleading is not of a “different” or “better” transaction case. What is proposed to be pleaded is, in effect, a “hypothetical transaction case”, which is a case assuming that the Council would have accepted the Counterfactual Tender. As the Plaintiff is not in a position to plead that the Defendant would have accepted the Counterfactual Tender, the Plaintiff cannot hedge its bets by pleading what it would have done “if” the Defendant had done so. Therefore, the court was not prepared to permit the Plaintiff to plead its case in this speculative fashion.

Decision

The Court proposed to grant leave to the Plaintiff to amend its List Statement by pleading that the Representations should be express terms of the contract. The Court however refused to grant the Plaintiff leave in amending its List Statement in relation to including the Representations.

The Plaintiff was ordered to pay the Defendant’s costs thrown away by the amendment. The court also noted that if the Plaintiff wanted to propound any further amendment to its List Statement, they should do so by Notice of Motion filed in the usual way, supported by an affidavit explaining why any further application to amend should be entertained.

Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305

[2020] NSWCA 327

Coram: White JA, Emmett AJA, Simpson AJA

Court: New South Wales Court of Appeal

Date: 15 December 2020

ADMINISTRATIVE LAW – Jurisdiction – Civil and Administrative Tribunal – whether the Tribunal has jurisdiction to review an occupation certificate whilst exercising its jurisdiction under the *Home Building Act 1989* (NSW) – whether review of the occupation certificate collateral to the proceedings – capacity of the Tribunal to engage in collateral review of administrative action – where statutory scheme provides Land and Environment Court jurisdiction to remedy or restrain a breach of the *Environmental Planning and Assessment Act 1979* (NSW)

BUILDING AND CONSTRUCTION – Occupation Certificate – whether document purporting to be an interim occupation certificate authorised use and occupation of the whole of the building – where running of limitation period for breach of a statutory warranty under the *Home Building Act* contingent on such authorisation – whether occupation certificate issued in contravention of s 109H(2) of the *Environmental Planning and Assessment Act* invalid

Facts:

These proceedings concerned works performed in the erection of a residential building containing 18 units. In substance, the issue was whether two purported interim occupation certificates authorised the use and occupation of the whole of the building. If so, the limitation period under the *Home Building Act 1989* (NSW) (‘**HBA’**) would have expired before the proceedings commenced. The interim occupation certificates were issued in breach of a legislative provision governing the issue of such certificates – s 109H(2) of the *Environmental Planning and Assessment Act 1979* (NSW) – and in circumstances where the certificates did not satisfy the definition of an interim occupation certificate under that Act (s 109H(1)(a)).

First Instance

The applicant sought leave to appeal from orders of an Appeal Panel of NCAT that affirmed a decision of the Tribunal *dismissing* an application for an order that a claim for breach of statutory warranties brought by the respondent was commenced out of time.

Decision:

White JA (with whom Emmett and Simpson AJA agreed) dismissed the appeal and held that as the purported interim occupation certificates did not satisfy the definition of such a certificate, they could not authorise the use and occupation of the whole of the building for the purpose of the running of the limitation period under the HBA. The Court did not need to resolve the question in those circumstances of whether the issuing of an occupation certificate in breach of s 109H(2) resulted in the invalidity of the certificate.

There was also a further discussion by the Court of a number of issues concerning the capacity of the Tribunal to engage in a review of the occupation certificates and the jurisdiction of the Tribunal generally in such cases.

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd (No 2)

[2020] NSWSC 1788

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 11 December 2020

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payments Act 1999 (NSW) – adjudication – final relief – where error found in failing to form a view as to what was properly payable in respect of one variation – whether determination should be quashed – whether error sufficiently material to be properly characterised as a jurisdictional error – held determination not infected by jurisdictional error

Facts:

Acciona Infrastructure Australia Pty Ltd ('**the Respondent**') sought to quash an adjudication determination made in favour of Chess Engineering Pty Ltd ('**the Claimant**') in the amount of $640,593.69 on the basis that there was a jurisdictional error in the determination. This error was made on the grounds that the adjudicator failed to fulfil his function under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**SOP Act**'). The Respondent contended that the adjudicator denied them procedural fairness by not considering aspects of their payment schedule and submissions, as well as failing to form a view as to what was properly payable for variation claims, as required under s 22(2) of the SOP Act.

The Court deferred making final orders to allow submissions to be made regarding the appropriate orders that should be made. The issues raised by such submissions were:

- Whether the determination should be quashed as it was infected by jurisdictional error;
- What orders should be made in relation to the money paid into Court together with the accrued interest; and
- What costs order should be made.

Decision:

The Court concluded that the Determination should not be quashed for jurisdictional error and held that:

1. The Plaintiff's summons be dismissed with costs;
2. The money paid into Court by the Plaintiff, together with any interest, be paid to the first defendant; and
3. The plaintiff to pay the first defendant's costs as agreed or assessed.

Ericon Buildings Pty Limited v The Owners Strata Plan No 96597

[2020] NSWCATAP 265

Coram: T Simon (Principal Member), D Fairlie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal

Date: 11 December 2020

APPEAL - HOME BUILDING - ancillary order - offer of consent judgment - Tribunal's discretion

Facts:

These proceedings concerned an internal appeal against a decision made in the Consumer and Commercial Division of the Tribunal. The builder, Ericon Buildings Pty Ltd, and the developer, Sundale Developments Pty Ltd (together, '**builders**') constructed and developed an eight-storey block of units. The Owners Corporation of Strata Plan No 96597 ('**owners corporation**') commenced proceedings in NCAT against the builders seeking damages and/or a work order under the *Home Building Act 1989* (NSW) ('**HBA'**) in relation to alleged defects.

The builders' solicitors forwarded NCAT and the owners corporation's solicitors proposed orders, offering to pay the owners corporation $500,000 plus costs, with no admission of liability (**Proposed Orders**). The owners corporation's solicitors responded, indicating the owners corporation:

- Did not consent to the Proposed Orders; and
- Intended to lodge an application to transfer the proceedings to the Supreme Court, due to:
    1. The high likelihood of the quantum of damages exceeding the building claim damages cap to NCAT's jurisdiction of $500,000 (under section 48K of the HBA); and
    2. The availability of relief under the *Design and Building Practitioners Act 2020* (NSW).

On 16 September 2020, NCAT made procedural orders in chambers, including setting out a timetable:

- For the owners corporation to lodge a transfer application;

- For the builders to file their consent or opposition to the application; and
- The dates for a contested hearing (if applicable) to be heard (NCAT Orders).

The Appeal

Rather than contesting the transfer application directly, the builders appealed the NCAT Orders to the appeal panel, alleging NCAT had erred on a point of law. The builder's argument was set out as follows:

1. *Primary ground of appeal*: the NCAT orders effectively rejected the Proposed Orders and in doing so, NCAT either exercised a discretion it did not possess or erred in exercising its discretion;
2. *Further ground of appeal 1*: NCAT's exercise of discretion miscarried because in the builders' Proposed Orders they consented to orders against them providing the maximum sum recoverable ($500,000) as damages;
3. *Further ground of appeal 2:* The Proposed Orders constituted a tender and NCAT either had no discretion to refuse them or erred in exercising discretion to reject them.

Decision:

The Appeal Panel refused leave to appeal and alternatively decided that the appeal was dismissed.

The Appeal Panel first considered whether the builders should have brought the proceedings under section 80(2)(a) of the NCAT Act concerning interlocutory decisions (and requiring leave to appeal) rather than section 80(2)(b) concerning ancillary decisions (and not requiring leave to appeal). The Appeal Panel determined that leave was required under section 80(2)(a) and refused to grant leave.

Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd

[2020] NSWSC 1702

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 30 November 2020

BUILDING AND CONSTRUCTION – whether adjudication determination under the Building and Construction Industry Security of Payment Act 1989 should be quashed – reference date – whether cl 4.1 of the construction contract was one by or in accordance with which the date for a progress claim was determined – whether term expressly nominates the date by which the claim may be made – whether s8(2)(a) of the Building and Construction Industry Security of Payment Act 1999 enlivened

Facts:

Waco Kwikform Ltd (**'the Plaintiff'**) sought to challenge an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) that it pay $301,856.36 to Complete Access Scaffolding (NSW) Pty Ltd (**'the Defendant'**). The basis of the challenge to the determination was that the relevant payment claim was not a valid claim, as there was no reference date. This question turned on whether or not the construction contract between the parties made express provision to the date on which a claim for a progress payment may be made, in reference to s 8(2)(a) of the Act.

Decision:

Stevenson J concluded there was a reference date for the purpose of the determination, and it follows that the challenge to the Determination fails. Therefore, summons was dismissed with costs and Plaintiff was ordered pay to the Defendant moneys paid into Court.

Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd

[2020] NSWCA 303

Coram: Leeming JA, White JA and Emmett AJA

Court: New South Wales Court of Appeal

Date: 25 November 2020

BUILDING AND CONSTRUCTION – limitation period – limitation period for actions arising out of defective building work more than ten years after completion of work – limitation period originally contained in s 109ZK of *Environmental Planning and Assessment Act 1979* – section renumbered as s 6.20 – as originally enacted, s 109ZK applied only prospectively – defendant's building work done before enactment of s 109ZK – whether limitation period applied to building work done before section enacted – whether s 6.20 replaced s 109ZK – whether limitation period applied to loss of the kind alleged by the plaintiff.

STATUTORY CONSTRUCTION – amending legislation – limitation section renumbered and reworded – transitional and savings regulations – regulations deferred commencement and qualified scope of limitation period – effect of repeal of regulation – further regulations including amended regulations preserving repealed sections and qualifying renumbered section – whether effect of legislation and amendment was a period of time during which limitation period did not apply – whether legislation displaced operation of *Interpretation Act 1987* – observations on undesirability of regulations affecting operation of statute.

Facts:

Sydney Capitol Hotels Pty Ltd (**'the Plaintiff**) occupied a building where a fire broke out, activating a sprinkler system, which caused property damage and consequential loss to the Plaintiff. The fire was alleged to have been caused by defective building work performed by Bandelle Pty Ltd (**'the Defendant'**) on the exhaust system, which allowed smoke to enter the hotel.

First Instance

At trial, the Plaintiff claimed that the Defendant had breached their duty of care to avoid the risk of harm to the Plaintiff in carrying out the building work.

The Defendant argued that the Plaintiff was time-barred by s 6.20 of the *Environmental Planning and Assessment Act 1979* ('**EPA Act'**), because they had brought their claim more than 10 years after the completion of the work. The Court was asked to determine whether this defence was available.

They key issue for determination was whether, on the proper construction of the s 6.20 of the EPA Act, the loss or damage suffered by the Plaintiff arose “out of or in connection with defective building work”. The Plaintiff argued that s 6.20 should be construed narrowly so as to only regulate the relationship between contracting parties, and not parties who are only "*accidentally, incidentally or indirectly*" affected by the defective building works (Australian Rail and Dinov cases).

While the trial judge considered that the natural and ordinary meaning of s 6.20 of the EPA act would capture the Plaintiff’s claim, he reached a different conclusion that was consistent with the outcome of two previous decisions. Accordingly, his Honour held that s 6.20 of the EPA Act did not apply on the facts because the Plaintiff was a mere occupier of a part of the building, and the damage was only caused by the building work in an “accidental, incidental or indirect sense”.

The Appeal

The Defendant in the primary proceedings sought leave to appeal from that judgement. The Court of Appeal granted the appeal and unanimously agreed with the trial judge, in that, the Plaintiff’s claim fell within the natural and ordinary meaning of s 6.20 of the EPA Act. However, the Court of Appeal did not agree on the earlier decisions required by the trial to depart from the natural and ordinary meaning of the Act.

Accordingly, it did not matter that the Plaintiff’s claim was for property damage, rather than pure economic loss, or that the Plaintiff initially suffered loss after the expiry of the 10 year long-stop limitation period. If s 6.20 – or its predecessor, s 109ZK – otherwise applied to the Plaintiff’s claim, then it would operate to bar the claim. This conclusion required the Court to grapple with complex legislative history as:

- The building work was completed in 1997;
- When originally enacted in 1998; the limitation provision did not apply to the building work carried out under a development consent issues prior to this time; and
- It was unclear whether this application of the limitation period carried through to s 6.20.

Although the issue split the Court of Appeal, Leeming and White JJA held that s 6.20 applied to all building work, irrespective of when development consent was issued. It was also unanimously held that, despite some complexities in the timing of the repeal of the predecessor legislation, there was no gap when neither provision applied. Therefore, the Court of Appeal overruled the primary Supreme Court decision and held that the Plaintiff’s claim was barred by s 6.20. Ordered the Defendant to pay the Plaintiff’s costs.

Hewatt Pty Ltd v Orange City Council

[2020] NSWSC 1662

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 23 November 2020

CIVIL PROCEDURE – separate question – whether there should be a separate determination of the merits of the plaintiff's claim under the Building and Construction Industry Security of Payment Act

BUILDING AND CONSTRUCTION – whether by reason of s 16(4) of the Building and Construction Industry Security of Payment Act the defendant would not be able to bring a cross claim against the plaintiff

Facts:

Hewatt Pty Ltd (**'the Plaintiff'**) and Orange City Council (**'the Defendant'**) entered into an agreement that the Plaintiff carry out works relating to the Defendant's expansion of the Orange City Airport. Following the Plaintiff's entry into voluntary administration less than a year later, the Defendant terminated the agreement. Once out of administration, the Plaintiff sought judgement for a nominated sum on the basis of its service of payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**'the Act'**) and alternatively damages for contractual breach (or on *quantum meruit*).

The Court heard argument in relation to the Defendant's application for an order under *Uniform Civil Procedure Rules 2005* (NSW) that, in substance, there be a separate determination of the merits of the Plaintiff's claim under the Act

The separate question sought was whether a tax invoice was a valid payment claim for the purposes of s 13 under the Act, because:

a) There was no reference date for the claim; and/or
b) The claim did not state that it was made under the Act as) required at the time.

The Court also had to determine whether, by reason of s 16(4) of the Act, the Defendant would be able to bring a cross claim against the Plaintiff.

Decision:

The Court held that it was not appropriate that there be a separate question as no answer to the question will dispose of the proceedings, and accordingly, held that the Defendant's notice of motion be dismissed.

Rawson Homes Pty Ltd v Allianz Australia Insurance Limited

[2020] NSWSC 1654

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 20 November 2020

INSURANCE – annual construction insurance policy – where hailstorm caused damage to residential development being constructed by plaintiff – whether one deductible payable for plaintiff's claim for cover or whether a deductible is payable in respect of each building works contract – meaning of "one event" and "claim" – held that hailstorm was the one event that gave rise to the plaintiff's claim and one deductible payable

INSURANCE – calculation of interest under s 57 of the Insurance Contracts Act 1984 (Cth) – where defendant rejected plaintiff's claim for cover to replace damaged tiled roofs until second day of hearing – date from which it was unreasonable for defendant to withhold payment – held that 13 month period to investigate claim and determine position was reasonable and interest payable from 29 March 2018

Facts:

These proceedings concerned a severe hailstorm passing through Sydney that caused damage to 122 roofs, part of a residential development, that was being constructed by Rawson Homes Pty Ltd (**'the Plaintiff'**). The Plaintiff seeks orders for Allianz Australia Insurance Limited (**'the Defendant'**) to fully indemnify them for the losses sustained under an Allianz Construction Annual Policy (**'the Policy'**) issued to the Plaintiff.

The main issues before the Court was:

1. Whether the indemnity under the Policy covered the cost of replacing the tiled roofs, or whether it's limited to the costs of simply repairing parts of the roofs ('**repair vs replace issue'**)
2. How the deductible is to be applied, relating to the construction of the terms of the Policy; and
3. Whether interest should be paid by the Defendant to the Plaintiff, pursuant to the *Insurance Contracts Act 1984* (Cth), in respect to the amount payable for the repair vs replace issue, and from which date.

Although the parties managed to resolve the repair vs replace issue between themselves, the second and third issues remained in dispute and required determination by the Court.

In respect to the second issue, the Plaintiff submitted that only one deductible of $10,000 applied to its claim for indemnity for losses to all 122 houses because, on proper construction of the Policy, one deductible is payable for all claims arising from the one event, which in this case, was the hailstorm. Alternatively, the Defendant submitted that the Policy, once properly construed, provides for a deductible to be applied to each of the 122 houses, as the deductible is payable for each claim made in relation to the Insurance Contract – and the Plaintiff made 122 claims for indemnity.

In respect to the third issue, the Plaintiff submitted that the interest should run from the date that Allianz determined to pay the second sum in answer to the claim, as by then, the Defendant had a reasonable period to investigate and assess the claim. Alternatively, the Defendant's second submission was that the materials provided by the Plaintiff in support of its claim for indemnity was insufficient and that, as a consequence, it was reasonable for the Defendant to have withheld payment and resisted the claim until it had an opportunity to consider evidence.

Decision:

Justice Henry held in favour of the Plaintiff with respect to both the second and third issues, and ordered:

1. Judgment for the plaintiff in the sum of $1,400,678 (**'judgment amount'**).
2. Unless a party makes an application in relation to the interest calculation within seven days, the defendant to pay the plaintiff interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on the judgment amount:
    a. in the sum of $158,401.38 for the period from 29 March 2018 to 18 August 2020; and
    b. at a daily rate of $182.28 from 19 August 2020 to the date of payment of the judgment amount.
3. Unless a party makes an application for a different costs order within seven days, the defendant to pay the plaintiff's costs of the proceedings.

CPB Contractors Pty Limited v Heyday5 Pty Limited

[2020] NSWSC 1625

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 16 November 2020

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) ss 22(2), (3), (5) – An adjudication determination upheld a claim for a variation of a building contract consisting of a direction by a head contractor to a sub-contractor to provide spotters for mobile elevated work platforms – Challenge to the determination on the grounds that it discloses no evident or intelligible justification for upholding the claim and that the adjudicator denied the plaintiffs procedural fairness because he found them on bases not the subject of submission duly made – HELD – Challenges not made out – Importance of recognising that adjudicators' determinations are not judgments of a court, that the procedural behaviour of adjudicators and determinations should not be examined with an overcritical or pedantic eye but should be viewed with common sense and without undue legality and should not be scrutinised with a fine-tooth comb approach.

Facts:

CPB Contractors Pty Ltd, Dragados Australia Pty Ltd and Samsung C & T Corporation (operating as a joint venture, '**CDSJV'**) commenced proceedings to challenge an adjudication determination made under *the Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act'**). CDSJV is a joint venture which had the contract for the WestConnex project, including the construction of roads, a tunnel and other physical works. In the contract between the parties, CDSJV retained Heyday5 Pty Ltd (**Heyday**) to do electrical installations works on the project, requiring the use of mobile elevated work platforms (**MEWPs**).

Adjudication Determination

The adjudication determination required CDSJV to pay Heyday $13,153,289.098 (exl. GST) under the provisions of the Act. Part of the total adjudicated amount was determined to be owing to Heyday for the provisions of 'spotters', whose function is to monitor the operation of MEWPs. This was referred to as the **Spotters claim**, where the issue was whether spotters were needed when MEWPs were stationary.

Challenge of Determination

CDSJV's challenge to the Determination is directed exclusively to the Spotters Claim, on the grounds that:

1. The Determination discloses no evident or intelligible justification for upholding the Spotters Claim; and
2. The Adjudicator denied it procedural fairness because he found against it on the bases not the subject of submissions duly made.

Decision:

Justice Hammerschlag held that neither ground raised by CDSJV could be established and the challenge of Determination therefore fails. The Court also made orders for the Plaintiffs (CDSJV) to pay the Defendants (Heyday) costs.

Maygood Australia Pty Ltd v The Owners – Strata Plan No 85338

[2020] NSWCATAP 237

Coram: G Blake AM SC, D Robertson (Senior Members)

Court: New South Wales Civil and Administrative Tribunal

Date: 16 November 2020

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Building dispute – Tribunal powers – Whether the Tribunal had jurisdiction to determine an application which had been accepted despite the absence of an investigation by Fair Trading NSW or a direction by the President

PRACTICE AND PROCEDURE – Whether it was an error of law for the Tribunal to refuse a party leave to amend its Points of Defence at the final hearing

Facts:

Maygood Pty Ltd (‘**the Appellant’**), developers of the Strata plan, appealed against a decision of the Tribunal by which it was ordered to pay the sum of $71,742.71 to The Owners – Strata Plan No 85338 (‘**the Respondent**’) in respect to what was found to be defective building work carried out in breach of s 18B of the *Home Building Act 1989* (NSW) (‘**HBA**’).

The primary issue in these proceedings was whether the Tribunal had jurisdiction to determine an application which had been accepted by the Tribunal’s registry despite the absence of an investigation by Fair Trading NSW or a direction by the President as required by section 48J of the *HBA.*

The Appeal

In written submissions, the appellant summarised its grounds of appeal as follows:

1. The Tribunal did not have jurisdiction to hear and determine the application because the Owners did not comply with the requirements of s 48J of the HBA;
2. The Tribunal erred in law by refusing to permit Maygood to amend its pleading and rely on a second affidavit from its director (Mr Koo);
3. The Tribunal made an error of law in finding that Maygood was liable to pay the cost of retiling the balcony when there was no evidence to support that finding;
4. The Tribunal’s finding that Maygood was liable to pay the cost of retiling the balcony was against the weight of evidence;

5. The Tribunal erred in its calculation of compensation to be paid for the retiling of the balcony [as noted, this ground was conceded by the respondent];
6. The Tribunal made an error on a question of law and/or alternatively made a finding against the weight of evidence in making an award of damages in respect of the fire dampers.

Decision:

The Tribunal held that all grounds of appeal, other than Ground 5, have failed and concluded:

1. Appeal allowed in part.
2. Vary Order 1 of the orders made on 16 December 2019 to read: “In application HB17/51531 the respondent is ordered to pay the applicant $66,581.51 …”
3. Leave to appeal is refused.
4. The appeal is otherwise dismissed.

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd

[2020] NSWSC 1588

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 11 November 2020

BUILDING AND CONSTRUCTION – whether adjudication determination under the Building and Construction Industry Security of Payment Act 1999 should be quashed – the mining exception in the Act – whether contract between the parties was a construction contract – whether work called for by contract was for tunnelling or boring or the constructing of underground words for the purpose of extraction of minerals – whether any work called for under the contract was construction work

BUILDING AND CONSTRUCTION – whether adjudication determination under the Building and Construction Industry Security of Payment Act 1989 should be quashed – reference dates – whether payment claim served before a reference date arose – whether there was an available reference date

Facts:

Cadia Holdings Pty Ltd (**'the Plaintiff'**), a wholly owned subsidiary of Newcrest Mining Ltd, operates an underground panel cave mine (**'the Mine'**) which is the largest underground mine in Australia. The Plaintiff and Downer EDI Mining Pty Ltd ('**the Defendant'**) entered into a contract for the provision of lateral development works at the mine.

Adjudication Determination

Under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**the Act**"), an adjudicator determined that the Plaintiff pay the Defendant $1,017,741.72.

Supreme Court Proceedings

The Plaintiff sought to challenge the adjudication determination on two bases:

1. The Contract was not a "construction contract" for the purposes of the Act. The basis on which this contention is advanced is that the work performed by the Defendant under the Contract was not construction work within the meaning of the Act, by reason of the Mining Exception (s 5(2)(b) of the Act). The Mining Exception sets out that work is not construction work if it is for the extraction of minerals, or if it involved tunnelling, boring or construction work for that purpose.
2. The payment claim that the Defendant served on the Plaintiff was not in respect to an available reference date pursuant to the s 13 and 8 of the Act.

Decision

Justice Stevenson held that:

1. As the Contract called for some work which was "construction work" within the meaning of s 5 of the Act, the contract as a whole was a construction contraction for the purpose of the Act. Further, the Mining Exception is not engaged because the work called for by the Contract was not for the purpose of extraction of minerals. Justice Stevenson also concluded that the Mining Exception should be construed narrowly.
2. At the time of the Defendant serving the payment claim, there was an available reference date.

Therefore, the Plaintiff's challenge to the adjudicator's determination failed, and summons were dismissed.

Ashton v Stevenson; Stevenson v Ashton

[2020] NSWCATAP 233

Coram: M Harrowell (Deputy President), T Simon (Principal Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 9 November 2020

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – major defect – major element – caused or likely to cause the inability to inhabit the building or part of the building or the destruction of the building or part of the building or a threat of collapse of the building or part of the building. – meaning of waterproofing – evidence relevant to determination of whether defect likely to cause prescribed consequences

APPEALS – leave to appeal – substantial miscarriage of justice – new evidence following completion of work subsequent to determination of claim

Facts:

These proceedings related to a long running dispute concerning residential building work in respect to a Darlinghurst property.

Ms Ashton (‘**the Respondent**’ in appeal) had carried out renovation work to the property pursuant to an owner-builder permit issues under the *Home Building Act 1989* (NSW) (‘**HBA’**). Following completion on the works, Ms Ashton sold the property to Mr Stevenson (‘**the Appellant’** in appeal). Consequentially, Mr Stevenson had become immediate successor in title to Ms Ashton, within the meaning of s 18C of the HBA, and therefore obtained the benefit of statutory warranties in respect of the building works.

Mr Stevenson had asserted that the roof of the property was leaking. Following enquiries with Ms Ashton as to who the builder was, Mr Stevenson sought for Ms Ashton to rectify the alleged defects, as she was the holder of an owner-builder permit.

First Instance

Mr Stevenson filed an application in NCAT claiming compensation for breach of the statutory warranty said to arise from the allegedly leaking roof. The claim at this time was for $34,000 but was subsequently amended to seek compensation for further defects amounting to approximately $272,000 with respect to balcony, plumbing and cladding issues. In these proceedings, Mr Stevenson was awarded compensation in the sum of around $42,000.

Original Appeal Proceedings:

Mr Stevenson and Ms Ashton each appealed the Tribunal's initial decision. In effect, Mr Stevenson's claim was dismissed as the Appeal Panel determined that there were no major defect and the limitation of 2 years for non-major defects had expired. Subsequently, the tribunal made orders requiring Mr Stevenson to pay Ms Ashton's costs of the appeal.

Supreme Court Proceedings:

The Supreme Court granted Mr Stevenson leave to appeal on questions of law and allowed the appeal on two grounds. Firstly, the Supreme Court determined the Appeal Panel's conclusions in respect to the operation of s 18E(4) of the HBA reveal clear errors of law. Secondly, the Court considered the Appeal Panel's conclusions in respect to the operation of s 3B of the HBA, and when the works were completed. The Supreme Court remitted both of these issues in questions to the Appeal Panel for determination according to law.

Issues on remittal and hearing of the appeal

The Supreme Court set aside the orders and costs orders of the Appeal Panel in its principal decision remitted the proceedings for rehearing. The partied filed written submissions in respect to the issues for determination on remittal.

The issues raised by Mr Stevenson in written submissions included:

1. What was the date of completion?
2. Whether the defects in connection with balcony, roofing, plumbing (basin overflow, rear terrace drainage and sewer surcharge) and cladding were major defects?
3. Whether the Tribunal was correct in its assessment of damages having regard to its analysis of quotations?
4. Should the Appeal Panel permit fresh evidence as to the costs actually incurred in carrying out rectification work subsequently to the original hearing and, if so, what award for damages should be made?

Decision:

The Appeal Panel made the following orders:

1. Mr Stevenson's leave to appeal was granted in respect of the decision concerning the rear terrace drainage defect.
2. The rectification costs for the rear terrace drainage defect to be assessed by the Appeal Panel following further submissions on quantum from the parties and final orders made in respect to these costs
3. Ms Aston's leave to appeal is refused and the appeal is dismissed.

HSL Group Pty Ltd v Department of Finance, Services and Innovation

[2020] NSWCATOD 125

Coram: A Britton (Principal Member)

Court: New South Wales Civil and Administrative Tribunal Occupational Division

Date: 30 October 2020

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Improper conduct — Disciplinary action

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Authority — Fit and proper person

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Insurance — Residential building work not carried out under a contract — whether offence under s 92 of the Home Building Act 1989 (NSW) is an offence of strict liability

Facts:

These proceedings concerned a series of false or misleading statements from HSL Group Pty Ltd (‘**HSL’**) and HSL’s sole director Mr Ibrahim, to their insurer, Insurance and Care NSW (‘**iCare**’). It was further alleged that HSL and Mr Ibrahim undertook residential building work with respect to three townhouses at three different sites in Sydney without a contract of insurance as required by the *Home Building Act 1989* (NSW) (‘**HBA**’).

Commissioner’s Decision:

In a decision made by the Commissioner for Fair Trading, it was found that HSL is not a fit and proper person to hold a contractor license and is guilty of improper conduct under the HBA. The Commissioner also found that Mr Ibrahim is not a fit a proper person to hold a supervision certificate and is also guilty of improper conduct under the HBA. It was therefore decided that HSL’s contractor licence and Mr Ibrahim’s supervising certificate was to be cancelled for two years in disqualifying both parties from holding an authority under the HBA.

Administrative Review by Tribunal

HSL and Mr Ibrahim exercised their right to seek administrative review of the Review Decisions. The issues of the decision under review is as follows:

1. Did HSL and Mr Ibrahim contravene s 103EA of the Act (knowingly making a false or misleading in connection with an application to a licensed insurer for insurance under

Part 6 of the Act), and as a consequence, are the parties guilty of improper conduct within the meaning of s 51(1)(a).

2. Did HSL contraven s 92 of the Act (doing residential building work without a complying contract of insurance), and, as consequence, are the parties guilty of improper conduct within the meaning of s 51(1)(a);
3. If HSL did contravene s 92 of the Act, is Mr Ibrahim guilty of improper conduct pursuant to s 53(1) of the Act;
4. Did Mr Ibrahim knowingly sign two statutory declarations containing false and misleading statements in relation to an application made to iCare for the cancellation of insurance at Bangalla Avenue;
5. Is HSL a fit and proper person to hold a contractor licence; and
6. Is Mr Ibrahim a fit and proper person to hold a supervisor certificate.

Did Mr Ibrahim make false statements "in connection with an application for insurance"?

It was agreed that in the applications for insurance for Junction Road and in the application for insurance for Bangalla Avenue, Mr Ibrahim made false statements in relation to the commencement and completion dates of the subject works and the date on which the contract for that work was signed. He knew those statements to be false and those statements were material. The parties also agreed that HSL and Mr Ibrahim contravened s 103EA of the HBA and is consequentially each guilty of improper conduct. However, Mr Ibrahim's actions in making those statements are nonetheless relevant to the question of whether he is a fit and proper person to hold an authority.

Did HSL contravene s 92 of the Act by doing residential building work without a complying certificate of insurance?

HSL undertook residential building work at each subject site without a complying certificate of insurance. In the case of Junction Road, iCare did not issue a complying certificate of insurance until after the work was complete. In the case of Bangalla Avenue, the work was at least 60% complete when iCare issued a complying certificate of insurance. In the case of Alfred Road, work had been underway for about three weeks when HSL ceased work on that site. The Commissioner's initial decision contended that s 92 created an offence of strict liability. HSL disagrees and contended that it could rely on the defence of reasonable and honest mistake. However, the Tribunal was not satisfied that the honest and reasonable mistake defence was available to HSL.

Is HSL and/or Mr Ibrahim a fit and proper person to hold an authority?

The Tribunal accepted that Mr Ibrahim demonstrated ignorance of several key statutory obligations imposed on authority holders and an inability to comply with those obligations, including issuing a complying certificate of insurance. It was found that this lack of necessary knowledge and skills to discharge an obligation evidenced that Mr Ibrahim was not a proper person to hold an authority. However, the most difficult question put the the Tribunal is whether Mr Ibrahim was fit to hold an authority at the time and in the sense of his future dealings with iCare. Several factors in favour of finding that Mr Ibrahim was fit to hold an authority included:

1. Mr Ibrahim's frank admissions made during the interview with Fair Trading in September 2019 and his candour in his subsequent dealings with Fair Trading, iCare and the Tribunal.
2. The fact that the impugned statements were made over a relatively short period.
3. The likelihood that when he made those statements, Mr Ibrahim was emotionally distressed.
4. The absence of any evidence to suggest that Mr Ibrahim had previously engaged in conduct of that type.
5. Mr Ibrahim's expression of remorse for his actions

However, despite these favourable considerations made, the Tribunal remained troubled by Mr Ibrahim's actions in *repeatedly* making false statements to iCare and fair Trading

Decision

The Tribunal decided to affirm the decisions to cancel the authorities held by HSL and Mr Ibrahim, but to *reduce* the disqualification period from 24 months to six months.

Deane Projects Building Pty Ltd v Kinda Kapers Holdings Pty Ltd

[2020] NSWDC 622

Coram: Abadee J

Court: District Court of New South Wales

Date: 19 October 2020

CONTRACTS – building and construction – variation claims – whether provision for variations was itself varied – whether implied term incorporated through prior course of dealing – alleged defective works – whether owner's claim limited in time – whether claimed defects appeared during defects liability period – whether builder liable for "design defects" in commercial contract for construction

DAMAGES – claim for rectification costs for defective works – whether owner intended to rectify – whether proposed works reasonable

PRACTICE AND PROCEDURE – building disputes – building experts – conflicting evidence about defects and scope of rectification works – desirability of practitioners ensuring building experts confer and jointly produce report prior to hearing

Facts:

These proceedings concerned the construction of renovation works undertaken in connection to a child-care centre, operated by the owner, Kinder Kapers Holdings Pty Ltd ('**the Defendant'**). The works concerned two buildings and was carried out under a standard contract for commercial construction. Deane Projects Building Pty Ltd ('**the Plaintiff**') issued 13 progress claims; the first 11 were paid by the defendant. Progress claim 12, which concerned money retained by the defendant pending rectification of defective work, was paid, but only belatedly. Progress claim 13, comprising of 15 alleged variations, was not paid at all. The plaintiff contended that its entitlement to variations was sourced not only in express terms under the written contract, but also partly impliedly by a course of prior dealing.

The plaintiff claims the sum of approximately $250,000 from the defendant. Broken down, the plaintiff's claim is principally made up of:

- Progress claim 13 (for a sum of approximately $180,000);
- Interest on the delayed payment of progress claim 12;
- Interest on progress claim 13;
- A mark-up on the progress claim 13;
- A separate mark-up on landscaping; and
- A component for GST

The plaintiff brings its claim principally in contract. In the alternative, a claim is brought on a *quantum meruit*.

The defendant partly accepted progress claim 13, but only to the extent of certain variations, and therefore denied liability of certain variations. Further, the defendant argued that the only basis of variations to be claimed was under express terms of the contract. Accordingly, the disputed variations would be invalid as certain prescribed procedures were not observed. The defendant nevertheless accepts that were the variations are established, the plaintiff is entitled to interest on the claim and a mark-up on the amount.

Decision

The Court accepted some of the contested variations claimed by the plaintiff, whilst also rejecting the remaining contested variations. It was found that the plaintiff is entitled to interest and the claimed profit margin on progress claim 12 and, to the extent variations have been found, interest and the claimed profit margin on progress claim 13. The plaintiff is also entitled to a profit margin in relation to the Landscaping and finally GST on some components.

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd

[2020] NSWSC 1423

Coram: Henry J

Court: New South Wales Supreme Court

Date: 16 October 2020

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payments Act 1999 (NSW) – adjudication – judicial review – whether adjudicator failed to perform statutory function and denied plaintiff procedural fairness by failing to consider payment schedule and adjudication response submissions – whether adjudicator failed to form a view as to what was properly payable on the merits of the defendant's claim – whether adjudicator misconstrued s 20(2B) of the Act – error in failing to form a view as to what was properly payable found in respect of one variation

Facts:

Acciona Infrastructure Australia Pty Ltd ('**the Plaintiff**') and Chess Engineering Pty Ltd ('**the first Defendant'**) entered into a contract under which the first defendant agreed to supply and install anti-throw screens and related components for a pedestrian bridge on Anzac Parade as part of the Sydney Light Rail Project for a contract sum of $1,244,500.00 ('**sub-contract'**).

The plaintiff sought to set aside an adjudication determination made by the Adjudicator ('**the second Defendant**') in favour of the first defendant under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the SOP Act**'). This determination related to a payment claim issued by the first defendant for $1,302,097.27 (excluding GST). The adjudicated amount determined by the second defendant was $640,593.69 (excluding GST).

The plaintiff contended that the determination was liable to be set aside because the second defendant failed to fulfil his statutory function under the SOP Act and denied it procedural fairness by not considering aspects of its payments schedule and submissions. The plaintiff raised five grounds of challenge to the determination, as follows:

1. The second defendant failed in his statutory duty to consider the Payment Schedule as required by s 22(2)(d) in respect of two variations;
2. The second defendant failed to properly consider the Adjudication Response submissions that were duly made in support of the Payment Schedule in respect of four variations;

3. The second defendant failed to afford the Plaintiff procedural fairness by failing to properly consider its Payment Schedule in relation to variations;
4. The second defendant failed to afford the Plaintiff procedural fairness by failing to properly consider its Payment Schedule;
5. The second defendant failed to form a view as to what was properly payable to the first defendant as he did not undertake any reasonable assessment of its claims and simply rejected the scheduled amounts; and
6. The second defendant misconstrued the operation of s 20(2B) of the SPP Act.

The first defendant contested this and submitted that the second defendant did not fail to consider or determine matters as required. The first defendant also submitted that any errors he made were within jurisdiction and did not involve any denial of procedural fairness.

Decision:

The Court found that the second defendant went beyond jurisdiction only in respect to one variation of 18. Therefore, the plaintiff's submissions – that there had been a pattern of dealing with disputes by the second defendant that reflected an overall failure by him to discharge his obligations under the SOP Act – was not accepted. As to the issues of costs, both parties had some success. However, it appeared that any cost order should reflect that the weight of the Court's findings was in favour of the first defendant.

ACN 057 690 034 Pty Limited v Wykrota

[2020] NSWSC 1430

Coram: Rees J

Court: New South Wales Supreme Court

Date: 16 October 2020

LEGAL PROFESSION – duty of candour – undefended hearing – principles at [83], [91] – no breach of duty – trial judge not misled.

SET ASIDE JUDGMENT – building contract –problems getting occupation certificate – damages sought from builder including loss of rent – first defendant appeared in person on occasion – 12 directions hearings – no appearance at final hearing – aware of hearing – unsatisfactory medical certificate – inadequate explanation – experienced litigant – access to legal advice – writ of execution registered against first defendant's property – property sold and judgment sum paid into court – application to set aside judgment, being 18 months after judgment.

JUDGMENT IRREGULARLY OBTAINED – r 36.15 UCPR – principles at [3]-[7] – whether admissions arising from failure to file defence provided basis for judgment – imperfect pleading against multiple defendants – admissions by first defendant founded judgment against him – whether damages awarded outside pleaded case – damages sought notified to first defendant in schedule of damages – no misconduct or dishonourable conduct by plaintiff –failure to accord procedure fairness no basis to set aside judgment (nor such unfairness here).

JUDGMENT IN ABSENCE OF PARTY – r 36.16 UCPR – principles at [8]-[12] – inadequate explanation for failure to attend – significant delay in bringing application – inadequate explanation for delay – little proffered to reduce hardship of judgment creditor – second defendant now deregistered – plaintiff took large discount in its claim before trial judge in order to finalise proceedings and only the judgment amount secured – offers in respect of plaintiff's legal costs parsimonious – arguable defence – not unjust to let judgment stand.

Facts:

These proceedings concerned an application to set aside judgement as either made irregularly, against food faith or in the absence of a party. Mick Mykrota ('**the First Defendant**') sought an order pursuant to rule 36.15 of the *Uniform Civil Procedure Rules 2005* (NSW) ('**UCPR'**), or alternatively, rule 36.16, that judgment entered against him in favour of ACN 057 690 034 (**'the Plaintiff'**) be set aside, together with an order for the costs of the motion.

The question concerning these proceedings was whether the first defendant had established that he is entitled to an order under either rule of the UCPR and whether, in the circumstances, the Court's discretion should be exercised to make the orders sought.

The hearing

Although the first defendant admitted to being aware of the hearing before Emmett AJA, he did not appear as he had alleged that he was in great pain. On this day, His Honour completed his ex-tempore judgement and final orders were made as follows:

1. Directed the entry of judgement for the sum of $244,896.85 against the first defendant;
2. Ordered the first defendant to pay the plaintiff's costs in the proceedings;
3. Ordered that the proceedings be dismissed against the second and third defendants.

Was judgement irregularly obtained?

The first defendant contended that the judgment was given irregularly as deemed admissions airing from a failure to file a defence did not support the judgment. The first defendant also submitted that by allowing parts of the damages claim outside the parameters of the pleading, Emmett AJA failed to afford procedural fairness to him. Further, the first defendant argued that the judgment was given against good faith by reason of a failure by the plaintiff's counsel to specifically draw his Honour's attention to documents which may support a conclusion that the building contract was not with the first defendant, but another defendant.

The plaintiff submitted that the judgment was not given against good faith, and that the pleadings were broad enough to encompass the damages awarded, including damages for building work not properly formed.

Decision:

The Court held that the first defendant had not established that it would been unjust to allow the judgment and orders stand having regard to the circumstances in which the orders were made: the inadequate explanation for the subsequent 18 months' delay before bringing this application, the proposed defence and what is proffered to reduce the prejudice to the judgment creditor. It was therefore held that there was no misconduct or dishonourable conduct on the part of the plaintiff in proceeding in the manner in which it did. Thus, the previous judgment and orders were not given or entered irregularly or against good faith.

Rice v JR and SD Farmer t/a Urban Bespoke Homes

[2020] NSWCATAP 208

Coram: Rees J

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 13 October 2020

APPEAL – discretion regarding admission evidence – Tribunal decision based on a mistaken view of relevant facts – refusal to admit evidence did not facilitate the just, quick and cheap resolution of the real issues in the proceedings – Tribunal decision to refuse admission of evidence due to improper form - s 36 and 38(4) Civil and Administrative Tribunal Act 2013 – appeal allowed.

APPEAL - Building and Construction – home building - requirement for variations to be in writing and signed – variation not in writing not enforceable in contract – recovery for unenforceable variation on a quantum meruit – cost of variation calculated in accordance with the contract constitutes cap on what may be recovered as fair and reasonable cost of work.

ADMINISTRATIVE LAW – appeal on a question of law – bias – actual bias – apprehended bias – decision not affected by actual or apprehended bias.

Facts:

These proceedings concerned homeowners, Spencer and Elisha Rice (‘**the Appellants’**), lodging an internal appeal against a decision made in the Consumer and Commercial Division of NCAT. The orders related to a claim made against the appellants by the builders, Urban Bespoke Homes (‘**the Respondents**’), for payment of the balance owing under a completed contract for renovations and extensions to the appellants’ home, plus a provisional allowance adjustment and four variations.

First Instance

The Tribunal considered and assessed the amounts claimed for four variations – gyprock to exterior ceilings instead of Hardiflex, vanity area walls, fireplace TV wall and materials handling charge – as well as the issue of whether the respondents were entitled to recover provisional allowances for plumbing and electrical work, in sums significantly greater than those specified in the contract. In summary of the Tribunal’s decision, it was satisfied that all the work charged for by the respondents was done, and the work outside the original scope was either specifically requested by the appellants or reasonably necessary.

Issues on appeal:

1. Whether the Tribunal erred in law by refusing to allow the homeowners during the hearing to tender and rely on a statement from Mr Long;
2. Whether the homeowners may have suffered a substantial injustice because the Member's decision not to admit Mr Long's evidence was not fair and equitable and/or was against the weight of the evidence;
3. Whether the Tribunal erred in law in allowing the builders to recover on a *quantum meruit* basis for variations which were not signed for and accepted by the homeowners; and,
4. If so, whether the Tribunal erred by requiring the owners to establish that the cost of variations was not fair and reasonable;
5. Whether the Tribunal erred in allowing the builders to recover for sums additional to the provisional allowances stated in the contract for plumbing and electrical works; and
6. Whether the Tribunal was biased (apprehended or actual).

The Tribunal rejection of Mr Long's statement

The appellants sought to rely on the evidence of Mr Long, a sub-contract carpenter who had worked on the extension and renovation for the respondents. Mr Long's statement contained evidence relevant to issues such as whether variations were requested by the appellants, why the plumbing works costed more, and whether additional sums for provisional allowances were reasonably and necessarily incurred. The Tribunal rejected this argument as Mr Long's statement had not been served in accordance with a timetable, and the appellants would be denied the ability to cross examine the Mr Long should it be admitted.

Recovery on a quantum meruit

The Tribunal correctly rejected the appellants arguments that builders were prevented from recovering for unsigned variations whether under the contract or in restitution. However, the Tribunal did not have regard to whether the amount claimed by the respondent exceeded the amount recoverable, the amount that could be established by the contract. Therefore, what the tribunal should have done was calculate the costs of the work claimed on a quantum meruit basis in accordance with the contract, which would be the ceiling on the amount recoverable by the builders. As such, by failing to ask itself this question, the Tribunal fell into error and applied the wrong law.

Provisional sums

The Tribunal's failure to consider whether the escalation in the provisional sums was a variation in the scope of the works, in the light of the contractual provisions, was deemed to be an error of law.

Bias

In support of their initial grounds of appeal, the appellants claimed that the Tribunal's decision was affected by "prejudgment bias" However, the appeal panel was not persuaded that the Tribunal's conduct evidenced actual or apprehended bias, or that its decision gave rise to an apprehension that the Member did not bring an impartial mind to his decision making.

Decision:

Having decided to allow the appeal, it was ordered that:

1. Decision on appeal to be set aside; and
2. Applications to the CCD for reconsideration in full before a differently constituted Tribunal with such further evidence as the Tribunal may allow.

Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd

[2020] NSWSC 1330

Coram: Hammerschlag J

Court: New South Wales Supreme Court

Date: 29 September 2020

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act) – The plaintiff design & construct contractor for the Sydney Light Rail Project entered into an agreement with the first defendant for the production and supply of ready mixed concrete – The first defendant made a payment claim on the plaintiff for ready mixed concrete allegedly supplied to the plaintiff under several purchase orders but not paid for – The plaintiff responded with a nil payment schedule – The claim went to adjudication and the second defendant made a determination for $2,953,035.57 in favour of the first defendant – The plaintiff challenged the jurisdiction of the second defendant on the grounds that the payment claim was invalid because it covered work under more than one contract – The plaintiff also relied on other grounds, including that the adjudicator had denied it procedural fairness, as vitiating the determination – HELD – The second defendant had no jurisdiction, the plaintiff had been denied procedural fairness, and the second defendant had not discharged the statutory task of satisfying herself that the work claimed for had been done and of its value

Facts:

Acciona Infrastructure Australia Pty Ltd (‘**Acciona**’) was the design and contractor for the Sydney Light Rail Project. Holcim Australia Pty Ltd (‘**Holcim**’) was a supplier of a ready-mixed concrete to Acciona for the project. The parties entered into an agreement for the supply and delivery of concrete by Holcim to Acciona (‘**the Agreement**’). The Agreement provided that if Acciona sought to order concrete it would issue a purchase order and, upon the issue of a purchase order, a separate contract would be formed between the parties. Over the life of the Agreement, Acciona issued around 12,500 purchase orders, whilst Holcim made around 26 payment claims.

These proceedings concern a dispute arising between the parties over a range of related matters, including the charge of plant opening fees and delay of cancellation fees by Holcim to Acciona. The dispute culminated in Holcim proceeding to adjudication and successfully obtaining and adjudication determination against Acciona in the sum of $2,953,035.57 (‘**determination’**).

Issue on Appeal:

Upon Acciona's appeal, it was submitted to the Supreme Court that the determination should be quashed as the adjudicator did not have jurisdiction to make the determination. This submission was based on the ground that the payment claim submitted by Holcim impermissibly claimed payment for work done under two or more construction contracts, pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**SOP Act**'). Thus, the issue concerned whether a claimant under the SOP Act can make claims for the construction-related works under more than one construction contract.

Decision:

The Court accepted the submission and quashed the determination. His Honour found that the adjudicator did have no jurisdiction to make the Determination because the payment claim in question was invalid and ineffective. It was provisionally ordered that Holcim pay Acciona's costs.

Lindvest DM Pty Ltd v CPDM Pty Ltd

[2020] NSWSC 538

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 22 September 2020

BUILDING AND CONSTRUCTION – contractual rights preserved by s 32 of the Building and Construction Industry Security of Payment Act 1999 (NSW) – party seeking final relief in relation to contractual rights while adjudication determination remains unsatisfied

CIVIL PROCEDURE – abuse of process – whether it is an abuse of process for a party to commence and prosecute proceedings seeking to enforce contractual rights – where adjudication determination made under s 22 of the Act – where judgment has been entered against it under s 25 of the Act – where party does not seek to stay or set aside judgment under s 25(1) of the Act – where party does not pay amount of judgment debt into court

Facts:

Linvest DM Pty Ltd (‘**developer’**) contracted with CPDM Pty Ltd (‘**project manager’**) under a development serviced agreement to provide project management services relating to a property development in NSW. The developer gave 60 days’ notice of termination without cases. The parties agreed that the effect of this notice was the cause the agreement to cease on 16 December 2019.

On 11 December 2019, the project manager made a payment claim to the developer, subject of an adjudication determination made in favour of the project manager (‘**determination’**). Subsequently, the project manager obtained judgement in the District Court of NSW for the adjudicated amount and applied for a writ of levy of property against the developer. The writ returned was unsatisfied, and the developer was therefore presumed to be insolvent.

At the same time, the developer commenced separate proceedings, seeking a declaration that the project manager was not entitled to any payment, pursuant to the terms of the contract. However, significantly, the developer did not seek to have the determination itself quashed or set aside.

The project manager sought an order that the proceedings be dismissed on the basis that their prosecution would be an abuse of process. Therefore, the issue posed to the court was whether it was an abuse of the process of the court for a party against whom judgement has been entered under the *SOP* act (following determination) and who does not seek to stay or set aside that judgement, to instead commence proceedings to enforce its contractual rights.

Decision:

The court dismissed the project manager’s claim to strike out or stay the proceedings. It was held that the developer’s claim for final relief in relation to its contractual rights did not constitute an abuse of process, despite the judgement on the adjudicated amount being unsatisfied. It was also found that the developer’s commencement of proceedings did not deny the operation of the SOP Act or subvert its operation, as the project manager remained free to enforce the NSW District Court adjudication judgement.

Murphy v Zubkrycki & Anor

[2020] NSWDC 538

Coram: Abadee DCJ

Court: District Court of New South Wales

Date: 17 September 2020

CONTRACTS – building and engineering contracts – residential building work – claim by beneficiary of implied statutory warranties – collapse of side retaining wall – whether builder constructed the wall – whether wall constituted 'residential building work' – rectification damages – whether works carried out were necessary and reasonable

Facts:

The defendants in these proceedings, Mr and Mrs Zubkrycki, were partners in a construction business ('**builders**') and purchased land from a developer, with the transaction settling in March 2015. During January 2015 (before settlement), Mr Zubkrycki constructed a retaining wall on the land, and then, the builders began construction of a house on the land. The builders sold that property to Mr Murphy ('**owner**'). Around a year later, the side retaining wall collapsed. The owner commenced proceedings on the basis that the builders had breached the implied warranties under section 18B of the *Home and Building Act 1989* (NSW) ('**HBA**') and that the owner had the benefit of a successor in title.

The owner claimed damages for the cost of rectification and damages for distress and inconvenience. The builders denied liability for the claim because they did not build the wall, and in the alternative, that the wall was not 'residential building work' under the HBA. The builders also claimed that the rectification works carried by the owner exceeded what was reasonable and necessary to achieve conformity with the original contract.

Decision

Residential building work

The court made a factual finding that Mr Zubkrycki constructed the wall. Further, the court held that the wall was in fact considered residential building work under the HBA, on the premise that the wall would not have been built but for the construction of the residential dwelling. This finding was reached notwithstanding that evidence indicated the wall was built unlawfully, at a time where Council approval had not yet been obtained. The court determined that the HBA does not require work to be lawful, and also does not involve a temporal requirement for construction of the dwelling to follow in sequence after the construction of the wall.

Reasonableness of rectification works

The rectification work was arranged and pursued by the owner under a quote obtained by the owner (‘**owner’s quote**’), rather than under an alternative design for rectification provided by the builder (‘**builders’ design**’). The owner argued that it was reasonable to reject the builders’ design if the builders had disclaimed responsibility for building the wall.

The court found that the rectification work under the owner’s quote was unnecessary or reasonable to bring the works in conformity with the original contract, as it included some betterment to the original wall. The court accepted the builder’ expert evidence of such betterment and the owner did not adduce evidence that the owner’s quote was reasonable and necessary to bring the works into conformity with the original contract. The court referred the quantum of damages back to the parties for agreement.

Distress and inconvenience

The court awarded 5,000 in damages to the owner for the distress and inconvenience because a physical inconvenience had been suffered. On the owner’s evidence, she indicated agitation and injured feelings arising from concern about damage to her property, as well as damage to her neighbour’s property due to the collapsed wall and any prospective liability she may deal with.

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd

[2020] NSWSC 1251

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 14 September 2020

BUILDING AND CONSTRUCTION – payment claim served by subcontractor on builder under Building and Construction Industry Security of Payment Act 1999 (NSW) – no payment schedule served by builder – alleged agreement between sub-contractor and builder that builder pay amount less than the amount claimed in payment claim in satisfaction of payment claim – where builder then paid agreed amount – whether that agreement void by reason of s 34 of the Act

BUILDING AND CONSTRUCTION – whether subcontractor entitled to summary judgment for difference between amount claimed in payment claim and amount paid pursuant to the agreement

Facts:

These proceedings concern Master Fabrication (NSW AU) Pty Ltd (‘**subcontractor**’) serving a payment claim under the SOP Act on Rewards Interiors Pty Ltd (‘**contractor**’). The contractor, however, did not submit a payment schedule in response to the payment claim. Here, the subcontractor could have sought judgement for the amount claimed under the payment claim as the contractor had failed to issue a payment schedule within the required time, pursuant to the SOP Act. Nonetheless, the parties agreed during a meeting that the contractor would instead pay a lesser sum in full satisfaction of the payment claim (‘**settlement sum**’). The contractor paid the subcontractor the settlement sum.

Following this, the contractor sued the subcontractor for damages arising from the construction work completed. In the subcontractor’s cross-claim in these proceedings, it sought summary judgement for the different between the settlement sum, and the amount claimed under the payment claim. Further, the subcontractor argued that it was entitled to summary judgement because the agreement for the settlement sum amounted to the parties contracting out of the SOP Act and was in fact void.

Decision:

In deciding the summary judgement application, the court decided that agreement was not void under the SOP Act, in accordance with the contractor’s argument, and dismissed the summary judgement application on that basis. Further, the court found that the subcontractor had relinquished its right to seek judgement for the amount claimed under the payment claim due to the contractor's failure to issue a payment schedule.

Repfix Industries Pty Ltd v FBD Group Pty Ltd

[2020] NSWDC 514

Coram: Abadee DCJ

Court: District Court of New South Wales

Date: 8 September 2020

CONTRACTS – building and construction – plaintiff supplied carpentry and joinery services to customer at three separate commercial premises – dispute about payment terms – whether customer liable to pay more than estimated costs previously agreed to – whether agreement to final payment terms can be inferred – whether construction works were defective – whether rectification works necessary or reasonable to be undertaken – relevance of any lack of intention to carry out rectification works

EVIDENCE – business records admitted – no testimonial evidence to support inferences said to be drawn from records – approach to considering weight to be given to records

Facts:

These proceedings concern a contract between a shop fit out and commercial joinery service Repfix Industries Pty Ltd ('**Repfix**') and kebab shop business FBD Group Pty Ltd ('**FBD**') for the performance of construction works and provision of materials for the fit out of kebab shops on three different premises.

Repfix sought to recover payment for services following the completion of the respective works. Repfix asserted that aside from the deposit payment of deposits, FBD had made additional payments in partial discharge of its contractual obligations. Further, Repfix contended that in breach of the contracts, FBD failed to pay an outstanding amount that was outlined in an invoice issued. Repix therefore sues for damages in contract and, in the alternative, sues on a quantum meruit, and claims pre-judgement interest.

FBD defended this by stated that in each of the three contracts for the three different premises, there was a verbal agreement that the price for the three projects was fixed. FBD also asserted that not only was the aggregate of these totals paid, but was in fact exceeded; it said that Repfix was overpaid by $20,000.

<u>*Cross claim*</u>

FBD also brought a cross-claim, where part of the claim refers to the overpayment of $20,000 claim, but also relates to allegedly defective works for two of the three contracts. FBD contended that Repfix was in breach of implied terms that:

a. It would perform the works in a proper and workmanlike manner; and
b. The material supplied would conform to the Design and Finishes Schedule of the contracts and be free of defects.

Repix admitted to the existence of the first two implied terms.

Decision

Although the parties' agreement that FBD pay Repfix an 'estimate' may imply that the payment term in each contract was not final, Repfix did not persuade the Court that a binding consensus was reached with FBD for the components of any 'cost plus' arrangement or any other basis for payment beyond the agreed estimate in relation to any of the three projects.

Owners of Strata Plan No 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liquidation)

[2020] NSWCA 199

Coram: Gleeson and McCallum JA, Emmett AJA

Court: District Court of New South Wales

Date: 31 August 2020

BUILDING AND CONSTRUCTION — Negligence — Miscellaneous forms of negligent conduct — Right of support — Application of *Conveyancing Act 1919* (NSW) s 177 and common law — Whether loss of support caused damage to adjoining property.

TORTS — Negligence — Essentials of action for negligence — Whether there was a failure to take reasonable care — Whether any failure caused damage — Assessment of expert evidence.

TORTS — Negligence — Proof of negligence — *Res ipsa loquitur*.

Facts:

These proceedings concerned building works in a development project in Double Bay leading to movements of the foundation below an adjoining strata scheme causing extensive damage to an apartment building on that land. The building works involved extensive excavations, a retaining and a shoring wall to support the property. The cost of rectification to the building was estimated at $5 million and $500,000 to repair the internal structural walls.

First Instance

The Owners of Strata Plan No 30791 ('**Owners Corporation**') made a claim in the NSW Supreme Court. The Court decided that neither Southern Cross Constructions ('**builder**') or the structural engineering firm were liable for any of the damage to the building. The Court did not accept that the builder's actions could have been said to have caused the relevant damage and, the evidence did not disclose that the structural engineer's designs caused any damage.

The Appeal

Allegations of Negligence

The Owners Corporation alleged that the builder and structural engineer breached their duties of care owed at common law and under the *Conveyancing Act 1919 (*NSW), suffering damage as a result. Further, the Owners Corporation also alleged that the builder was negligent with respect to the excavations and construction of the shoring wall and that the structural engineer was negligent with respect to the structural designs failing to properly accommodate the design of the shoring wall.

Expert evidence showing case to the damage of the Building

A joint expert engineering report indicated that inadequate support of the retaining wall caused the movement of the shoring and retaining walls that supported affected property, causing movement of the foundation strata below the affected property. The expert engineers had also identified the parties associated with various technical issues, however, could not allocate any percentage of responsibilities as it was outside their area of expertise, and was a matter for the court to decide.

Decision

The Appeal Court found that the primary judge should have found that the builder was negligent in directing a subcontractor to conduct excavations near a certain area which was contrary to a written report he had received from an engineering consultant. The Court concluded that the primary judge should have found that this excavation carried out had a relevant causal connection with the damage to the building. However, the Court found that the builder was not negligent on any of the other grounds put forward by the Owners Corporation and upheld the primary judge's decision that the structural engineering firm was not liable for the damage to the building.

MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd

[2020] NSWSC 1147

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 27 August 2020

BUILDING AND CONSTRUCTION – determination under the Building and Construction Industry Security of Payment Act 1999 – whether adjudicator acted beyond jurisdiction – whether adjudicator denied plaintiffs procedural fairness by deciding claim in favour of first defendant on basis not advanced by either party – whether adjudicator failed to consider relevant matters

Facts:

MTR Corporation (Sydney) NRT Pty Ltd and UGL Rail Services Pty Ltd formed a systems joint venture ('**SJV**') for the delivery of works on the Sydney Northwest Rail Link. SJV entered into a construction contract with Thales Australia Ltd ('**Thales**') in respect of the installation of input and output points required to integrate third party equipment into the Sydney Metro System.

First Instance:

Pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**SOP Act**'), an adjudicator determined that Thales was entitled to payment in the sum of around $25,000 ('**determination**').

SJV appealed the determination on the basis that it contained four different jurisdictional errors. SJV argued that the adjudicator:

1. Decided a claim on the basis that had not been advanced by either party (**ground 1**). SJV contended that the adjudicator should have informed the parties that she considered Thales' claim had been made pursuant to cl 3.7 of the Specification (and not only cl 57 of the Contract), and therefore given them the opportunity to make submissions in relation to the issue;
2. Failed to perform her duties set out in section 22(2) of the Act (**ground 2**);
3. Failed to come to a view or consider the merits of three of Thales' claims (**ground 3**); and
4. Failed to decide whether a set-off totalling $800,000 had been made out (**ground 4**).

The Appeal

Each ground of appeal argued by SJV was considered by the NSW Supreme Court as follows:

Ground 1

In considering whether the adjudicator decided a claim on a basis that had not been advanced by either party, the judge determined that although the payment claim did not expressly refer to cl 3.7 of the Specification, the description in the payment claim was apt to refer to a claim under cl 3.7. The judge held that the adjudicator had not failed to afford the parties procedural fairness in preferring one claim over the other.

Ground 2

The adjudicator had rejected an argument put forward by SJV on the basis it was not raised in the payment schedule. In doing so, the judge found that the adjudicator had evaluated SJV's contentions. Whether or not the evaluation was correct was irrelevant as any such error did not deprive the adjudicator of jurisdiction.

Ground 3

The Court disagreed with SJV's claim that the adjudicator failed to come to a view or consider the merits of three of Thales' claims. SJV had rejected two of the claims in the payment schedule on the basis that Thales had not substantiated the amount claimed. The judge held that the adjudicator considered the two claims and formed the view that the quantum was not in dispute. SJV had rejected the third claim by reference to a release which the adjudicator was not satisfied had effect in relation to that claim. Accordingly, the judge held that the adjudicator had given proper consideration to the third claim as well.

Ground 4

The adjudicator concluded that the reasons supporting SJV's set-off claim as put forward in the adjudication response were not raised in the payment schedule and could not then be considered in the determination. The judge found that the adjudicator had therefore not simply rejected the set-off claim.

Decision

The NSW Supreme Court dismissed SJV's appeal in its entirety.

Valmont Interiors Pty Limited v Giorgio Armani Australia Pty Limited

[2020] NSWDC 395

Coram: Smith SC, DCJ

Court: District Court of New South Wales

Date: 27 August 2020

BUILDING AND CONSTRUCTION – Construction contract – Completion – delay damages – scope of work – defects

Facts:

The defendant, Giorgio Armani Australia Pty Limited (‘**Armani**’) engaged the plaintiff, Valmont Interiors Pty Ltd (‘**Valmont**’) to fit out its retail store at Sydney International Airport. Significantly, there was some urgency about the work to be completed and instructions about it were updated after the contract was entered. In these proceedings, Valmont claimed that it was asked to perform and did perform work outside the scope of the contract, and had not been paid for that work. It also claimed that Armani had not paid it the final instalment of the contract price. Armani claimed that certain works were defective and that it lost money because of Valmont’s delay in completing the work.

There were many issues in the proceedings that had been divided into four segments: construction contract, completion, delay damages and defects.

Construction contract

The first issue stipulated in relation to the contract segment was whether the Construction Contract was wholly contained in the Works Contract. The parties agreed that the answer to this issue was yes, as Clause 1.1 provided that the Contract Documents constituted the entire agreement between the parties. The second issue was what was the balance of the Contract Price due to Valmont. Similarly, the parties agreed that $98.981 is the balance of the Contract Sum that had not been paid to Valmont. Accordingly, the question as to whether Armani must pay that sum (and interest) depended on whether it was entitled to any amount from Valmont in relation to defective work or liquidated damage.

Completion

The issue with this completion segment of the proceedings was what were the valid extension of time claims pursuant to clause 16 of the Contract. Valmont argued that it had made three extension of time claims under the Contract on three different occasions. However, the Court found that these requests for an extension did not comply with clause 16 of the Contract, and subject to the issues that had remained, the Valmont was not entitled to an extension of time for Practical Completion.

Delay damages

Armani claimed damages for the delay in achieving practical completion. The principal basis of this claim was that the liquidated damages provision (clause 18) in the Contract allowed the Armani to claim $7,000 per day of the delay. Valmont contended that the provision for liquidated damaged is void as a penalty. The Court found for a number of reasons that Valmont was liable to pay Armani liquidated damages for the extra period of 20 days, meaning the damages payable were $140,000.

Defects

Although the Court dealt with each defect in connection with each relevant item separately, it was ordered that Armani was entitled to judgement of $95,611.29 for 8 out of 9 defects caused by Valmont (the only rejected being ‘black metal blades to wall unit to be changes to bronzed metal finish’).

Decision

In summary of findings on Armani’s cross-claim, the Court found that Armani was entitled to judgement for $140,000 in liquidated damages and $95,611.29 in defects, totalling to $235,611.29. It was also decided that under clause 18 of the Contract, Armani was entitled to either deduct liquidated damages from payments due to Valmont, or to have recourse to security. Finally, the appropriate order for costs was that Valmont pay 50% of Armani’s costs as agreed or assessed.

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd

[2020] NSWCA 172

Coram: Meagher, Leeming, and Payne JA

Court: New South Wales Court of Appeal

Date: 11 August 2020

BUILDING AND CONSTRUCTION — progress payments — whether right to a progress payment arose before suspension — whether adjudicator determined amount of progress payment — whether adjudicator committed jurisdictional error — whether contractor entitled to withdraw adjudication application under s 26 and file new adjudication application — whether necessary first to obtain declaratory relief –*Building and Construction Industry Security of Payment Act 1999* (NSW), ss 8, 9, 13, 22, 26.

Facts:

These proceedings concerned a dispute between parties, Parrwood Pty Ltd ('**Parrwood**') as principal and Trinity Constructions (Aust) Pty Ltd ('**Trinity**') as contractor, in relation to a design and construct contract ('**Contract**') for a residential development. Under the Contract, Trinity was permitted to submit payment claims to be made on the 25th of each month.

Following the accrual of work completed for August 2019, but prior to Trinity submitting a payment claim in respect to this work, Parrwood served a notice on Trinity taking the remaining works out of Trinity's' hands, however, did not terminate the contract ('**Take-Out Notice**'). Under the Contract, the effect of the Take-Out Notice was that Trinity would be entitled to an 'adjustment payment' following the work completed by another subcontractor. Following this, Trinity issued a payment claim to Parrwood and then proceeded to adjudication.

Primary Adjudication

The adjudicator found that the amount owing to Trinity Constructions was 'no amount'. This was on the basis that prior to service of the payment claim, Parrwood had taken the work out of Trinity's hands and therefore, payment to Trinity could be suspended until its entitlements following the Take-Out Notice had been assessed by the Superintendent. The adjudicator made several statements in the determination, to the effect that he was declining to decide on the basis that the payment claim was premature: that is, Trinity's right to payment would not arise until the 'adjustment payment' was due ('**Primary Determination**')

Second Adjudication

Trinity subsequently withdrew the primary adjudication and made a new adjudication application. The second adjudicator found that:

1. The adjudicator in the primary adjudication had failed to perform his statutory function because he had declined to determine the amount of the payment claim; and
2. There was an amount owing to Trinity by Parrwood in respect of the payment claim.

(‘**Second Determination’**)

Parrwood then proceeded to Court to challenge the validity of the Second Determination.

First Instance

Justice Ball dismissed Parrwood’s summons and decided that the Primary Determination was null and void. In doing so, his Honour made an observation with respect to the effect of contractual suspension on rights and found that the right to make a payment claim in this case was such a right.

The Appeal:

Parrwood subsequently appealed to the NSW Court of Appeal. The Court found that the Primary Determination was vitiated by jurisdictional error as the adjudicator had failed to perform his function pursuant to s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘**Act**’). The basis of the Court’s finding was that the primary adjudicator’s reasons made it plain that he did not determine the adjudicated amount as the Take-Out Notice had been served and therefore, concluded that ‘no amount’ was payable.

The Court subsequently found that on and from 25 August 2019, being the date that a reference date had accrued under the Act, Trinity benefited from a statutory entitlement to submit the payment claim, which it was entitled to do so for the next 12 months.

The Court also found that as the determination of the Primary Adjudication was void, Trinity was not precluded from exercising its statutory right and making the second adjudication.

Decision:

The Court of Appeal upheld a finding at first instance that, where a reference date had arisen under the Act, a claimant's entitlement to payment was not suspended by the respondent subsequently issuing a notice to take works out of the claimant's hand after that reference date had accrued.

One Pro Baulkham Hills Pty Ltd v Ming Tian Real Property Pty Ltd

[2020] NSWSC 1043

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 10 August 2020

CONTRACTS – building contract – construction – conditions precedent – whether conditions precedent were to formation of contract or parties' performance of their obligations under the contract – whether defendant contractor obliged to commence work under contract – whether failure by defendant to provide bank guarantees and evidence of home warranty insurance caused plaintiff to suffer damage

CONTRACTS – ambit of exclusion clause – whether exclusion clause survived consensual termination of contract

CONTRACTS – remedies – damages – whether plaintiff principal proved it had suffered damage by reason of defendant's conduct

CONSUMER LAW – misleading or deceptive conduct – where director of defendant represented guarantee was genuine – where bank guarantee was not genuine – where plaintiff general manager saw at once that bank guarantee was not genuine – whether plaintiff has suffered any loss by director's conduct

Facts:

On 22 December 2017, One Pro Baulkham Hills ('**developer**') and Ming Tian Real Property ('**builder**') contracted to design and construct 40 townhouses at Baulkham Hills for $20.7 million ('**Contract**'). On 31 October 2018, the developer served the builder with what was purported to be a Notice to Proceed. The builder did not construct the townhouses, nor did it provide valid security and evidence of home warranty insurance. On 22 January 2019, Mr Meng Dai (sole director of the builder) provided what appeared to be a bank guarantee, which the parties accepted was not genuine. Following this, on May 1 2019, the parties agreed to mutually terminate the Contract through a Deed of Termination, which provided that each party had reserved their rights in relation to any breach arising before termination.

The developer sought damages from the builder arising from the builder's "twin failures" to provide developer's security by way of bank guarantee and evidence of home warranty insurance. The developer also sought damages from Mr Meng Dai, arising from his allegedly misleading or deceptive conduct.

Issues:

Clause 7(a)(i) of the contract provided that:

> '*[the builder] must not commence the [Work Under Contract] unless and until [the developer]... issues a notice to proceed*.'

Further, clause 9(a)(ii) of the contract included four key conditions precedent, whereby the builder was under no obligation to perform the works until:

A. *[the developer] has secured financing for the cost of the [Work Under Contract] on terms and conditions acceptable to [the developer] acting reasonably;*
B. *all conditions precedent to [the developer] making first draw on that financing have been satisfied;*
C. *[the developer], [the builder] and [the developer's] Financier have entered into any tripartite agreements required by [the developer's] Financier on terms acceptable to all parties;*
D. *[the developer] has provided a Notice to Proceed to [the builder] in accordance with clause 7;*

Relevantly:

- One condition precedent in the financing agreement to the developer making first draw was that the contract was unconditional, including 'the issuance of a notice to proceed'; and
- The builder had to provide security and evidence of home warranty insurance within a certain period after receipt of the notice to proceed.

The parties agreed that the conditions A and C were satisfied, however the builder argued that the condition B was not satisfied when the Notice to Proceed was issued, as the Notice to Proceed was not valid, and condition D was also not satisfied.

Further, as the builder did not provide valis security or evidence of insurance, the developer could not draw down any additional funds from the financier, as it could not meet the financing conditions precedent. Therefore, on this basis, the developer argued that it had suffered loss.

The three issues before the Court were disputed as follows:

1. Whether the conditions precedent in clause 9 were to the formation of the contract or to the obligation of the parties to perform under that contract;
2. Whether the builder was in breach of the contract by failing to provide security and evidence of home warranty insurance; and

3. Whether Mr Meng Dai misled and deceived the developer by providing the purported bank guarantee.

In sum, the developer sought damages from the builder regarding item 2, and damages or compensations from Mr Meng Dai regarding item 3.

Decision:

The Court held that the developer had failed to establish that it had suffered damage as a result of any breach of contract by the builder. The Court also held that the developer failed to establish that it suffered any loss as a result of any misleading or deceptive conduct by Mr Dai. Accordingly, the proceedings were dismissed with costs.

Cappello v Hammond and Simonds NSW Pty Ltd

[2020] NSWSC 1021

Coram: Ball J

Court: New South Wales Supreme Court

Date: 7 August 2020

BUILDING AND CONSTRUCTION – Where damages for work done but not invoiced sought to be proved on a *quantum meruit* basis – Damages for delay – Where loss not established – Where loss too remote – Breach of statutory warranties in the *Home Building Act 1989* (NSW), s 18B.

CONTRACT – Whether contract validly terminated – Where liquidated damages clause provides for nominal amount – Whether provision relating to liquidated damages provided an exclusive remedy for delay and, if it did, whether it was rendered void by the *Home Building Act 1989* (NSW), s 18G.

Facts:

In September 2017, Mr and Mrs Cappello (‘**owners**’) entered into a contract for the renovation of their residence in Haberfield with the construction company Hammond & Simons NSW Pty Ltd (‘**builder**’). The contract was in the form of an HIA standard contract for costs plus works. The builder commenced the works on 4 September 2017, and on 23 August 2018, sent the owners a progress claim for $156,113.54. The owners disputed the invoice on the basis that the works were incomplete and paid part of the claim, leaving $81,113.54 unpaid.

On 10 October 2018, the builder suspended the works pursuant to the Contract, and on 18 October 2018, served a Notice to Show Cause. The owners failed to pay the balance, so the builder terminated the contract in November 2018.

Liquidated damages

The liquidated damages for late completion of the works were a nominal amount of $1 per working day, which was consistent with the default position under the contract. Accordingly, the works under the contract were completed approximately 7 months late and the Builder made no requests for any extensions of time. The owners made various claims against the builder, among them, was a claim for general damages for delay in the sum of $30,000.

The Proceedings

On 9 January 2019, the owners issued proceedings seeking, amongst other orders, general delay damages.

The builders argued that the owners were only entitled to recover $1 per working day for delay in accordance with the liquidated damages clause in the contract, and that by making a provision for liquidated damages in the contract, the parties were taken to have intended to exclude a right for the owners to also claim general damages for delay against the builder.

The owners claimed that the liquidated damages clause did not provide the only remedy for the builder's delay because if it did, it would be void due to s 18G of the *Home Building Act 1989* (NSW) ('**HBA**'). Accordingly, this provision of the HBA would have the effect of restricting the owners' rights in relation to the benefit of the warranty under s 18B of the HBA: that the work will be completed with due diligence and within the time stipulated in the contract.

Decision:

Findings on s 18G

Ball J approached the owner's two arguments as tied together, finding that s 18G did operate to render clause 28 void. As a result, the owners had a general right to delay damages. However, his Honour indicated that his decision was restricted to nominal liquidated damages and said that his position would have been different if the clause had provided for the payment of a substantial amount by way of liquidated damages.

Therefore, the owners were entitled to recover $10,363.65 in respect to their claim for breach of the warranties implied by s 18B of the HBA, and $152 as liquidated damages. Further, Ball J found that the builder was entitled to recover $81,113.54 in respect of its outstanding invoice. The first two amounts were ser off against the third, with the orders that the builder is entitled to judgement in the sum of $70,597.89, plus interest payable.

Slaven v Bryant

[2020] NSWCATAP 168

Coram: K Rosser (Principal Member), G Curtin SC (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 7 August 2020

APPEALS – from findings of fact – credibility of witnesses – limitation on appeal where findings of fact based on demeanour of witnesses – procedural fairness – bias or apprehension of bias – prior professional association as members of the same chambers – insufficient of its own – requirements to be satisfied

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – definition of dwelling - for use as a residence or for use in conjunction with a dwelling – time for assessment – quantum meruit – benefit when not the owner of the land

Facts:

In 2017, the appellant ('**Slaven**') approached the respondents, Mr and Mrs Bryant ('**builders**') to build a house on his parents' land, and in 2018 approached the builders to also construct a shed on that land. The builders, who operate as a partnership conducting a building business, agreed to build both.

Slaven alleged that an oral contract arose between he and the builders to the effect that the builders would construct a shed for Slaven on his parents' land for the price of $24,000. Between May and August 2018, the builders carried out construction work on the shed, and rendered invoices for their work to Slaven from time to time. In August 2018, disputes between the parties began to arise. Slaven terminated the agreement between the parties by email on 24 August 2018. By the date, Slaven had paid the invoices issued by the builders totalling to $32,617, with further unpaid invoices amounting to $42,913.47.

First Instance

Slaven commenced proceedings against the builders in NCAT, making a claim for alleged defective building work and alleging that the shed had been constructed in the wrong location. He sought an order that he was not required to pay the builders for their outstanding invoices and that they pay him $71,000 in compensation for various matters.

The builders also commenced proceedings against Slaven in NCAT soon thereafter, making a claim for payment of their unpaid invoices on a quantum meruit basis.

Both proceedings were heard together. The Tribunal ultimately rejected Slaven’s claims, accepted the claims of the builders and ordered Slaven to pay the builders’ outstanding invoices.

The Appeal

Slaven appealed from that order and, in substance, raises five grounds of complaint for consideration.

Ground 1

Slaven contends that the Tribunal erred in:

1. Finding that the contract between the parties was on a “do and charge” or “costs plus” basis rather than for a fixed price of $24,000;
2. The Tribunal had no jurisdiction to determine the claim in relation to the shed because the shed was not a “dwelling” and so the HBA did not apply;
3. He received no benefit from the work performed by the respondents and so no amounts ought to have been awarded to the respondents by way of quantum meruit.

However, the Tribunal’s Appeal Panel countered these areas of concern:

1. The Tribunal’s finding was substantially based on primary facts which were capable of support, and thus, no error of law arises in the Tribunal’s finding that the contract was not for a fixed price.
2. The Tribunal did not accept the submission that the shed is not a dwelling because the proposed house was not completed.
3. The Tribunal did not accept the submission that the builders are not entitled to restitution because Slaven did not own the land on which the shed was constructed.

Ground 2

Slaven contended that the appeal should be upheld because the found recording of the hearing before the Tribunal had been withdrawn and concealed for biased reasons not in his favour. He submitted that the hearing was not sound recorded, and this indicated that the Tribunal was biased against him, and that this amount to a significant miscarriage of justice. The Appeal Panel held that the malfunctioning of the equipment is not evidence of bias nor evidence of a miscarriage of justice.

Ground 3

Slaven contended that the Member conducting the hearing had many conflicts of interest which had resulted in bias and false decisions against him. All three of these submissions, on the conflict-of-interest basis, were held to have no substance whatsoever.

Ground 4

Slaven contended that he was disadvantaged in conducting the proceedings on his own behalf, as he had suffered from many medical conditions which made it difficult for him to represent himself. The Appeal Panel held that there was nothing in the material before them which suggested that Slaven was unable to put his case as best it could be put, or that he was under any disadvantage.

Ground 5

Finally, Slaven contended that the shed was incorrectly positioned on the land. However, the Appeal Panel held that there was no error in the Tribunal's rejection of this allegation. Further, even if the allegation were correct, Slaven did not prove any loss or damage resulting from the alleged incorrect position of the shed, as accordingly, he does not own the land.

Decision:

The Appeal Panel indicated that no ground of appeal, whether involving a question of law or otherwise, was apparent to them from Slaven's submissions. Therefore, having considered each of Slaven's complaints, it was of the Appeal Panel's opinion that none of the grounds of appeal succeeded and the appeal was dismissed.

Taylor Construction Group Pty Ltd v The Owners – Strata Plan No 92888

[2020] NSWCATAP 163

Coram: S Westgarth (Deputy President), D Robertson (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 4 August 2020

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Statutory warranty — In accordance with the law - Building Code of Australia – Whether issue of interim occupation certificate creates an irrebuttable presumption that the building is BCA compliant – Whether attachment of “Biowood” to the exterior walls constituted an “undue risk of fire spread via the façade of the building” – Words and phrases – “undue risk”

Facts:

These proceedings concerned the registered proprietor of a building located in Ryde, The Owners – Strata Plan No 9288 (‘**Owners**’), bringing a claim against Taylor Construction Group Pty Ltd (‘**builder**’) and Frasers Putney Pty Ltd (‘**developer**’), alleging that the Biowood cladding that had been installed posed an undue fire risk.

First Instance

Relevantly, there had been no fire incident, which led to the proceedings. The issues for determination by the Tribunal were:

a. Whether the Biowood, as installed, is compliant with applicable codes and standards; and
b. Even if it is compliant, is the Biowood as installed a material which is fit for purpose.

The Owners contended that the Biowood cladding was combustible and breached the statutory warranties of, s 18B of the Home Building Act 1989 (NSW) (‘**HBA**’). Further, the Owners argued that the Biowood was not compliant with the Building Code of Australia (BCA) and Australian Standards.

The builder and the developer contended that consideration should be made of CSIRO’s publication stipulating fire safety guidelines for external walls. In their view, Biowood was compliant with the BCA as it passed one of the tests required by CSIRO.

However, the Tribunal found that even though there is no evidence of a large-scale fire testing of Biowood, it is indisputably combustible and any risk that it will support fire spread between levels presents an undue risk. The Tribunal found in favour of the Owners and concluded that Biowood was not fit for purpose wen used as an attachment to the building, amounting to a breach under s 18B and was non-compliant with the BCA.

The Appeal:

The Appeal Panel was required to determine, among other things, whether the Tribunal erred:

a. In applying an improper construction of the Environmental Planning and Assessment Act 1979 (NSW) (‘**EP&A’**) specifically that on the issuance of an IOC, the EP&A does not create an irrebuttable presumption that the building is compliant with the BCA;
b. In applying an improper construction of … the BCA specifically that any risk of fire is an undue risk of fire and by assigning no meaning to, or by disregarding, the word “undue” found in that clause;
c. In applying the wrong legal test to the facts specifically by way of reversing the onus of proof and requiring [the builder and developer] to prove that there was no undue fire risk for the purposes of … the BCA;
d. In finding as fact that the Biowood attachment diminishes the fire resistance of the external walls in the absence of evidence of that fact;
e. In finding that the Biowood attachment presented an undue fire risk;
f. In applying the common sense test incorrectly with respect to … the HBA; and
g. In finding that the Biowood material was not reasonably fit for the specified purpose for which it was used.

The Appeal Panel rejected all of the grounds of appeal. It was determined that the issue of an IOC does not create an irrebuttable presumption that warranties under the BA have been complied with, and the Tribunal’s findings with respect to undue risk of fire did not amount to an error of law. Accordingly, the Appeal Panel agreed with the Owners submissions that the Biowood used as an attachment to a non-combustible external wall presents an undue risk of fire spread, and as such, diminishes the fire resistance of the external walls.

Decision:

The Appeal Panel found that the Tribunal was correct in determining that the Biowood cladding installed on the façade of a building was in breach of the statutory warranties under the HBA was combustible, posed an undue risk of fire spreading and that the Biowood cladding had to be replaced with cladding that complied with statutory warranties.

Nyunt v North Shore Homes Pty Ltd

[2020] NSWCATAP 143

Coram: K Rosser (Principal Member), M Gracie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 17 July 2020

APPEAL - Home Building Act - residential building contract - delay - suspension or abandonment of works - home warranty insurance - structural and non-structural works cover - quantum meruit - just and equitable - repudiation - termination - statutory warranty and intermediate contract terms - defective works - expert evidence - costs to complete - loss of rent

COSTS - provisional costs order

Facts:

North Shore Homes Pty Ltd ('**builder**') and Ms Ann Nyunt ('**owner**') entered into a written building contract for extensive renovations works to the owner's premises. The contract sum was $360,000 (including GST) and the estimated date for completion was 13 July 2018. Works began on-site and disputes began to arise between the parties in July 2018. There were challenges by the owner concerning the progress payments already made, disputes concerning the scope of the works and complaints of allegedly defective work. The works were delayed three to four months without a request for an extension of time before June 2018.

First Instance

At the hearing before the Tribunal, it was found that the building contract did not comply with the provisions of the Home Building Act 1989 (NSW) ('**HBA**') because the works were uninsured and no insurance under the Home Building Compensation Fund (HBCF) ('**the insurance**') was obtained for the building works until 11 July 2018. However, although the insurance was eventually obtained, it did not expressly cover structural work, which had been performed by the builder. The certificate of insurance referred to merely "non-structural renovations". It was also common ground at the Tribunal hearing that the building contract was unenforceable against the owner under s 10 of the HBA.

In those circumstances, the builder claimed a total sum of $72,126 for unpaid work performed on a quantum meruit.

The owners claim was in respect to variations, defect claims and costs to complete, including a claim for loss of rent following the termination of the building contract, totalling to $133,654.80.

The Tribunal found the owner liable to the builder in the sum of $60,995.87, being the balance of the outcome of both applications.

The Appeal

The builder appealed and sought payment of outstanding money under the building contract with the owner in respect to the building work on the following 11 grounds:

Grounds 1 to 4

Collectively, these grounds raise for consideration whether the Tribunal erred in law in finding that it was just and equitable for the respondent builder to recover on a quantum meruit.

Having considered the evidence and submissions in the appeal, the Appeal Panel was satisfied that leave to appeal should be granted in relation to this ground and the appeal allowed. The Appeal Panel also held that the Tribunal’s finding was against the weight of evidence and that led to an injustice.

Grounds 5 to 8

Collectively, these grounds challenge the Tribunal's finding that the owner was not entitled to terminate the contract by reason of "the builder's contraventions of the HBA, and in particular its failure to obtain insurance".

The Appeal Panel found that the owner was entitled to terminate the contract as and when she did in this case.

Ground 9

This ground concerns the Tribunal's provisional orders in relation to costs. However, this appeal ground was not pressed.

Grounds 10 and 11

These two grounds assert that the builder did not comply with Order 2 of the Tribunal's orders in relation to the provision of insurance.

The Appeal Panel found that the builder had not satisfied the condition on which the Tribunal allowed the quantum meruit and the Tribunal incorrectly attributed a retroactive operation to the policy - either as issued at the time of the hearing or which was assumed to be the case in any further cover for structural work which was to be later obtained by the builder in an attempt to comply with Order 2 made by the Tribunal.

Decision:

The builder was wholly successful in the appeal. The Appeal Panel determined to:

1. Grant leave to the builder to appeal ground 1-4 of the Notice of Appeal and allow the appeal under grounds 1-4;
2. Allow the appeal on grounds 5-8, 10 and 11 of the Notice of Appal
3. Set aside Order 1 of the Tribunal…; and
4. Vary Order 3 of the Tribunal made … and order that the respondent is to pay the builder the sum of $46,728.13, being the total of the amount found by the Tribunal for defective works of $11,130.13 and the sum of $35,598 agreed between the parties based on the outcome of the appeal.

MJH Built Pty Ltd v Robinson

[2020] NSWCATAP 133

Coram: T Simon (Principal Member), D Fairlie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 7 July 2020

APPEAL – HOME BUILDING – onus of proof, credibility, leave to appeal

Facts:

MJH Built Pty Ltd ('**builder**') and Deborah Robinson ('**homeowner**') entered into a contract in relation to the renovation of a bathroom and laundry. These proceedings was mainly concerned with how the contract came to an end.

First Instance

The homeowner lodged her application to the Tribunal on 6 December and sought amounts in relation to defective and incomplete works and overcharging. The homeowner also sought an order to not pay the builder's alleged outstanding amounts. The builder's application was for an order for the payment of the outstanding amount of $5,749.13.

The Tribunal found that the contract came to an end when the builder repudiated the contract and, in accepting that repudiation, the homeowner terminated the contract. The Tribunal subsequently awarded the homeowner the amount of $48,652.40 for defects and dismissed the builder's application.

The Appeal

The builder sought to appeal the decision of the Tribunal on 10 grounds. However, by the time the appeal came for final hearing, the builder was no longer pressing grounds 2 or 3. The builder appealed on the basis of errors of law and sought leave to appeal the decision.

Ground 1

The builder appealed on this ground as an error of law, submitted that the Tribunal had erred throughout the decision by misapplying the onus on the homeowner to prove each breach. The Appeal Panel accepted that if such an error was made it would indeed amount to an error of law, however, did not find that such an error was actually made.

Ground 4

The builder submitted that the Tribunal made adverse credit findings against Mr Higgins, who provided affidavit evidence, in relation to the installation of the underfloor heating mat, Mr Higgins' license and testimonials. The builder also contended that those adverse credit findings infect the whole of the decision. However, the Appeal Panel did not accept that the findings about Mr Higgins' credit gave rise to an error.

Ground 5-10

The builders remaining grounds appeared to be leave grounds and repeat many of the submissions discussed above. The Appeal Panel found that there were no issues of principle, no questions of public importance or matters of administration or policy which concerned this appeal. Accordingly, the Appeal Panel was not satisfied that the builder had suffered a substantial miscarriage of justice, and therefore, leave to appeal was refused.

Decision:

Therefore, the builder was not successful in appealing on any grounds and as such, leave to appeal was refused and the appeal was dismissed.

Bao Long Guo t/as GD Brother Projects v GB Electrical Services Pty Ltd [2020] NSWCATAP 131

Coram: Cole DCJ (Deputy President), G Blake AM SC (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 2 July 2020

APPEAL – Building and Construction – Quantum Meruit

Facts:
GB Electrical Services Pty Ltd (‘**electrician’**) entered into a contract with Bao Long Guo, trading as GD Brothers projects (‘**builder**’) to provide electrical work for a residence to be constructed by the builder, pursuant to a contract between the builder and the owner of the land (‘**the landowner’**) upon the residence was to be constructed. In addition to performing the electrical work specified in its contract with the builder, the electrician performed certain electrical work on the residence which was not stipulated in its contract with the builder.

First Instance
The electrician made an application to the Tribunal for payment from the builder in the amount of $6,000, which it claimed, was outstanding under its contract with the builder. Further, the electrician claimed another amount that compensated the builders for undertaking some additional electrical works, and therefore claimed a total or $37,256. Following the hearing, the Tribunal at first instance ordered the builders to pay the electrician the sum of $31,586 as money owed under the contract and in relation to quantum meruit claim. The Tribunal also order the builders to pay the electrician’s costs of the application.

The Appeal
The builder appealed to the Appeal Panel. Although, on the face of his notice of appeal, the builder appeared to sought leave to appeal, thus giving rise to the inference that he had wised to appeal on a ground which is not a question of law. On the other hand, the electrician sought leave, in the context of the builder’s appeal, to essentially reopen its case and adduce fresh evidence in the form of two affidavits. However, the Appeal Panel indicated that the application was made subsequent to the hearing of the appeal and noted that the electrician was the respondent to the appeal and not filed a cross claim. The real issue in the appeal was whether it was an error of law for the Tribunal at first instance to determine that the electrician had

established that the builder had obtained the benefit of the additional electrical work performed by the electrician.

The Appeal Panel examined that the Tribunal had determined that the builder had been unjustly enriched on account of the additional electrical works performed by the electrician at the request of the landowner, in the absence of supporting that conclusion. The electrician failed to establish, by adducing any probative evidence, that the builder was unjustly enriched at its expense in relation to the performance of additional electrical work. Therefore, the determination that the builder had been unjustly enriched by the additional electrical works performed by the electrician, without any evidentiary basis, constitutes an error of law by the Tribunal at first instance.

Decision

The Appeal Panel's findings held that the appeal by the builder was allowed and orders made by the Tribunal at first instance were set aside.

Cohen v Zanzoul trading as Uniq Building Group (No 2)

[2020] NSWSC 838

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 30 June 2020

BUILDING AND CONSTRUCTION – contract – defects – whether defendant had opportunity to rectify works – whether plaintiffs failed to mitigate their loss

BUILDING AND CONSTRUCTION – consideration of incomplete works and defective works – use of Scott Schedule

Facts:

The facts of this case are summarised in more detail in the decision *Cohen v Zanzoul trading as Uniq Building Group* (2020) NSWSC 592 (‘**Judgment No 1**’) (PAGE number). Broadly, the proceedings concerned the Cohens’ (‘**owners**’) claim for damages for Zanzoul's (‘**builder**’) failure to rectify defects and incomplete work. The builder claimed that the owners' failure to pay the full amount of multiple progress claims amounted to a repudiation of the contract.

In Judgement No 1, it was determined that the parties’ rights, which had respectively accrued under the contract before the termination, were not absolved upon termination. It followed that the owners were entitled to recover damages from the builder for defective or incomplete work, and the builder was entitled to recover monies owed under the contract.

Moreover, in Judgement No 1, consideration of the amounts recoverable by the owners was deferred. The issues decided in these proceedings concerned:

1. Whether the owners were entitled to recover damages in respect of defects notified on 11 February 2016, in respect of which the builder alleged he was not given an opportunity to rectify;
2. Whether the owners had mitigated their loss; and
3. Whether the owners were only entitled to claim damages for incomplete work above the amount they would have been obliged to pay the builder to complete the works.

Decision

<u>*11 February Defects*</u>

It was found that the builder was provided an opportunity to rectify, however refused to do so until the owners acknowledged the progress payments that he claimed had remained owing to him. Further, it was held that the owners' entitlement to damages had accrued when the defective work was completed, and they were entitled to recover the cost of rectifying the defective work.

Mitigation

It was also found that the issue of failure to mitigate was not properly pleaded. In any event, the Court found that there was no evidence which demonstrated that the builder could have rectified defects for less than the cost incurred by the owners.

Incomplete work

Additionally, it was found that the owners had demonstrated the cost to complete the works by way of expert evidence. The Court dismissed the builder's claim to discount the amount by reference to the amount the owners would have been obliged to pay the builder had he completed the work

Amirbeaggi v Matrix Group Co Pty Limited

[2020] NSWSC 827

Coram: Johnson J

Court: New South Wales Supreme Court

Date: 30 June 2020

APPEAL – Magistrate refused application for stay of execution of Local Court civil judgment – judgment obtained by respondent following registration of adjudication certificate under s.25 Building and Construction Industry Security of Payment Act 1999 – consideration of ss. 39 and 40 *Local Court Act 2007* – whether judgment appealed against was an interlocutory judgment requiring leave – Local Court judgment held to be interlocutory – leave to appeal required – whether leave to appeal should be granted – appellants commenced separate proceedings in District Court against respondent seeking damages including recovery of money covered by Local Court judgment – District Court proceedings still on foot – claim of error in construction and application of ss.92 and 94 Home Building Act 1989 - issue sought to be argued on appeal not raised squarely in Local Court – appellants able to litigate issue in District Court proceedings – leave to appeal refused with costs

Facts:

Farshad Amirbeaggi and Brooke Maniscalco ('**the Appellants**') owned a terrace residence and retained Matrix Group Co Pty Limited ('**the Respondent**') to undertake building renovation works at the property. The parties entered into a cost-plus residential contract in which the estimated the cost of works and fees was $330,000.00.

The dispute between the parties involved the payment of the Respondent's invoices. The Respondent sought an adjudication in its favour under s 25 of the *Building and Construction Industry Security of Payment Act 1999* ('**SOP Act'**) and thereafter, an adjudicator determined that the Appellants were liable to pay, by way of progress payment, an adjudicated amount totalling $58,848.25 (which included interest and the Appellants' unpaid share of the fees of the adjudicator and the authorised nominating authority). The Respondent filed the adjudication certificate under s.25(1) SOP Act and thereafter, judgment was entered by the Local Court in favour of the Respondent against the Appellants in the sum of $60,253.02.

In these proceedings, the Appellants sought leave to appeal under the *Local Court Act 2007* ('LC Act') with respect to a judgment and consequential orders made by a Magistrate on 25 November 2019 refusing the Appellants a stay with respect to enforcement of a judgment given in favour of the Respondent. Therefore, the issue before the court was whether the Appellants should be granted leave to appeal in this case.

The Appellants submitted that the Respondent did not have a contract of insurance as required by s.92 *Home Building Act 1989* ('**HB Act**') so that the Respondent was barred by s.94 from obtaining judgment from the Local Court under s.25(1) SOP Act, with a result that the Local Court should have stayed the execution of the judgment permanently. He submitted that the Respondent was not assisted by s.94(3) HB Act which has application where a contract of insurance is subsequently obtained.

The Respondents submitted that the Magistrate had not been asked to stay the enforcement of the judgment upon the basis that there was a failure to comply with s.94 HB Act so that there was, in effect, a statutory barrier to enforcement of the judgment. He submitted, in any event, that such an argument was not to be deployed appropriately in seeking a stay of enforcement of a judgment. He submitted that the Appellants had not sought judicial review of the adjudication certificate nor had an application been made to set aside the Local Court judgment.

Decision:

The Court asserted that generally, it is appropriate to grant leave in cases that involved issues of principle or questions of public important or where it is reasonably clear that an error has been made. However, the Court was not satisfied that it would have been appropriate to grant leave to appeal in this matter, and made orders as follows:

1. the Appellants are refused leave to appeal from the interlocutory judgment and orders of the Local Court;
2. the Summons filed on 18 December 2019 is dismissed; and
3. the Appellants are to pay the Respondent's costs of the Summons;

East End Projects Pty Ltd v GJ Building and Contracting Pty Ltd

[2020] NSWSC 819

Coram: Ball J

Court: New South Wales Supreme Court

Date: 29 June 2020

BUILDING AND CONSTRUCTION - Progress payments – Where right to present payment claim contingent on the provision of a draft payment claim on a certain date – Whether contingency void for unduly restricting the operation of the Building & Construction Security of Payment Act 1999 (NSW)

Facts:

East End Projects Pty Ltd ('**developer**') and GJ Building & Contracting Pty Ltd ('**builder**') entered into a contract for construction works on a project at East End, Newcastle. The developer sought a declaration that a payment claim was void for the purposes of the *Building & Construction Industry Security of Payment Act 1999* (NSW) ('**Act**') and an order restraining the builder from seeking a determination under the Act regarding that claim because a reference date had not arisen when the claim was served.

The mechanism for making a claim for payment under the contract required the builder to provide a draft claim before its actual progress claim, as stipulated in the contract. However, the builder did not follow the draft progress claim procedure and instead served a progress claim on 28 May 2020 without having served a Draft Progress Claim. The builder claimed that the mechanism for fixing a reference date was void under section 34(2) of the Act, and therefore the reference date arose on the last day of each month under section 8(2)(b) of the Act. The developer claimed that the reference date was to be determined by the contract under section 8(2)(a) of the Act, and therefore no relevant reference date arose because no Draft Progress Claim had been served.

Decision

The Court found in favour of the builder and held that the contract did not identify a date on which a claim for a progress payment may be made. A reference date arose under the contract under section 8(2)(b) of the Act (being the last day of the month in which the work was carried out). The Court did not accept the developer's argument that the requirement to submit a Draft Progress Claim before the Final Progress Claim was a mechanism designed to facilitate the prompt payment of progress claims rather than a mechanism which impeded a reference date from arising and restricting the operation of the Act.

The fatal flaw in the payment mechanism was the requirement that a Draft Progress Claim had to be served by the 25th day of the month, the result being that if the builder failed to serve the Draft Progress Claim by that date, no reference date would arise and the builder would lose its entitlement to serve a progress claim regarding that month. That requirement restricted the operation of the Act.

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd

[2020] NSWCA 118

Coram: Bell P, Macfarlan and Leeming JA

Court: New South Wales Court of Appeal

Date: 19 June 2020

BUILDING AND CONSTRUCTION - Building and Construction Industry Security of Payments Act 1999 (NSW) - builder served payment claim - developers failed to serve payment schedule - builder obtained judgment pursuant to Act - developers' appeal from judgment dismissed - proceedings based on construction contract pending in Technology and Construction List - late filing of cross-claim by developers - no explanation for late filing of cross-claim - developers seek further stay of judgment pending determination of main proceedings - developers claimed that they would be wound up if no stay were ordered and the cross-claim would not be adjudicated - primary judge dismissed application for a stay - whether any error of principle - whether principles in a “Grosvenor stay” applicable - Grosvenor Constructions (NSW) Pty Ltd v Musico [2004] NSWSC 344 considered - whether developers had demonstrated basis for stay of execution - leave to appeal refused

Facts:

These proceedings concerned a disputed payment claim between TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd (‘**Developers**’) and Decon Australia Pty Ltd (‘**Builder**’). The Developers and the Builder entered into a building contract for the design and construction of a residential development in Epping. The Builder issued a payment claim for approximately $6.4 million, and the Developers did not respond until after the strict 10 business day timeframe required under the *Building and Construction Industry Security of Payment Act 1999* (‘**Act**’).

First Instance

The Builder commenced proceedings in the Supreme Court to recover payment by way of summary judgment whilst the Developers challenged this decision and argued that the payment claim was not valid because:

1. The supporting statement that was attached to the claim was not compliant with the Act because it stated that suppliers and subcontractors had only been paid for one week (as opposed to payment for all work performed)
2. There were amounts claimed which accrued after the ‘reference date’ on which the claim is based.

The Builder obtained an SOP judgment in the Supreme Court for approximately $6.4 million against the Developers for their failure to serve a payment schedule in response to a payment claim validly made under the Act. This SOP judgment was readily obtained by virtue of s 15 of the Act, which entitles a claimant to recover a payment claim in full as a debt due in a Court where the respondent fails to serve a payment schedule within the time stipulated in the Act. In such proceedings, the Respondent is prohibited from bringing any cross claims and raising any matters arising under the contract in its defence.

The Developers' subsequent appeal of the SOP judgment was dismissed

The Appeal

The Developers sought leave to appeal and the issues before the Court were as follows:

1. Whether the principles from *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344 and related cases apply either directly or by way of analogy where a judgment debtor cannot pay the judgment ordered;
2. Whether s 32 of the Act has a varied operation depending upon the financial circumstances of the parties; and
3. Whether the primary judge's discretion miscarried in refusing to grant the stay.

Decision:

The Court of Appeal held that any question of principle or general importance identified by the Developers was not made out. Further, there was a failure on the part of the Developers to make out a case that the practical effect of failing to obtain a stay would stultify the litigation of the cross-claim is another reason telling against the grant of leave. Therefore, leave to appeal was refused, with costs.

Javam v Al-Amin

[2020] NSWCATAP 113

Coram: S Westgarth (Deputy President), J Currie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 17 June 2020

CONTRACT - Home Building Act - failure to progress the works - findings available on the evidence - substantial breach – repudiation - contractual rights and coexistence of common law rights - procedural fairness - failure of consideration."

Facts:

These proceedings concerned an appeal from the Tribunal. The parties, Abdollah Javam ('**Builder**') and Mohammad Al-Amin ('**Homeowner**'), had entered into a residential building contract and fell into dispute. Proceedings were commenced in the District Court and those proceedings were resolved upon the basis that the parties entered into an agreement dated 25 November 2017, by which the home building contract between the parties was amended through an addendum. The addendum contained a number of provisions, and relevantly, set out the agreement between the parties to appoint an independent architect ('**the Architect**') to resolve all disputes as an independent expert. Accordingly, in 2018, Mr Ian Cutcher was jointly reported as the independent architect pursuant to the addendum.

First Instance

The Homeowners tendered before the Tribunal a quantity of documents which had been filed in the District Court proceedings. The Builder objected to the receipt of that material and sought a ruling from the Tribunal that those documents be excluded. The Tribunal decision examined events following the appointment of the architect and in summary, found that the Builder failed to progress the works or pay Mr Cutcher's invoices and that the Builder had committed a substantial breach of the contract. The Tribunal also found that the Homeowners had both terminated the contract and had accepted the Builder's conduct as repudiatory. Therefore, the Tribunal ordered that the Homeowners were entitled to a refund of the amount paid being $446,513.65 on the basis that they have received no material benefit for the payments they made to the Builder.

The Appeal

The Builder's 10 grounds of appeal, submissions in support of the appeal and the Appeal Panels' decisions in accordance with each ground can be summarised as follows:

Ground 1: the Tribunal erred in finding that the Builder failed to progress the works "without no evidence to its finding".

The Appeal Panel found that the evidence supported the Tribunal's finding of the decision that by the time the Homeowners had issued a termination notice, the Builder had repudiated his obligations under the contract and the appendum. Therefore, in the absence of any error of law and due to the ample evidence in support of the Tribunal's decision, it was decided that Ground 1 had no merit and was rejected.

Ground 2: No evidence to support finding of fact that the development of the model did not go beyond the scope of the architect's work and that the Builder was obliged to pay the architect's fees

The Appeal Panel reiterated that the Builder had an obligation under the addendum to pay the Architect's fees and found that the Builder's submissions failed to explain how or why the Tribunal erred in finding that the Builder was to pay the Architect's fees. Ground 2 was therefore rejected.

Ground 3: No evidence to support finding of fact that the Builder was in substantial breach with respect to delay in paying the architect's fees

The Appeal Panel asserted that the Builder did not actually identify any contrary evidence on the ground that the Tribunal failed to take into account contrary evidence. To the extent that Ground 3 related to the role of the Architect and the non-payment of his fees, the Homeowners repeat their earlier submissions and claim that the Architect acted within his role and was entitled to be paid his fees. The Builder's failure to pay the architect's fees triggered the resignation of the architect. This failure, combined with the Builder's failure to perform any building work of substance in 2018, resulted in the Homeowners terminating the contract by reason of the Builder's repudiation of his contractual obligations under the contract and the addendum. Ground 3 was therefore rejected.

Ground 4: the Tribunal erred in failing to take into account the effect of clause 30 of the contract.

Ground 4 was rejected on the basis that clause 30 does not remove any general contractual entitlement to terminate for repudiation or to recover the cost of completion of the building work.

Ground 5: <u>the Tribunal erred in finding that the architect acted within his role under the addendum.</u>

Ground 5 was rejected on a the same basis as referred to above: the Builder failed to explain how or why the architect is said to have not acted within his role or how or why the architect's role was confined to acting in accordance with the addendum

Ground 6: <u>Identification of wrong issue/ wrong question asked/ applied on principle of law/ failure to provide reasons in respect of whether the Builder repudiated the contract, whether the Homeowners validly terminated the contract at common law</u>

In the circumstances, the Appeal Panel found that the Homeowners did not lose their entitlement to accept the Builder's continuing repudiatory conduct and terminate the contract as they did by the termination notice. Therefore, Ground 6 was rejected.

Ground 7: <u>the Tribunal erred in implying that the Homeowners' alleged termination notice was implicitly made under clause 27.3 with no evidence to support implication</u>

The Homeowners submitted that their submissions concerning Ground 6 answer the Builder's submissions in support of Ground 7.

Ground 8: <u>the Tribunal erred in concluding the slab was of no value with no evidence to support its finding in implying that the slab had no value as it was not yet certified</u>

The Appeal Panel found that no building works of substance occurred following the addendum and the Homeowners did not receive anywhere near a substantial part of the benefit expected under the contract and the addendum. This ground was rejected.

Decision:

Therefore, all grounds of appeal were rejected and accordingly, the appeal was dismissed. The Appeal Panel also ordered that the Builder pay to the Homeowner the Homeowners' costs of the appeal in an amount as agreed or assessed.

Jamie Beyer t/as Leisure Pools & Spas Newcastle v Palazzi

[2020] NSWCATAP 109

Coram: P Durack SC (Senior Member), D Robertson (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 11 June 2020

APPEAL – Procedural fairness – Appellant claimed had not received critical expert report prior to hearing – no evidence filed on appeal to support assertion – facts said to constitute denial of procedural fairness not established.

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Major defect – a small crack in a swimming pool shell not extending below the water-line did not amount to "destruction" of the swimming pool – evidence that the pool shell was not adequately supported and that cracking of the shell had occurred was sufficient to establish that the pool was likely to become unusable

Facts:

These proceedings concerned an appeal from the decision of the Tribunal. Jamie Beyer t/as Leisure Pools and Spas Newcastle ('**Builder**') installed a swimming pool at Mr and Mrs Palazzi's residence ('**Homeowners**') between November 2012 and March 2013. Sometime later, the area surrounding the pool experienced subsidence, resulting in a vertical crack in the corner of the pool above the waterline. The Homeowners commenced proceedings in the Tribunal on 9 September 2018 alleging that the work carried out by the builder was defective and in breach of the statutory warranties set out in section 18B of the *Home Building Act 1989* (NSW) ('**HBA'**).

First Instance

Expert Evidence

The major issue between the parties was the cause of the movement of the pool:

- the Homeowners alleged that the movement was caused by defective building work by the builder. The owners obtained three expert reports, one of which from Dr Savage dated February 2019 ('**Original Report**'), in support of their position; and
- the Builder alleged that the movement was caused by inadequate construction and engineering detail of a retaining wall. The Builder obtained a single expert report in support of his position.

On the day of the hearing, the Builder, under some confusion as to whether he had been served the Original Report, claimed that:

- he had not been given the opportunity to reply to the Original Report; and
- was not aware that the matter had been set down for the final hearing and, as a result, had not arranged for his expert to give evidence.

The Tribunal declined requests for the matter to be adjourned to allow the Builder to obtain further expert evidence. In these circumstances, the Tribunal accepted Dr Savage's evidence and determined that the damage to the swimming pool was caused by defective work by the Builder.

Major Defect

The HBA provides that a person has six years to commence proceedings in relation to a 'major defect' and two years to commence proceedings for all other defects. If proceedings are not commenced within the relevant time period, the Tribunal does not have jurisdiction to make a determination. As the Homeowners commenced proceedings more than 5 years after the works were completed, the Tribunal would only have jurisdiction to determine the matter if the Homeowners could establish that the relevant defect was a 'major defect' pursuant to the HBA.

The Tribunal determined that the work performed by the Builder had caused a defect in two major elements of the pool:

- the cracking of the shell of the pool above the waterline, because it was load bearing and was essential to the stability of the core; and
- the inadequate slab and piers, because they were load bearing components of the pool and were essential to its stability.

The Tribunal also found that the defect in the major elements of the pool:

- had caused destruction of part of the pool (by causing a significant crack); and
- was likely to cause the inability to use the pool for its intended purpose, as it was likely that the crack would worsen over time.

Therefore, it was determined that the Tribunal had jurisdiction to make a determination and found in favour of the Homeowners.

The Appeal

The matter was appealed by the Builder on two grounds, and can be summarised as follows:

Ground 1: Procedural Fairness

The first ground of appeal arose from an alleged denial of procedural fairness, as the Builder was not given an adjournment when he should have been, nor given a reasonable opportunity to present his case. The also Builder contended on a number of bases that he was not provided with the Original Report before the hearing, and therefore had not been given an opportunity to obtain expert evidence in reply. However, the Appeal Panel was unable to conclude that the Builder did not receive a copy of the report before the hearing, because:

- it was not apparent from the decision or the record of the hearing that the Original Report had not been served;
- the assertion that the Original Report was not received was at odds with the Builder's response at the hearing that he had read Mr Savage's reports; and
- the Builder failed to put on any evidence in support of his assertion.

Ground 2: Lack of Jurisdiction

The second ground of appeal was that the Senior Member made a decision in which he did not have the jurisdiction to make, given there was insufficient evidence to satisfy the Senior Members' finding that the defect was a 'major defect' for the purposes of the HBA (and therefore the relevant limitation period for the claim had expired).

The Builder submitted there was no evidence to support the Senior Member's conclusion that:

- the defect caused the destruction of a part of the pool as it is responsible for a significant crack; and
- the crack would increase over time and be quite likely to cause the inability to use the pool for the intended purpose.

The Appeal Panel agreed with the builder that the existence of the crack did not constitute the 'destruction' of the pool or part of the pool. The Appeal Panel also, notwithstanding that finding, determined that on the evidence available at hearing, it was reasonably open to the Senior Member to determine that the crack would increase over time. On this basis, the Appeal Panel was not persuaded that there was an error of law in the Senior Member's conclusion that the defect was a 'major defect' within the meaning of the HBA.

Decision:

Accordingly, both grounds of appeal failed, and it was held that the appeal was the be dismissed.

DB Homes Pty Ltd v D'Souza

[2020] NSWCATAP 104

Coram: T Simon (Principal Member), D Goldstein (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 10 June 2020

HOME BUILDING – Contract completion date - Delay damages for late completion- new evidence

Facts:

The proceedings concerned an appeal from a decision in the Tribunal which awarded Mr and Mrs D'Souza ('**Homeowners**') damages of $9,800 for the late completion of a granny flat by DB Homes Pty Ltd ('**Builder**'). The parties entered into a non-standard contract for the construction of the granny flat. This contract set out a schedule of payments to be made for completion of seven stages of work. The special conditions to the contract allowed extensions of time for rain and inclement weather and importantly stated:

> '*Construction period – Estimate 84 business days from Concrete Slab State. (A 4 week period of Christmas and New Year is excluded from the … Construction Time frame*).'

The Tribunal at first instance decided that the Builder was 35 weeks late in completing the granny flat and the appropriate weekly rate of damages was $280.

On appeal, the Builder claimed that the Tribunal:

- failed to determine the correct contractual start and finish dates of the project;
- failed to determine the actual construction duration; and
- was not fair and equitable in making its decision.

Decision:

The Appeal Panel upheld the Tribunal's decision awarding $9,800 to the Homeowners and dismissed the appeal. It was also held that the Tribunal was fair and equitable in making its decision, and that whilst the contract did not refer to the availability of damages (or have any liquidated damages mechanism), that did not operate to prevent the owners claiming or obtaining a damages order, nor did the fact that the builder did not include in its contract price a risk allocation amount for such an eventuality. The Appeal Panel also held that the Tribunal Member did not fail to determine the correct contractual start and finish dates of the project, or the actual construction duration. Therefore, the appeal was dismissed.

Taouk v Commissioner for Fair Trading, Department of Customer Service

[2020] NSWCATOD 66

Coram: N S Isenberg Rfd (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Occupational Division

Date: 9 June 2020

MERITS REVIEW - Building and construction – Home Building Act 1989 (NSW) - contractor licence – fit and proper.

Facts:

These proceedings concerned whether Mr Taouk met the relevant industry experience requirements for general building works, and whether he was a fit and proper person to hold a Contractor's License per the *Home Building Act 1989* (NSW) ('**HBA**').

First Instance:

Mr Taouk had previously unsuccessfully sought the assistance of the Tribunal in relation to an application for a contractor's licence under the HBA. The Tribunal observed that Mr Taouk's qualifications were not an issue. The Tribunal affirmed a determination of a delegate of the Commissioner for Fair Trading ('**Respondent**') that the Respondent was not satisfied that Mr Taouk was a fit and proper person to hold a contractor's licence under s 21(a) of the HBA. The delegate had also determined that Mr Taouk did not meet the relevant experience requirements. The Tribunal held that having regard to its decision concerning Mr Taouk's 'fit and proper' situation it was not necessary for it to make a decision in relation to Mr Taouk's relevant experience.

Review Proceedings

In these proceedings, the Respondent states that he is now satisfied with Mr Taouk's experience. However, the Respondent is no longer satisfied with Mr Taouk's qualifications. The Respondent also remains unsatisfied that Mr Taouk is a fit and proper person to hold a contractor licence in the category of "Plumber, Drainer, Gasfitter, LP Gasfitter" ('**License**').

Decision:

Experience

The Respondent conceded that Mr Taouk had satisfied the experience requirements. Accordingly, the issue of relevant experience is not alive in these proceedings.

Fit and Proper

Several aspects were considered in dealing with the fitness and propriety issue, and can be summarised as follows:

1. **Firearms Licence**: Mr Taouk submitted that holding such a licence requires him to be "fit and proper". However, the Tribunal was not satisfied with Mr Taouk's implied claim that the issue of a firearm licence/permit provides automatic and compelling evidence that the holder of such a licence/permit is a fit and proper person to hold a relevant contractor's licence under the HBA.
2. ***Production by Mr Taouk of incorrect information to the Respondent in support of an application for a licence under the HB Act***: Mr Taouk made some admissions during cross-examination and impliedly changed his evidence, relating to completing and paying for modules for a certificate, on many occasions. Accordingly, the Tribunal found that Mr Taouk had not enrolled in any relevant courses and it was highly implausible that Mr Taouk had attended to any payment for such courses
3. ***Non-production of documents destroyed in a fire***: Mr Taouk asserted that the documentation requested by the Respondent was destroyed by a fire in a storage facility. However, the Tribunal rejected this evidence.
4. ***Potential breaches of s 13 – work for Elevation Projects***: The Respondent submitted, and it was not disputed, that Mr Taouk did not at any relevant time hold an endorsed contractor licence, nor a supervisor or tradesperson certificate nor an owner-builder permit. Accordingly, the Tribunal accepted the Respondent's submission and was not satisfied that Mr Taouk was not carrying out work in breach of s 13 of the HBA.
5. ***Mr Taouk's character***: Whilst Mr Taouk made several submissions concerning his good behaviours, particularly relating to his honesty and integrity, the Tribunal was not satisfied that he had sufficient understanding of the statutory requirements for fitness and propriety of licence holders

Having regard to my above findings, the Trubunal was not satisfied that Mr Taouk would comply with relevant requirements if the contractor licence he applied for was issued to him at this time. Accordingly, the Tribunal was not satisfied that Mr Taouk was at that time a fit and proper person for the purposes of s 20(1)(a).

Qualifications

Although there were substantial disputes regarding Mr Taouk's qualifications and their validity, it was not necessary for the Tribunal to deal with the voluminous evidence and submissions concerning Mr Taouk's qualifications, having regard to the finding that Mr Taouk was not a fit and proper person to hold the License.

Vannella Pty Ltd Aff Capitalist Family Trust v TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd; Decon Australia Pty Ltd v TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd

[2020] NSWSC 659

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 29 May 2020

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payments Act – where builder served payment claim and developer did not serve a payment schedule – where builder obtained summary judgment – where developer unsuccessfully appealed from that judgment – where developer now brings a cross claim in main proceedings – where developer sought a "Grosvenor stay" – where stay brought on basis of developer's parlous financial position rather than builder's financial position – whether stay sought truly a "Grosvenor stay" – whether any stay should be granted

Facts:

TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd ('**the Developers**') owned a property in Epping. The Developers entered into an agreement with Decon Australia Pty Ltd ('**Builder**') whereby the Developers would design and construct a residential development ('**the Juniper Development**') on the Epping property. These proceedings concerned the Developers seeking a stay of a judgment entered against them by Henry J on 11 October 2019 in separate proceedings for the sum of $6,355,352.46 ('**the Judgment**'). Those proceedings ('**SOP Proceedings**') were brought by the Builder against the Developer under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ('**SOP Act**').

History of Proceedings

In May 2019, the Builder and a related company, Vannella Pty Ltd ('**Vannella**') commenced proceedings against the Developers. Vannella contended that it was a project manager in relation the project.

In the meantime, in June 2019, the Builder served on the Developers a payment claim of $6,355,352.46, comprising of contract works, variations and interest. The Developers did not serve a payment schedule within the time required by s 14(4)(b) of the SOP Act. They thereby became liable to pay the Builder the $6,355,352.46 referred to in the payment claim.

In July 2019 the Builder commenced the SOP Proceedings seeking judgment for the $6,355,352.46 and, in those proceedings moved for summary judgment. Accordingly, Henry J awarded the Judgment in favour of the Builder.

The Developers appealed, and in February 2020, the Developers sought a stay of the Judgment pending the appeal. In March 2020, Henry J granted such a stay on terms including the giving to the Court by the Developers of undertakings concerning their assets. In May 2020, the Developers' appeal was dismissed.

These Proceedings

Four days after their appeal was dismissed, on May 2020, the Developers did two things in these proceedings: firstly, filed a cross claim and secondly, filed a notice of motion seeking a stay of the Judgment until determination.

The Cross Claim

In short, the cross claim submitted that the Builder:

1. Was not entitled to the retention of $1,551,825 claimed in the payment claim;
2. Was not entitled to the variation claim of $1,512,526.40 claimed in the payment claim;
3. Liable for defects, particularly in relation to cladding, in an estimated amount of $4,787,810.50; and
4. Liable to pay general damages for delay in an amount yet to be quantified but which "will ultimately be in the many millions of dollars".

The stay application

The Developers offered undertakings to the Court concerning their assets to the same effect as those given to Henry J as a condition of the stay her Honour granted pending the appeal in the SOP Proceedings. The stay was sought on the basis that the Developers cannot pay the $6,355,352.46 now due under the Judgment, as it would push the developers into insolvency and ultimately liquidation. The Developer's claim for a stay as an application was characterised as the "Grosvenor stay: by the legal representation; that is, a stay restraining a part entitled to a judgment by reason of the Act from enforcing the judgment by reason of that party's financial position. However, there was no question about the Builder's financial position, and the Court asserted that there was no decision where a stay of judgment granted under the Act had been stayed on this basis. Ultimately, then, the Developers accepted that they were not seeking a Grosvenor stay.

Nonetheless, the Developers relied on the power of the Court to grant a stay whenever the requirements of justice so demand. The Court then grappled with the question of whether the requirements of justice warrant such a stay in this matter.

Anterior matters

Stevenson J asserted that there was no explanation as to why the Developers did not file a cross claim alone with the response, and why it is only in these proceedings that the Developers decided to do so. Accordingly, had the developers more diligently brought a cross claim in these proceedings, that would have provided a basis on which they could have sought a stay of judgment from Henry J. However, instead, the Developers left matters in these proceedings in abeyance whilst they brought the appeal in the SOP Proceedings, where they failed. Therefore, to grant a stay in these proceedings would render pointless and set to nought all that had occurred in the SOP Proceedings. For those reasons, Stevenson J arrived at the conclusion that the requirement of justice does not in this case warrant the granting of the stay sought by the Developers.

Decision

Therefore, Stevenson J was not persuaded that the requirements of justice warrant a stay of the Judgement and declined the grant to stay.

Betta Build Group Pty Ltd v El Baba (No. 2)

[2020] NSWDC 238

Coram: Abadee DCJ

Court: District Court of New South Wales

Date: 22 May 2020

BUILDING AND CONSTRUCTION – referral of question of rectification costs for defective works to referee – whether referee's approach should be wholly or partly adopted – whether referee denied natural justice by closing his mind to the Builders' evidence and contentions – whether apprehended bias – whether referee failed to give adequate reasons for its findings

Facts:

These proceedings concerned construction works undertaken on a residential property in Bankstown. After making payments for 5 of 6 claims, the defendant ('**Owner**') terminated the contract with the plaintiff ('**Builder**') and brought a claim for damages against the Builder for breach of warranties implied under the *Home Building Act 1989* (NSW) ('**HBA**').

First Instance

In 2019, Abadee DCJ delivered reasons for judgment in this proceeding, in which the two claims submitted by the Builder were rejected and the Owners' claim in relation to defective works was accepted. A claim in relation to overpayment for a relatively modest figure was also upheld. After identifying the defects and indicating the nature of the rectification works, the issue of quantification of the rectification of costs to a referee was discoursed and the making of dispositive orders was deferred (including costs of the referral and the proceedings generally) until that issue had been determined.

These Proceedings

The issue before the court was related to the referee's report, consisting of an indication as to how the works were priced, and then a pricing of the defects. By a notice of motion in May 2020, the Owner applied for the adoption of the report. The Builder opposed the Court's adoption of the report on three bases:

1. Denial of Procedural Fairness;
2. Apprehended Bias; and
3. Inadequate or no reasons

The Builder contended that:

1. Primarily, the referee did not accord natural justice to the Builder. Further, it did not accord with the terms of the reference, as it required the referee to consider only the evidence of the quantity surveying evidence of each party;
2. Secondly, and alternatively, this approach by the referee manifested apprehended bias. The same facts relied upon in support of the natural justice argument were said to sustain this argument; and
3. Thirdly, the referee failed to give adequate reasons, and there were specific instances where no reasons were advanced.

The Owners submitted in response that:

1. There was little doubt that natural justice had been accorded to the parties as the referee has taken all reasonable steps and rejected the point that the referee engaged in any form of pre-judgment;
2. A requirement that a party advocating for ostensible bias would have to be made out to clearly identify the facts necessary to make good the contention; and
3. The referee's reasoning process was sufficiently disclosed so that the Court could be satisfied that the referee's conclusions were the result of that intellectual process.

Decision:

The Court held, on the above three bases, that:

1. The Builder had not made out, to the requisite standard of proof on the serious charge it makes, that the referee did not accord natural justice to it;
2. The Builder accepted that its argument on bias would follow the result of its argument on natural justice. This argument therefore also fails; and
3. Builder had not demonstrated any "patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding" which is usually required to enliven the Court's discretion to reject the whole or part of the report.

Therefore, it was ordered that the report be adopted in its entirety, the amended statement of claim to be dismissed, and judgment was in favour of the Owner in the sum of $227, 941.21 relating to the defective works.

In-Line Building and Construction Management Services Pty Ltd v Bluecarp Pty Ltd

[2020] NSWSC 606

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 21 May 2020

BUILDING AND CONSTRUCTION – whether serious question to be tried that an adjudication determination made under the Building and Construction Industry Security of Payment Act void – whether balance of convenience favours restraining defendant from enforcing the determination pending the hearing of the proceedings

Facts:

In-Line Building and Construction Management Services Pty Ltd (‘**In-Line**’) and Bluecarp Pty Ltd (‘**Bluecarp**’) entered a contract for the provision by Bluecarp of carpentry services at premises in Bondi. In March 2020m Bluecarp served In-Line a payment claim of $35,895.50. Soon thereafter, In-Line served a payment schedule specifying that the amount payable by it to Bluecarp was nil.

First Instance

In April 2020, Bluecarp made an adjudication application, to which In-Line responded with an adjudication response. In its response, In-Line contended that four amounts relating to allegedly defective work and totalling $74,000 should be set-off against the amount claimed by Bluecarp. In-Line also contended in its response that it had paid $18,656 on account of the work the subject of the Payment Claim.

In May 2020, the adjudicator determined that In-Line was obliged to pay Bluecarp $11,906.50. That sum was calculated by deducting from the $35,895.50 claimed in the payment claim and adjudication application an amount of $23,989 being part of the $74,000 set-off claimed by In-Line. The Adjudicator made no reference to the $18,656.

These Proceedings:

In-Line contended that, had the Adjudicator taken into account the $18,656, he would have found that no amount was due by it to Bluecarp. Further, In-Line contended that in these circumstances the determination is of no effect because the Adjudicator:

1. failed to consider the allegedly undisputed fact that In-Line had paid the $18,656 to Bluecarp;
2. thereby failed to “consider” the payment schedule as required by s 22(2)(d) of the Act;
3. thereby acted in breach of the rules of natural justice so as to render his Determination void on the basis of the principles that Justice Stevenson recently summarised in *TWT Property Group Pty Limited v Cenric Group Pty Limited.*

Decision:

Stevenson J held that the defendant was restrained from enforcing an adjudication determination pending final determination of the proceedings

Kyriacou v Bronxx Construction Management Pty Limited

[2020] NSWDC 469

Coram: Neilson DCJ

Court: District Court of New South Wales

Date: 19 May 2020

CONTRACTS – BUILDING AND CONSTRUCTION – ASSESSMENT OF DAMAGES – P obtained default judgment against D for damages to be assessed – Assessment of those damages

Facts:

Kyriacou ('**Plainitff**'), the registered proprietor of the property in Miranda, engaged Bronxx Construction Management Pty Limited ('**Defendant**') for the construction of a childcare centre on the Plaintiff's land. Following construction, the parties fell into dispute relating to a range of factors, including defective work and delay in competition of the works.

The plaintiff had previously recovered a default judgment against the defendant for damages to be assessed relating to this matter. Therefore, these proceedings concerned the assessment of damages in relation to the plaintiff's action for damages for breach of the building contract under five different heads:

1. _Defective work_
   The plaintiff argued that the defendant, in breach of the terms of the contract, failed to carry out works according to the specifications of the building contract, using proper care and skill in relation to the works and resulting in defective work.
2. _Delay in completion of the works_
   Although the building contract was executed on or about 5 August 2016 and the defendant was required to compete the works before 2 August 2017, the work was not completed until after this expected date. Accordingly, an occupation certificate was not granted until 20 February 2018, despite it being obviously known to the defendant that the building would be used as a childcare facility. The plaintiff's claim under this head therefore amounted to around $20,000 in interest up until the February date.
   a. _Loss in rent_
      The plaintiff claimed a loss in rent from two days following then due date for completion until the issuing of the occupation certificate, based on a daily rent of

$438.36. The lost rent totalled to almost $82,0000, in addition to a 12-day holiday period of around $5,000.

b. *Loss in utilities*

The cost of utilities (water rates) for the period of delay was also sought by the plaintiff, amounting to around $107,0000.

c. *Variations*

Although the defendant served a variation summary document to the plaintiff claiming an additional payment of $257,367.74, the defendant did not comply with the contract. Therefore, although the plaintiff made a $110,000 payment to the defendant, the Court agreed with the plaintiff's argument that this was an ex-gratia payment. Accordingly, the plaintiff claimed the return of the $110,000 as the defendant had not complied with the building contract.

3. *Allowances*

An express term in the building contract was that Bosch kitchen appliances were to be installed in the kitchen should they be available. However, the defendant failed to comply with such a term and instead installed kitchen appliances of inferior quality, although the Bosch appliances were available at the time. Additionally, the plaintiff also claimed for the installation of a custom joinery, in which the defendant again installed pre-made fixtures of inferior quality. This claim totalled to around $10,000. Under this head of claim, the plaintiff also argued for the difference between the provisional sum of items referred to in the contract and the actual cost of the provisional items, in including the installation of a lift and shade sail.

4. *Other expenses claimed*

This head of claim combined the related to the cost of the proceedings together with the cost of repairs, amounting to around $16,000.

Decision:

The court allowed the sum of all the plaintiff's claims. Verdict and judgment were therefore against the defendant for $544,321.63.

Cohen v Zanzoul trading as Uniq Building Group

[2020] NSWSC 592

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 19 May 2020

BUILDING AND CONSTRUCTION – residential building work – whether plaintiff principals repudiated their obligations under the contract – whether defendant builder thereby exonerated from any liability for defective work – accrued rights of parties

CONTRACTS – residential building work – whether plaintiff principals repudiated their obligations under the contract – whether defendant builder thereby exonerated from any liability for defective work – accrued rights of parties

RESTITUTION – whether restitution on the basis of a quantum meruit available where there is an enforceable contract and rights have accrued under that contract

Facts:

On 22 May 2013, Mr and Mrs Cohen ('**owners**') and Danny Zanzoul trading as Uniq Building Group ('**builder**') entered into a contract under which the builder agreed to demolish an existing dwelling on the owners' waterfront property and construct a multi-level dwelling in the amount of $2,577,785 ('**contract sum**'). The contract comprised the 'Minor Works Contract Conditions (Principal Administered)' form together with a bespoke document titled 'Official Order'. The owners arranged finance with Commonwealth Bank of Australia (CBA), however, the parties understood that the cost of the construction of the new dwelling would exceed the contract sum and that the owners would fund the excess from their own resources. The Official Order provided for payments to be made over the contract sum. The contract stipulated the date for practical completion as 4 September 2014. It was agreed between the parties that practical completion did not occur any earlier than 17 November 2015, when an occupation certificate was issued.

The builder made 23 progress claims during the course of the works. Claims 1 to 17 were paid in full by CBA. Claim 18 was split between CBA and the owners as the CBA facility was exhausted, whilst claims 19 to 23 were submitted to the owners but were not paid in full. The parties agreed that the shortfall amount was $142,688. The defects liability period commenced when the occupation certificate was issued (on 17 November 2015) and ended on 17 May 2016.

The dispute between the parties arose during the defect's liability period, where the builder had asserted that the owners had repudiated the contract by refusing to make any further payments. The owners, on the other hand, demanded that the builder had to rectify incomplete and defective work. The builder asserted that he would willingly rectify the work on the condition that the owners address the overdue payments. However, the owners had the defective work rectified by other builders during 2017 and 2018. The owners then commenced proceedings, suing for damages, whilst the builder cross-claimed for the unpaid amounts said to be owed to him, both under the contract and as a quantum meruit.

Decision:

It was determined that the parties' rights, which had respectively accrued under the contract before the termination, were not absolved upon termination. It followed that the owners were entitled to recover damages from the builder for defective or incomplete building work, and the builder was entitled to recover monies owing under the contract, as these rights had accrued before termination. Accordingly, consideration of the amounts recoverable by the owners was deferred.

Ippolito v Cesco

[2020] NSWSC 561

Coram: Ball J

Court: New South Wales Supreme Court

Date: 14 May 2020

BUILDING AND CONSTRUCTION – Breach of statutory warranties in the Home Building Act 1989 (NSW), s 18B – Application s 48MA of the Home Building Act 1989 (NSW) to proceedings brought before the Supreme Court – Whether the Court will order specific performance of a building contract - Whether damages for loss of rent were in the parties' reasonable contemplation at the time the contract was entered into – Distinction between difficulty of assessing damages and failure to take reasonable steps to prove damages suffered

Facts:

Mr Ippolito ('**owner**') engaged Mr Cesco ('**builder**') to develop a dual occupancy residential development in Willoughby ('**development**'). There were various defects relating to water ingress that affected the development after the completion of the works and after the due date of the defect's liability period. The builder carried out some rectification work, but several defects remained, and the water leaks continued. The parties then fell into dispute relating to the builder's liability for the remaining defects.

The owner engaged another builder to rectify the defects given the urgency of preventing the water leaks. The owner then commenced proceedings against the builder in order to recover the costs already paid to the other builder, alongside the estimated costs for the defects still to be rectified.

A key issue before the court was whether the builder should be given another opportunity to rectify the remaining defects if it was found that he was responsible for them. The builder argued that, should he be found responsible, the court should give effect to the principle stated in s 48MA of the *Home Building Act 1989* (NSW) ('**HBA**') that a court should have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome, and should be completed in one of the following ways:

- An order of specific performance;
- Declining to award damages and adjourning the proceedings to allow the rectification work to be carried out;

- Remitting the matter to the tribunal, which has power to make a rectification order in place of the order for the payment of money; or
- Granting a mandatory injunction to require the builder to undertake rectification work.

Decision:

The Court found that the builder was responsible for most of the defective items and held that an award of damages, amounting to $380,509, was the appropriate remedy opposed to an order allowing the builder to return to rectify the defects. The Court concluded that:

- The owner was entitled to claim damages for breach of contract and section 48MA of the HBA should not be interpreted as seeking to alter that position;
- Courts are hesitant to order specific performance of a building contract because of the difficulties in formulating an appropriate order and the expectation that the order will require continual supervision by the Court;
- Thee builder had no right to rectify the defects, whereas the owner had the right to the relief of damages and the Court has no discretion to refuse or delay that right;
- It was not appropriate to refer the matter to the Tribunal when the matter has been heard in court and the owner had otherwise made out the facts that entitled him to the relief that he claimed; and
- There was no basis on which the court could substitute a remedy which the owner did not seek (a mandatory injunction) for one that he did seek (being damages for breach of contract).

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd

[2020] NSWCA 93

Coram: Basten JA and Meagher JA, Emmett AJA.

Court: New South Wales Court of Appeal

Date: 14 May 2020

BUILDING AND CONSTRUCTION – claim for progress payment – reference date – whether claim with respect to an available reference date – inclusion of three days' interest accruing after reference date – whether claim invalid – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13(7) and (8)

BUILDING AND CONSTRUCTION – claim for progress payment – service of claim – supporting statement – requirements for valid supporting statement – consequence of failure to serve valid statement – whether payment claim invalid

BUILDING AND CONSTRUCTION – claim for progress payment – variations – whether sums claimed under the contract or for quantum meruit – whether the claim invalid if amounts not owing under the contract – statutory scheme for adjudication of payment claim disputes – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 14 and 15(4)

STATUTORY INTERPRETATION – penalty provision – implied civil consequences – whether intention to invalidate step creating civil obligation – breach of requirement to serve compliant supporting statement – whether claim invalid – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13(7) and (8)

Facts:

These proceedings concerned a disputed payment claim between a builder, Decon Australia Pty Ltd ('**Builder**') and principal, TFM Epping and Katoomba Residence Investments Pty Ltd ('**Principals**'). The Builder issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999 (*NSW) ('**SOP Act**') for $6.4 million. The Principals did not respond until after the strict 10 business day timeframe required under the Act. The Principals also did not resist that they were liable to pay that amount and so became liable to pay it under s 15(4) of the SOP Act.

First Instance

The Builder commenced proceedings to recover the payment by way of "summary judgment" and the Principals challenged this decision. The Principals argued that the payment claim was not valid because:

1. The claim had not been validly served; and

2. The payment clams itself was invalid.

The Builders' arguments were unsuccessful and therefore, the primary judge gave judgment for the builder. The Court ordered the Principals to pay the Builder the $6.4 million.

The Appeal

The Principals sought leave to appeal from this judgment, contending in the appeal that the payment claim was invalid. In dismissing the appeal, the Court held the $6.4 million claim did properly arise under the contract. The appropriate course to challenge liability for the claimed amounts was to provide a payment schedule to the Builder in accordance with the SOP Act. The payment claim was also made with respect to an available "reference date", even though part of the claimed amount was interest that had accrued after that date.

The Principals also submitted that the payment claim was invalid because it had not been validly served. There are criminal penalties if a progress payment claim is not validly served and accompanied by a compliant supporting statement. However, the Court held that breach of these provisions does not also invalidate a payment claim and so is not a basis for resisting payment.

Decision

The Court dismissed the appeal from a summary judgment in favour of the Builder for payment of a progress payment claim for $6.4 million.

FLDC Pty Ltd v Fenlan Pty Limited

[2020] NSWDC 271

Coram: P Taylor SC DCJ

Court: District Court of New South Wales

Date: 8 May 2020

BUILDING AND CONSTRUCTION – particulars schedule – utility

Facts:

FLDC Pty Ltd ('**Plaintiff**') commenced proceedings against Fenlan Pty Limited and Joseph and Mariette Khouri ('**Defendants**') in the amount of $429,665.95 for architectural work and services completed pursuant to two contracts. The amount claimed under the first contract comprises about 400 items, and totals to $359,375.95, in addition to a lump sum item said to have been paid.

The Defendants applied for orders that required the Plaintiff to properly particularise and articulate its claim by completing the Variation Schedule. Whilst the Plaintiff had given particulars in respect to each of the items – including the work done, how long it took, when it was done, and how much was charged for it – the Defendants denied the entirety of the claim. The Defendants also submitted that the if the invoiced items were linked to one or another of the limited number of designs, the dispute might be narrowed. However, the Court noted that there was no concession that any of the relevant designs fell within any agreement or gave rise to any entitlement in the Plaintiff to payment. The Court also noted that to allow the Defendants to, in effect, interrogate the Plaintiff about which line item is in respect of which design, when there is no evidence that it would shorten the dispute, would increase the costs of the proceedings for no discernible benefit.

Decision:

Therefore, the court ordered that the Defendants' notice of motion was to be dismissed.

Jayasooriah v Wisdom Properties Group Pty Ltd

[2020] NSWSCATAP 81

Coram: K Rosser (Principal Member), D Goldstein (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 8 May 2020

APPEAL – Building and Construction – Functus officio – Failure to exercise jurisdiction

Facts:

Jayasooriah ('**Appellant**') commenced proceedings against Wisdom Properties Group Pty Ltd ('**Respondent**') in relation to the construction of a customised residence for a disabled person under the *Home Building Act 1989* (NSW) ('**HBA**'). The Appellant sought order relating to alleged defective work, the Respondent causing delay and overcharging. The application also indicated that the Appellant was concerned with time limits for bringing claims under the Act and that he was proceeding on the understanding that the time for bringing an action for the breach of a 2-year statutory warranty under the Act would soon expire.

First Instance

The Tribunal member discussed the fact that the Appellant's defect claims were not for major defects, the date of the contract, the time allowed for competition of the works, the practical completion inspection dare and that the Appellant had accepted compensation for a 15-week period of overrun. The Tribunal dismissed the matter.

The Appeal

The Appellant appealed against this order dismissing his application and sought leave to appeal on the grounds that he was denied natural justice with the result that the decision was not fair and equitable, and that there was an error in law. However, the Appellant had filed his appeal application 14 days late. Although the Respondent opposes the grant of an extension of time, it was of the view that refusing the extension of time that the Appellant sought would impose an injustice to him. Furthermore, the Respondents conceded that some of the Appellant's claims should be remitted to the Tribunal for rehearing.

The Appellant's submissions indicated that his claim was in connection to factors as follows:

1. Power connection;

2. Relocation of Power Pole;
3. Price increase of fixed price tender;
4. Purported Amendment to the Agreement; and
5. Liquidated damages.

The Appeal Panel noted that the Tribunal Member's decision did not refer to these claims at all and held that it would be an error in law if a Tribunal member does not deal with an issue that was before him/her for determinations. Therefore, as there was an error in law in that the Tribunal Member did not determine the Appellant's claims, the Appeal Panel remitted those claims to the Tribunal for determination.

Decision:

Therefore, the appeal was allowed, and the decision was held in favour of the unrepresented Appellant.

Baserite Constructions Pty Ltd v Tanios

[2020] NSWCATAP 77

Coram: G K Burton (Senior Member), M R Gracie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 6 May 2020

HOME BUILDING - limitation period - major defects - separate agreement as basis of work order - procedural fairness - material not before Tribunal on no appearance

Facts:

These proceedings concerned the predecessors in title to the respondent ('**Owner**') contracting with the appellant Baserite Constructions Pty Ltd ('**Builder**') to carry out building works at their residence in Concord on 23 April 2012. Practical completion was achieved around 13 November 2013.

First Instance

The Owner lodged a claim on 19 December 2018 ('**original proceedings**'), relying on an expert report dated 30 December 2018. The Builder submitted that the Owner's expert report disclosed that none of the alleged defects was for major defects as defined and that, accordingly, the Tribunal had no jurisdiction other than to dismiss the primary claim. However, the primary member found in favour of the owner's case and made an order for the payment of $175,750.25 to the owner, payable immediately.

The Appeal

The Builder proceeded with appellant proceedings on the grounds that:

1. The Tribunal lacked jurisdiction to make the original work order and hence any money order;
2. The Builder had no knowledge of the hearing date, and had he have known, he would have attended the hearing and produced relevant evidence (specifically, satisfaction letter), and therefore the proceedings were procedurally unfair;
3. The Owner acted in bad faith as he had not provided the satisfaction letter; and
4. The decision was not fair and equitable as the Builder had carried out all rectification works and had the owner's satisfaction letter.

Decision:

The Appeal Panel concluded that:

1. The jurisdictional ground of appeal failed;
2. There was an insufficient weight of evidence to suggest that the Builder lacked the knowledge of the hearing date and therefore this ground also failed; and
3. The ground relating to the non-provision of the satisfaction letter succeeded as the Tribunal established that this had caused procedural unfairness.

Therefore, the Tribunal held that there was a basis for a grant of leave to appeal on the ground of non-provision of the satisfaction letter and the primary member's consequential inability to consider its impact of his decision.

Diona Pty Ltd v Downer EDI Works Pty Ltd

[2020] NSWSC 480

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 1 May 2020

BUILDING AND CONSTRUCTION – adjudication determination under the Building and Construction Industry Security of Payment Act 1999 (NSW) – whether determination void – whether jurisdictional error – whether Adjudicator failed to consider the contract

Facts:

Diona Pty Ltd (‘**head contractor’**) entered into a subcontract agreement (‘**contract’**) with Downer EDI Works Pty Ltd (**subcontractor**) for safety upgrades on the Great Western Highway, Blackheath. The subcontractor proceeded to adjudication on a payment claim served on the head contractor under the contract.

Adjudication Determination

The subcontractor claimed two extensions of time (**EOT 18** and **EOT 21**) pursuant to the contract which would have reduced the liquidated damages it owed to the head contractor. The head contractor argued that the subcontractor was not entitled to EOT 18 or EOT 21 because, by reason of another clause in the contract, the claims were time-barred.

The adjudicator determined that the head contractor should pay the subcontractor $430,990. An amount of $30,000 was determined as being due and payable to the subcontractor for delay costs in relation to EOT 18 and EOT 21.

Supreme Court Proceedings

The head contractor then sought injunctive and declaratory relief, contending that the adjudicator's determination was void on the basis that the adjudicator failed to address his statutory function in relation to EOT 18 and EOT 21. The head contractor also submitted that the Adjudicator had not fulfilled the requirements of section 22(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘**SOP Act**’) because the adjudicator had failed to consider the head contractor’s contention in its adjudication response submissions – that the subcontractor was not entitled to EOT 18 and EOT 21, due to the operation of a time barre in the contract. Thus, the key issue before the Court was whether the adjudicator considered the provisions of the contract.

Decision:

Stevenson J questioned whether it should be inferred that, despite the adjudicator having explicitly acknowledged his obligation to consider the provisions of the contract pursuant to section 22(2)(b) of the SOP Act in the adjudication determination, the adjudicator had nonetheless failed to do so. Stevenson J noted that the question of whether the adjudicator *'considered'* the provisions of the contract, as required by the SOP Act, is a question of fact. In coming to a decision on the question posed, his Honour noted that, while the head contractor had further developed its legal arguments in submissions on its application for declaratory relief, the case it put forward in the adjudication response was limited and was *not put forward with great clarity*. Therefore, the head contractor's application to quash the adjudicator's determination was dismissed.

***Morrison v Moss (No. 3*)**

[2020] NSWDC 136

Coram: Abadee DCJ

Court: District Court of New South Wales

Date: 23 April 2020

BUILDING AND CONSTRUCTION – referral of question of rectification costs for defective works to referee – whether referee's approach should be wholly or partly adopted – whether a conclusion by referee contrary to evidence

Facts:

These proceedings concerned construction work for a residence near Lake Macquarie between Morrison ('**owner**') and Moss ('**builder**'). The owner brought a claim for damages for defective work in breach of the statutory warranties implied by the *Home Building Act 1989* (NSW) ('**HBA**').

The findings from the earlier decision was to the effect that the builders were entitled to receive payment for the sum of $56,470.56 plus interest at the contractual rate. This entitlement was, however, subject to the entitlement of the owner to recover damages for defective works in various respects set out in the earlier decision. Abadee DCJ made detailed findings as to each of such contested items and whether they amounted to defects and, if they did, indicated the appropriate scope of the rectification works. Abadee DCJ also directed that the quantum of the rectification costs for the defective works be referred to a referee, appointing Mr David Madden as that referee.

Mr David Maddens' referee report ('**Madden Report**') was divided into 3 main headings:

1. Trade Costs (Section 6.0)
2. On Costs (Section 7.0)
3. Total Defect Costs (Section 8.0)

Builders Objections to the Madden Report

The builder's submission indicated that the Madden should generally be adopted, however subject to:

1. The Court rejecting an allowance for the contractor's preliminaries made in 7.4; and
2. The Court rejecting an allowance for professional fees of architect and engineer in item 7.2.

Item 7.4: Contractor's Preliminaries

The referee indicated that the rectification works would need to be coordinated and managed by a contractor responsible for a vast range of items, giving an estimate of $26,763. The builder submitted that it was erroneous for the referee to refer to 'meetings with residents, the body corporate and consultants' because the Owner's residence was a standalone house and was not even in the immediate or proximate vicinity of strata complexes. That being so, there was no occasion for meetings with residents, the body corporate and consultants. The Court found that the referee was not in a position to determine whether in fact, any rectification works were likely to impinge upon any nearby strata complexes.

7.2: Architecture and Engineering Fees

The builder also submitted that no allowance should be made for professional fees at least to the extent that those fees recognise some allowance for the fees of an architect or engineer, as engineering plans were already in existence. However, Abadee DCJ was not persuaded that there was a basis for the Court intervening on this matter

Adoption of the referee's report

Other than the specific respects identified above, the builders did not oppose the general adoption of the Madden Report. Abadee DCJ considered that there was nothing to suggest that any of the conclusions made in the Madden Report were arbitrary or affected by improper considerations.

Decision:

The Court was satisfied that the report should be adopted, with item 7.4 being rejected.

D'Amico v The Owners – Strata Plan No 87635

[2020] NSWCATAP 65

Coram: K Rosser (Principal Member), D Robertson (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 20 April 2020

APPEAL – Building and Construction – Home Building Act 1989 (NSW) – Building dispute – appellant ordered to pay compensation for defective building work – appellant denied that he was the builder – Home Owners Warranty insurance issued in the name of the appellant – appeal dismissed – no issue of principle

Facts:

Mr D'Amico ('**appellant**') was engaged by a developer to construct a new low-rise multi-unit development in Woonona, which was to become Strata Plan 87635. After the residents moved into the new strata plan, however, they noticed building defects in the units and in the common property. The Owners Corporation ('**respondent**') then commenced proceedings against the developer and Gino D'Amico. The developer then went into liquidation and was therefore removed from the proceedings.

First Instance

The appellant appealed against the decision made in the Consumer and Commercial Division, in which he was ordered to pay amounts ranging from $136,739.81 to $140,443.84 in six applications brought by the respondents to the appeal. At first instance, the Tribunal identified various issues and resolved them as follows:

1. The Tribunal found that it had the power to make a money order against one respondent on the renewal of proceedings in which a work order was made against another respondent. The appellant did not challenge this finding.
2. The Tribunal found that the fact that the renewal proceedings were commenced before the date work was required to be completed under the order the subject of the renewal proceedings was not of significance for the proceedings. The appellant did not challenge this finding.
3. The Tribunal held that it was not significant that the renewal proceedings were lodged more than 12 months after the 2015 Consent Orders were made, compelling the appellant to perform work. The appellant did not challenge this finding.
4. The Tribunal held that it may take into account evidence to show the cost of rectifying defects as at the date of the renewal hearing and is not restricted in making a money

order for such rectification by the amount claimed in the original application. The appellant did not challenge this finding.

5. The Tribunal found that the appellant *was the builder engaged in the building works* at the site that has become Strata Plan 87635, and, more importantly, was the party who consented to carry out works in accordance with the Scope of Works the subject of the 2015 Consent Orders. The appellant sought to challenge this last conclusion.

The Appeal

In these proceedings, the appellant identified his main ground of appeal as the Tribunal erring in finding that the appellant was the builder on the basis that the respondents never produced any evidence to prove that he had anything to do with the building of Strata Plan 87635. However, the Appeal Panel found that this ground did not disclose any error of law, nor could it have been said that the finding that the appellant was the builder was made against the weight of evidence. This ground of appeal was therefore rejected.

Mr D'Amico also identified other alleged errors in the Tribunal's decision as follows:

1. When the Consent Orders were amended in 2018 Mr D'Amico wasn't removed as a respondent.
2. That the Tribunal had ignored evidence that Mr D'Amico was not the builder.
3. That the Supreme Court (McCallum J) had made orders for the payment of all moneys sought by the respondents and there was accordingly no warrant for the making of orders against Mr D'Amico.

However, all grounds failed due to a failure of the appellant to establish that there was an error of law disclosed, that it was not fair and equitable, or it was against the weight of evidence.

Decision:

The Appeal Panel rejected the appeal on all grounds, refused leave to appeal and ordered that the appeal be dismissed with costs.

Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd

[2020] NSWSC 409

Coram: Ball J

Court: New South Wales Supreme Court

Date: 17 April 2020

BUILDING AND CONSTRUCTION – Progress payments – Whether payment claim claiming amounts paid under bank guarantees is one for construction work or related goods or services – Whether adjudicator can determine whether it has jurisdiction to determine a claim – Whether set off clause in construction contract void under s 34 Building and Construction Industry Security of Payment Act 1999 (NSW) - Building and Construction Industry Security of Payment Act 1999 (NSW), ss 5, 6, 8, 13 and 34.

Facts:

Grocon (Belgrave St) Developer Pty Ltd ('**developer**') entered into a contract with Construction Profile Pty Ltd ('**contractor**') for the construction of the Telstra Exchange residential development in Manly. The contractor provided two bank guarantees as security for performance of its obligations under the contract.

The contractor served a Payment Claim No 2 in the amount of $3,220,777. The developer responded with a payment schedule indicating that the amount due to the contractor was in fact $1,360,307 and that therefore the scheduled amount was nil. This figure was calculated by deducting the value of the work performance for liquidated damages in respect of a delay in reaching practical completion. The developer issued a tax invoice for payment of the liquidated damages. The contractor then disputed the claim for liquidated damages.

The developer then called on the two bank guarantees, relying on the tax invoice it had issued. The contractor did not challenge the developer's right to call on the bank guarantees.

The contractor then served Payment Claim No 33 in the amount of $1,054,386. The claim was for the net balance of the total amount claimed under the contract against the amount said to have been already paid. The amount said to have been paid included two negative amounts each for $498,911 which were described as amounts *'to cover LDs under the contract'*.

In response, the developer sought a declaration in the Supreme Court that Payment Claim No 33 was void and of no effect under *the Building and Construction Industry Security of Payment Act 1999* (NSW) ('**SOP Act**'). The developer also sought an injunction restraining the contractor from seeking an adjudication determination under the SOP Act on the grounds that Payment Claim No 33 was for repayment of the amounts paid under the bank guarantees, and was not a claim for performance of construction work or supply of related goods or services under the SOP Act.

Adjudication Determination for Payment Claim No 32

At adjudication, it was determined that the amount payable by the developer in respect of Payment Claim No 32 was $1,241,238. The adjudicator determined that the contractor was entitled to extensions of time which extended the date for practical completion beyond the date of practical completion, thus, making the value of the developer's claim for liquidated damages nil. The developer paid the adjudicated amount.

Supreme Court Proceedings

The Court was asked to determine:

- Whether the claim fell under the SOP Act and whether that could only be determined by the adjudicator;
- Whether Payment Claim No 33 was a claim for construction work because the payment claim included the value of the whole of the work undertaken less the amount the contractor had been paid; and
- Whether the developer's right to set-off under the contract was rendered void by section 34 of the SOP Act.

Decision

The developer was successful in its application. The Court determined that Payment Claim No 33 was void and of no effect under the SOP Act and granted an injunction restraining the contractor from seeking an adjudication under the SOP Act in respect of that payment claim.

Ball J found that while the jurisdiction of an adjudicator is determined by the SOP Act, it is ultimately a question for the Court to determine whether adjudicators have jurisdiction to determine a particular claim. Ball J also clarified that there was no general principle in relation to courts being reluctant to grant injunctions to restrain purported payment claims from being referred to adjudication.

In relation to the second point, Ball J found that Payment Claim No 33 was not a valid payment claim under the SOP Act, irrespective of the fact that other smaller amounts were also claimed in that payment claim.

Finally, in relation to the third contention, Ball J did not determine this issue as the contractor did not challenge the validity of the developer's right to call on the guarantees.

Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd

[2020] NSWCA 63

Coram: Meagher JA, Gleeson JA, Payne JA

Court: New South Wales Court of Appeal

Date: 17 April 2020

BUILDING & CONSTRUCTION – appeals – payment claim referred for adjudication – where available reference date under construction contract – Building and Construction Industry Security of Payment Act 1999 (NSW) – where adjudicator determined entitlement to payment claim by reference to an unavailable reference date – jurisdictional error – where available reference date under contract not the reference date addressed by the adjudicator – whether adjudication determination also involved a denial of natural justice

Facts:

Hanson Construction Materials Pty Ltd (‘**principal**’) engaged Brolton Group Pty Ltd (‘**contractor**’) under a construction contract for the construction of a quarry processing plant. Under the contract, monthly progress payments were payable with a reference date of the last Tuesday of each month. The principal terminated the contract on 3 October 2018.

On 28 August 2019, the contractor served a progress claim for work performed up to September 2018, but which also included a claim for work performed between 25 September 2018 and 10 October 2018, as well as interest up until 28 August 2019 (‘**Payment Claim**’). The principal responded with a payment schedule with an adjudicated amount of '$nil'.

Adjudication Determination

In submissions made in a subsequent adjudication, each party had assumed that the reference date for the Payment Claim was 25 September 2018. The adjudicator adopted a reference date of 23 October 2018 and found in favour of the contractor.

Supreme Court Proceedings

The principal commenced proceedings in the Supreme Court, in which the primary judge found that the adjudicator's determination was void as:

- The adjudicator determined the Payment Claim based on the reference date of 23 October 2018 and in doing so he did not embark on the task he was required to perform under section 22(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘**SOP Act**’); and

- The adjudicator's determination involved a denial of natural justice, as the adjudicator determined the dispute on a basis for which neither party contended without giving the parties an opportunity to make submissions on the matter.

Court of Appeal Decision:

The contractor appealed the decision. The Court of Appeal dismissed the appeal and declined to make a decision.

Reference dates (pre 21 October 2019)

Once an available reference date is objectively ascertained by the parties, the adjudicator must address that specific reference date when making a determination under section 22(1) of the SOP Act. Accordingly, it is not open to the adjudicator to select another reference date, as this would go beyond the adjudicator's statutory power, giving rise to jurisdictional error. In this case, it was agreed between the parties that the reference date was 25 September 2018. However, in the adjudication determination, the adjudicator did not address that specific reference date, but rather chose an alternative reference date of 23 October 2018 (which in any event was not an available reference date). The adjudication determination was void due to jurisdictional error.

The court also held that the contractor could not seek to uphold the validity of the adjudicator's determination by arguing that the 25 September 2018 reference date was available. The adjudicator had not made the determination on the basis of that reference date.

Natural Justice

The adjudicator's determination involved a denial of natural justice or procedural fairness because the adjudicator determined the dispute on a basis for which neither party had contended, without giving the parties an opportunity to make submissions on the matter.

Hanson v Metricon Homes Pty Ltd

[2020] NSWSC 401

Coram: Hamill J

Court: New South Wales Supreme Court

Date: 16 April 2020

CIVIL LAW – building dispute – money owed on contract – cross-claim – defence – shoddy building work – proceedings before NCAT – procedural fairness – where owners abandon cross-claim – failure to deal with defence – unrepresented litigants – where lawyer seeks leave to withdraw on day of hearing – hearing did not start well – confusion over reason lawyer withdrew – refusal of adjournment – "stage fright" – late service of joint expert report – contradictory case management orders – whether owners denied opportunity to challenge joint expert – internal appeal – whether Appeal Panel erred in failing to find denial of procedural fairness

Facts:

These proceedings concerned an application for leave to appeal against a decision made by the Appeal Panel of the New South Wales Civil and Administrative Tribunal ('**NCAT**'). Lloyd and Anna Hanson entered into a residential building contract with Metricon Homes and certain building works were carried out at their home address in Riverstone. Metricon asserted that the total value of the work performed under the contract was $592,673. The Hansons made payments totalling to $423,241.85. Metricon then brought a claim for the shortfall, being an amount of $169,431.15 (plus interest).

The decision of the Senior Member

Although the broader issue between the parties involved a dispute over the non-payment of money owed on a building contract, and a cross-claim alleging defective and incomplete building work, these proceedings sought to resolve was largely confined to the failure of the Senior Member to grant an adjournment and the decision of the Appeal Panel dismissing an internal NCAT appeal of that decision. This is centred on the assertion that there was a denial of procedural fairness. The order made by the Senior Member was in favour of Metricon in the sum of $208,757.74.

The appeal to the Appeal Panel

The Hansons' grounds of appeal were set out as follows:

1) A denial of procedural fairness in that the Hansons were not granted an adjournment and not given a reasonable opportunity to present their case on the basis of:

a) Mrs Hanson's illness
b) the failure of the Member to question the withdrawal of the solicitor on the morning of the hearing; and
c) the complexity of the Zakos report and the inability of the Hansons to deal with it while they were not legally represented; and

2) An error by the Senior Member in finding that there was no assertion (by the Hansons) that the builder was not entitled to payment of the amount claimed in circumstances where there were a number of allegations of incomplete and poor quality work.

The Supreme Court Decision:

1) On the first ground, the Court was satisfied that a denial of procedural fairness may have resulted in the Hansons suffering a substantial miscarriage of justice and that leave to appeal should have been granted. Hamill J also noted that had the Senior Member considered the Hansons' defence or allowed the opinion of their expert to be heard, there is a chance that the Hansons may have achieved a different and more favourable outcome by way of a smaller sum.
2) On the second ground, Hamill J indicated that the question on whether to grant an adjournment is a discretionary one, and it will be a rare case where that discretion is interfered with lightly on appeal. In addition, it is also a rare case where the refusal of an adjournment is such as to give rise toa question of law. However, Hamill J was satisfied that the combination of the Hansons' grounds of appeal does constitute a denial of procedural fairness in the proceeding before the Senior Member and that the failure of the Appeal Panel to recognise this amounted to an error of law.

Therefore, the appeal was allowed and the decision of Senior Member Goldstein was quashed.

Miller v Kadir

[2020] NSWCATAP 57

Coram: P Durack SC (Senior Member), G Sarginson (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 2 April 2020

APPEALS – home building - building defect in swimming pool – errors in dismissing claim

Facts:

Mr and Mrs Miller ('**owners**') had a pool constructed by Mr Kadir ('**builder**') in their residence. However, the pool was built far from level, causing the owners to refuse payment of a final instalment to the builder. Following an order from NCAT, in proceedings brought by the builder to recover the amount, the amount was paid by the owners. At the same time as ordering the owners to pay the final instalment, the Tribunal dismissed the owners cross-claim in respect of the defect with the pool. These proceedings concerned the owners then appealing against that dismissal.

First Instance

The owners relied upon the content of a Rectification Order from NSW Fair Trading but did not present any expert evidence as to the means of rectification and the costs to rectify, although the Tribunal had directed them to provide any expert report in support of their claim before hearing. No expert evidence was presented by the builder. The absence of any expert evidence about rectification was raised by the Tribunal with the owners, and in response, the owners indicated that evidence could only be obtained for a later hearing. The builder then objected to any further delay involving and adjournment of the hearing. The Tribunal then indicated that it was not going to allow any adjournment, at which point the owners left the hearing and did not return. The Tribunal then dismissed the cross-claim and proceeded to determine the builder's claim.

The Appeal

The Appeal Panel concluded that in the Tribunal taking the course that it did, it erred in a number of respects.

1. Firstly, the Tribunal failed to appreciate that the material presented by the owners established that work had been done contrary to Australian Standards and in breach of the section 18B (c) warranty of the *Home Building Act* 1989 (NSW) ('**HBA**'). The

Appeal Panel held that it was an error by the Tribunal to not have identified and applied this warrant.

2. Secondly, the Tribunal erred by then not proceeding to consider its options relating to a remedy, given that there was clear and inconvertible evidence of breach of the statutory warrant under the HBA. In that context, the merits of an adjournment to obtain evidence about rectification appeared more compelling.
3. Finally, an option for the Tribunal to consider was whether to find that the owners had proved breach of the statutory warranty under the HBA, but had provided no or insufficient evidence for the Tribunal to make a work order in favour of the owners or to order the payment of damages.

Decision:

Therefore, all three issues involved both errors of law and fact. The Appeal Panel held that the owners had a right to appeal on any question of law, and accordingly, the appeal was upheld.

Longbottom v Boughton

[2020] NSWCATAP 53

Coram: Dr R Dubler SC (Senior Member), D Charles (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 23 March 2020

HOME BUILDING – whether the Tribunal erred in finding that the home owners had denied the plasterers access to the home building site – whether the home owners had denied the builder access to the home building site – whether the home owners by invoking the dispute resolution mechanism prevented the builder from terminating the home building contract – whether the home owners in denying the builder access to the home building site repudiated the building contract – whether the builder was entitled to terminate the home building contract –whether the Tribunal erred in dismissing the claim of misleading and deceptive conduct under the Australian Consumer Law (NSW)

APPEAL – whether a disputed finding of fact in a reply to appeal requires leave to appeal - whether the question as to whether or not, based upon facts fully found by the Tribunal, there is a repudiation of the contract, is a question of law

Facts:

The Appellant (‘**the Builder**’) entered into a Building Contract (‘**the Contrac**t’) with the Respondents (‘**the Homeowners**’) in respect to the construction of their home. The parties eventually fell into dispute in regard to the construction of the roof. The Homeowners claimed that the Builder had engaged in misleading and deceptive conduct when describing the work that had to be completed to the roof. They purported to “suspend” the works and disputed the Builder’s payment claims. In response, the Builder purported to terminate the contract. The Homeowners disputed the Builder’s right to do so, whilst proceeding to terminate the contract for the wrongful termination of the contract by the Builder.

First Instance

At first instance, the Tribunal made numerous findings for a number of arguments raised by the parties. The Tribunal found that the Builder was not entitled to terminate the contract and the Homeowners were. On the issue of whether the Homeowners were entitled to damages, the Tribunal also found that total amount of damages payable to the Homeowners was $149,219.01, less the outstanding contract balance, including the cost for completion of the work and rectifying the respective defects. In addition, the Homeowners also claimed at that the Builder engaged in misleading and deceptive conduct in respect to the roof. The Tribunal concluded, however, that any shortcomings in the plans could not be said to be the responsibility of the Builder and, therefore, there was no misleading and deceptive conduct on part of the Builder.

The Appeal

The Builder sought to overturn the Tribunal's decision. The Homeowners were also not content with the Tribunal's decision and filed their own Notice of Appeal. The Homeowners contended that the Tribunal wrongly dismissed their claim that the Builder had engaged in misleading and deceptive conduct when describing the work involving the roof.

The principle contentions raised by the Builder in the appeal can be summarised as follows:

1. Firstly, the Senior Member erred in finding that the Homeowners had suspended the works when in fact no agreement to vary the contract to permit the Homeowners to suspend works had in fact occurred;
2. Secondly, the learned Senior Member erred in failing to consider that the Homeowners had repudiated the contract by purporting to suspend the works; and
3. Thirdly, the learned Senior Member erred in failing to find that the Homeowners had repudiated the contract and that the Builder accepted the repudiation.

Decision

The Appeal Panel rejected the three grounds raised by the Builder. In addition, and In respect to the Homeowner's appeal, the Builder was ordered to pay around $52,000 to the Homeowner.

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd

[2020] NSWSC 208

Coram: Ball J

Court: New South Wales Supreme Court

Date: 11 March 2020

BUILDING AND CONSTRUCTION — Progress payments — Where right to a progress payment arose before suspension — Whether adjudication determined amount of progress payment — Whether adjudicator committed jurisdictional error — Whether party entitled to withdraw adjudication application under s 26 and file new adjudication application — Where supporting statement under Building and Construction Industry Security of Payment Act 1999 (NSW) s 13(8) allegedly false or misleading — Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 9, 13, 22, 26 and 34.

EVIDENCE — Application of the principle in Briginshaw v Briginshaw.

PRACTICE AND PROCEDURE — Where cross summons filed late — Whether decision not to challenge the first adjudicator determination amounts to election.

Facts:

Parrwood Pty Ltd (‘**developer**’) engaged Trinity Constructions (Aust) Pty Ltd (‘**builder**’) under a design and construct contract for 59 apartments in a development known as the Affinity Project. The developer exercised its right to take work out of the builder’s hands for substantial breach under the contract. The builder served a payment claim to which the developer issued a payment schedule amount of $nil.

Adjudication Determination

An adjudicator decided that no amount was owing to the builder because when the payment claim was made, the developer had validly exercised its right to take work our of the builder’s hands, so that payment under the contract was suspended until it became due (‘**first determination**’).

The builder then purported to withdraw the adjudication application by notice served on the first adjudicator and made a new adjudication application. The second adjudicator decided that the first adjudicator had failed to perform his statutory function, because he declined to determine the payment claim, meaning that the first determination was void. There was nothing preventing the second adjudicator from determining the claim herself, which she did in favour of the builder (‘**second determination**’).

Supreme Court Proceedings

The developer sought a declaration in the Supreme Court that the second determination was void, whilst the builder simultaneously sought a declaration that the first determination was void.

Ball J was required to determine:

- Whether it was open to the builder to contend that the first determination was void where the builder hadn't applied to set it aside before the second adjudication and if so, whether it was void; and
- Whether the payment claim was invalid due to it being accompanied by a supporting statement which the builder allegedly knew to be false or misleading in a material particular.

Decision:

Ball J granted the builder leave to file the cross-summons and held that the first determination was void. His Honour decided that it had been clear since the builder purported to withdraw the adjudication application that it thought the first determination was void and that the cross-summons simply formalised the position that existed before it was filed. Further, in determining the progress payment to be paid to the builder, the first adjudicator incorrectly concluded that the developer's right to a progress claim was suspended when the decision to wake the work out of the builder's hands was made.

Paraiso v CBS Build Pty Ltd

[2020] NSWSC 190

Coram: Fagan J

Court: New South Wales Supreme Court

Date: 11 March 2020

CONTRACT - building - whether variations required to be in writing and signed - consequence of non-compliance - Home Building Act 1989 s7E - terms that do not require variations to be in writing and signed unenforceable

BUILDING AND CONSTRUCTION - whether defendant entitled to quantum meruit if not contractually entitled to payment for variations

ADMINISTRATIVE LAW - whether denial of procedural fairness - Tribunal member cross-examining plaintiff's expert - bias - failure to invite counsel to cross-examine opposing expert - relief granted

Facts:

Rica Paraiso ('**the owner**') entered into a written contract in March 2016 with CBS Build Pty Limited ('**the builder**') for the construction of two dwellings for a price of $630,000 (**contract**). By mid-2017, the owner had paid $719,267 to the builder; approximately $90,000 over the contract price. The amount paid included a number of variations which had not been signed by the owner.

The builder filed an application to claim the additional amounts for variations and provisional sums. The owner denied liability for certain variations and the provisional sums and claimed $300,000 in amounts overpaid to the builder.

First Instance

At first instance, the owner was ordered to pay the builder $94,381. The owner appealed but was dismissed by the NCAT Appeal Panel. The owner then sought leave to appeal in the Supreme Court of New South Wales on a number of grounds, including the proper construction of the variation clause in the contract, whether quantum meruit was available to the builder, the appropriate valuation of any such quantum meruit claim and whether the owner was denied procedural fairness by the Senior Member at first instance.

Supreme Court Proceedings and Decision

<u>Variation Clause</u>

The Supreme Court found that the Senior Member erred in the construction of clause 14 of the contract in finding that the builder was entitled under the contract to recover the costs of complying with an oral instruction to perform the work. Accordingly, on a proper construction, a variation was not contractually binding on the parties unless documented in writing and signed by the parties. In addition, the Senior Member's construction was contrary to clause 1(2) of Schedule 2 of the *Home Building Act 1989* (NSW) (‘**HBA Act**’) which requires any agreement to vary the contract to be in writing and signed by the parties.

Quantum Meruit

The Court agreed that the builder was entitled to claim in quantum meruit as the owner:

- had requested the additional work;
- knew it was being undertaken by the builder in the expectation of being paid for it; and
- had accepted the benefit of the additional work.

However, the owner further argued that the tribunal erred in its assessment of the builder's quantum meruit claim on the basis of reasonable costs rather than the actual costs incurred. The Court held that it must follow that contract rates will similarly be an upper limit on a quantum meruit claim that has arisen because of the fault of both parties in not signing written details of each variation as required by the contract. The Tribunal should have determined the price of each variation by applying the contract rates and 15% margin specified in Schedule 2. Therefore, the Court granted leave to appeal, and remitted the matter to NCAT for re-determination on this basis.

Procedural Fairness

The Court was also highly critical of the Senior Member’s approach in not allowing cross-examination of an expert witness. Instead, Senior Member took it upon himself to cross-examine the owner’s witness, which gave rise to a manifestation of pre-judgement and actual bias. Therefore, the Court upheld this ground of appeal, and also remitted this issue to NCAT for rehearing.

Decision:

The Supreme Court held that the appeal was allowed on the abovenamed grounds and the orders of the NCAT Appeal Panel were set aside.

Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd

[2020] NSWSC 178

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 5 March 2020

BUILDING AND CONSTRUCTION – contracts – performance bond – condition precedent to beneficiary's entitlement to call on bond – whether security recourse event has occurred

CONTRACTS – remedies – application for injunction to restrain a breach of contract – whether damages an adequate remedy

Facts:

These proceedings concerned Icon Co (NSW) Pty Ltd ('**Builder**') acting for Australia Avenue Developments Pty Ltd ('**Principal**') in a design and construction contract ('**Contract**') to orchestrate works for a high-rise residential and commercial development property known as '*Opal Towers*' in Sydney Olympic Park.

Under the Contract, the Builder was to provide security in the form of an unconditional and irrevocable bank guarantee in the sum of $3.9 million, in exchange for the proper performance of its obligations to the Principal ('**Bank Guarantee**'). Following the Principal giving notice to call on the Bank Guarantee, the Builder then sought to restrain the Principal doing so.

Decision:

Stevenson J noted that the evidence before the Court strongly pointed to the conclusion that practical completion had not in fact then occurred. Accordingly, as the Builder was required to establish a negative stipulation – namely, that the Principal is not entitled to the recourse to the Guarantee – it is for the Builder to establish that there was no failure to comply with a material obligation under the Contract. Stevenson J concluded that the Builder had failed to do so, and therefore, the Builder was not entitled to restrain the Principal from calling on the Bank Guarantee on such basis. In addition, Stevenson J was not satisfied that damaged would not be an adequate remedy for the Builder. Accordingly, the proceedings were dismissed.

Hunter Prestige Childcare Pty Ltd v Ball

[2020] NSWCATAP 33

Coram: K Rosser (Principal Member), G Curtain SC (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 5 March 2020

BUILDING AND CONSTRUCTION – contract – breach - consent orders – non-compliance with consent orders – assessment of damages

Facts:

These proceedings concerned an appeal by the Appellant ('**Builder**') from a decision of the Tribunal awarding the Respondent ('**Homeowners**') $53,117.21 in relation to incomplete or defective works done pursuant to consent ordered entered into by the parties. This sought to resolve the competing claims made by each party against each other in separate proceedings commenced in the Tribunal.

The Builder and Homeowners entered into a contract for the construction of a domestic dwelling for the Homeowners' residence. Work commenced; however, the parties fell into dispute before the work was completed.

First Instance

At first instance, the Tribunal decided that the respondents were entitled to renew their original proceedings. Both renewal proceedings were heard together, and the Tribunal delivered a single decision from which the Builder now appeals. This decision ordered the Builder to pay the Homeowners a sum of around $53,000 for the cost of completing the rectification work. The Tribunal also dismissed the Homeowners' claim for the costs incurred by them in the original proceedings, although, it allowed them to make an application for costs of the renewal proceedings.

The Appeal

The Builder appealed on 4 grounds as follows:

1. The Tribunal erred in refusing to allow the Builder to renew its original proceedings;
2. The Tribunal erred in failing to find the completion of the rectification work had been delayed by rain;
3. The Tribunal erred in failing to find the completion of the rectification work had been delayed by the delay in the appointment of a supervisor; and

4. The Tribunal erred in its decision as to costing the incomplete work.

Decision:

In respect to the abovenamed grounds of appeal, the Appeal Panel made the following findings:

1. Ground 1 was dismissed on the basis that no injustice was done;
2. Ground 2 was dismissed on the basis that the Builder failed to identify any evidence that rain did delay the work;
3. Ground 3 was dismissed also on the basis that the Builder failed to identify any evidence that provided any link between the lack of a supervisor and the inability to commence the work; and
4. Ground 4 was dismissed on the basis that no objection to the tender of the reports was taken before the Tribunal and the Builder should not be permitted to raise this point for the first time on appeal.

Therefore, the appeal was dismissed.

***Sleiman t/as Perfect Kitchens v Dempsey* [2020] NSWCATAP 26**

Coram: S Westgarth (Deputy President), D Robertson (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 26 February 2020

BUILDING AND CONSTRUCTION – Contract – damages for breach of contract

Facts:
The Appellants ('**builders**') entered into an oral contract with the Respondent ('**owner**') for the provision of residential building work – namely, the installation of a new kitchen – in an apartment owned by the owner in Woolloomooloo. The owner paid the builders the sum of $7,500 in cash by way of deposit. The agreed price for the work to be performed by the builders was the matter of dispute.

The owner alleged that the agreed contract price was $25,050, however, in an email to the Builders, the owner had asserted that the amount agreed to be paid in cash was $28,020. This amount was recorded in the decision under appeal as the amount the owner contended was the contract price. On the other hand, the builders alleged that the total agreed cost for the construction works was $32,300.

The construction works commenced, however the owner claimed to have identified defects and omissions in the work. The builders then declined to rectify the matters the owner asserted were defects and indicated that further work would constitute a variation requiring further payment.

First Instance
The builders filed an application in the Tribunal seeking $24,800, which the builders alleged was the amount outstanding pursuant to the contract. In defence, the owner relied upon a number of breaches by the builders of the requirements under the *Home Building Act 1989* (NSW) ('**HBA**'), being that the contract was not in writing and that the builder had failed to obtain a contract of the owners' warranty insurance under the HBA. The Tribunal concluded that the builders were ordered to pay the owner $14,941 and dismissed the builders' claim as the work performed was found to be defective, implicitly in breach of the statutory warranties set out in the HBA.

The Appeal

The builders sought leave to appeal on the basis that the decision was not fair and equitable, and stated the reasons for this repeatedly in 8 grounds of appeal, alongside the fact that the decision was against the weight of evidence. However, subject to the requirements of procedural fairness, the Tribunal was not bound by the rules of evidence; the admission of the evidence to which the builders object could not have constituted an error of law. In addition, the weight accorded to evidence was not found to have been a question of law.

<u>A further issue identified by the Appeal Panel</u>

At the commencement of the appeal hearing, the Appeal Panel indicated to the parties that there was an apparent problem with the Tribunal's assessment of the quantum of compensation payable to the owner. The owner sought compensation for breach of contract. The measurement of damages for breach of contract is the amount necessary to put the owner in the same position as if the contract had been performed.

Contrary to what appears to be the builders' submission, the Appeal Panel found that the unpaid balance of the agreed contract price exceeded the damages sustained by the owner. This did not mean that the payment was entitled to the builders. Therefore, it was clear that the builders could not recover from the owner any amount by way of quantum meruit, as the reasonable value of the work performed by the builders for the benefit of the owner amounted to less than $1,000, which was less than the builder had already been paid.

Decision:

Therefore, the appeal was allowed and the cost orders made at first instance were set aside.

Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd

[2020] NSWCA 25

Coram: White JA, Brereton JA, Barrett AJA

Court: New South Wales Court of Appeal

Date: 25 February 2020

BUILDING AND CONSTRUCTION – construction contracts – Building and Construction Industry Security of Payment Act 1999 (NSW) – whether right to suspend work validly exercised – whether unpaid interest on late payment of "scheduled amount" forms part of the scheduled amount – the definition of "scheduled amount" does not include interest payable under s 11 on the unpaid amount of a progress payment unless that amount is included in a "scheduled amount"

CONTRACT – Breach of Contract – whether 'show cause notice' was validly issued in circumstances where the power to issue the notice was conferred on the principal's representative – where principal was involved in the principal's representative's decision to issue the notice – notice validly issued as principal's representative gave adequate and proper consideration to issuing the notice and it would be inconsistent with the principal's right to see that its representative acts properly if it could not be involved in the decision

CONTRACT – Breach of Contract – whether 'take out notice' was validly issued where its validity was contingent on the principal's representative being satisfied that the default that was the subject of the 'show cause notice' had not been remedied or the contractor had otherwise failed to show cause – not shown that the principal's representative failed to give adequate and proper consideration to the issues – not shown that the principal's representative did not possess the relevant satisfaction

EVIDENCE — Privileges — Without prejudice privilege – whether information obtained during the course of 'without prejudice' meetings can be used for purposes other than settlement – 'without prejudice' privilege is not based upon an implied agreement that if the negotiations do not result in an agreement for settlement of the dispute, the parties will make no use of what has been disclosed by the other party in the negotiations

Facts:

The Appellant, Duffy Kennedy Pty Ltd ('**Contractor**'), entered into a contract with the Respondent, Galileo Miranda Nominee Pty Ltd ('**Principal**') for the design and construction of the Palisade, a residential apartment block in Miranda. The contract was for a lump sum of around $66 million, and practical competition was specified for 18 February 2019. Resource Co-Ordination Partnership Pty Ltd ('**RCP**') administered the project as the Principal's representative.

The dispute arose amongst the parties when practical competition was not met. The Contractor alleged that, as at the end of February 2019, about '99.9%' of the works, by reference to the Contract sum, were complete, with the value of the remaining works to be about $56,000. In order to obtain the Occupation Certificate, it was still required:

- a 'Penetration Schedule' identifying each location within the project where pipes, wires or other services 'penetrated' structural walls, ceilings or floors of the building (of which there were hundreds); and
- The increase in the heights of the balustrades on four balconies to meet safety requirements of the Building Code of Australia.

Progress Claim

As such, on 26 February 2019, the Contractor issued a Progress Claim to the Principal, claiming $1,010,161.72. RCP issued a Payment Certificate and Payment Schedule in response on 12 March 2019, assessing the sum due was around $294,000. The parties did not dispute that payment was due on 19 March 2019. Galileo initiated an electronic payment on 22 March 2019, for the certified amount, which was received on 25 March 2019.

Notices to Suspend Works

On the basis that the Principal failed to include interest accounting for the late payment, the Contractor issued two notices to the Principal on 25 March 2019. Both parties effectively sought to provide notice of the Contractor's intention to suspend the works. Particularly, the second notice issued purported to entitle the Contractor to suspend works, should the Principal default in making any payment under the contract.

Show Cause Notice

In response, the Principal issued a show cause notice, requiring the Contractor to show reasonable cause as to why the Principal should not exercise their contractual rights to terminate the contract or take the work out of the Contractor's hands. Relevantly, the show cause notice was issued on a Galileo letterhead, and signed by both a representative of Galileo and of RCP.

Take Out Notice

The Contractor's response to the show cause notice was deemed unsatisfactory by the Principal, who then issued a take-out notice to the Contractor. Pursuant to the contract, the take-out notice required the Contractor to leave the site. In this respect, the key contention was the completion of the 'Penetration Schedule' described above.

In response, the Contractor disputed the validity of the take-out notice by asserting that the take-out notice was a repudiation of the contract. As such, the Contractor argued that since the Principal had repudiated the contract, the Principal were required to return the bonds which had been provided as security for the Contractor's obligations under the contract.

First Instance

The Supreme Court proceedings were initially commenced by the Principal, who sought to affirm the contract and thereby compel the Contractor to perform their obligations under the contract, following the take out notice. The Contractor then cross-claimed, and sough orders that their security bonds be returned by the Principal.

The issues posed to the Court at first instance, and corresponding judgment, can be summarised as follows:

1. Whether or not the Contractor had been entitled to suspend the works for the failure of the Principal to pay interest on the certified amount un the Payment Schedule. If not, did the Contract have reasonable cause to suspend the works, acting in good faith on the basis that payment of the interest was not forthcoming.

Accordingly, the Court held at first instance that the Contractor was not entitled to suspend the works. The Court made specific reference to the fact that the Contractor's decision to suspend the works, on the basis of a failure to pay $177.40 in interest, was disproportionate and therefore unreasonable.

2. The second issue was whether the take-out notice had been validly issued by the RCP and whether the Principal had been entitled to retain the security to satisfy any costs incurred by the Contractor in engaging other contractors to complete the works.

Among other considerations, the Court determined the notices on the Galileo letterhead could be validly issued by RCP. By way of the relevant RCP representative having reviewed and signed the documents, RCP had indicated their consent to the document's contents, and have discharged their duties to act in good faith when making determinations on contractual issues. Thus, the take-out notice had been validly issued.

The Appeal

The Contractor challenged the above decision to the Court of Appeal on the grounds that Judge in the first instance erred on the following issues:

1. Duffy Kennedy were entitled to suspend the works pursuant to the SOP Act;
2. Duffy Kennedy had reasonable cause to suspend the works under the Contract;

3. Galileo had been too involved in the issue of the Show Cause Notice, and the Show Cause Notice was not valid; and
4. Galileo had been too involved in the issue of the Take Out Notice; and the Take Out Notice was not valid.

Decision

However, by way of a unanimous decision of the Court of Appeal, the Contractor failed on all grounds to appeal the decision of the first instance, and thus, the reasoning of the Supreme Court was largely affirmed.

Morrison v Moss (No. 2)

[2020] NSWDC 29

Coram: Abadee DCJ

Court: New South Wales District Court

Date: 21 February 2020

PRACTICE AND PROCEDURE – building dispute – finding in reasons for judgment in relation to debt owed to Builders by Home Owner subject to Home Owner's defence of set-off – Home Owner's defence of set-off comprises claim for cost of rectification works for defective or incomplete work by the Builders – application by Home Owner to re-open judgment to correct provisional finding on debt owed to Builders – whether discretion to re-open should be exercised – quantum of costs to rectify defective work to be the subject of referral – application to limit information available to referee to evidence served by parties prior to the hearing – appropriate orders to give effect to referral

Facts:

Morrison ('**owner**') entered into a contract with Moss ('**builder**') for the construction work of the owners' residence near Lake Macquarie. The owner commenced earlier proceedings following a dispute between the parties and sought to claim damages for defective work in breach of the *Home Building Act 1989* (NSW) ('**HBA**').

These proceedings concerned the owner raising two issues in relation to the findings of the earlier decision. The first issue disputes the amount that the builder was found to have been entitled to, at first instance, for their debt claim. As such, the Court had found that the builder was entitled to receive around $52,000, with such amount subject to be set-off against the owners claim, which would be quantified by a referee. The second issue before the Court arose from a concern of which information the referee should have regard to once a referral is made to quantify the owners claim.

The owner therefore sought the following:

1. A variation of the amount of the Builders' damages, to the sum of $28,770.56 (subject to further set-off); and
2. A limitation upon the materials to be provided to the referee which quantify the defects in the works as the Court has found them), being that they only consist of the evidence on quantum served by the parties in the proceeding to date.

Decision:

Abadee DCJ referred to the owners' submission as substantive in nature, and thereby an arguable view of the evidence that the previous finding should not have been made. However, it was found that his Honour did not purport to exercise discretion in re-opening the judgment in the matter sought by the owner. This was determined on the basis that, should the application have been acceded, a consequence could well be incentivising litigants, who are dissatisfied with Court findings, to routine apply to the Court in re-opening a hearing. As such, this would provide reason to allow elaboration on losing arguments, and perhaps, even tweaked. Abadee DCJ indicated that this would be contrary to the obligation that parties present their cases fully during trial. Therefore, the owners' application failed.

Kitchen Complex Pty Ltd v Revelop Building and Development Pty Ltd & Anor

[2020] NSWSC 96

Coram: White J

Court: New South Wales Supreme Court

Date: 21 February 2020

CIVIL PROCEDURE — Hearings — Procedural fairness – submissions raised by defendant for the first time after close of the plaintiff's case – where the matters subject of the submissions were in issue in the course of the hearing – no denial of procedural fairness

BUILDING AND CONSTRUCTION — Contract — Novation – whether novation of contract in circumstances where invoices issued to a related company at the request of a contracting party – no evidence of novation

Facts:

These proceedings concerned an appeal from orders of the Local Court, in which judgment was given in favour of Revelop Building and Development Pty Ltd & Anor ('**defendants**'). Kitchen Complex Pty Ltd ('**plaintiff**') had commenced proceedings against the defendants for around $52,000, which was the balance of the price alleged to be owing under a contract made with either the first defendant, Revelop Building and Development Pty Ltd ("**RBD**") or the second defendant, Revelop Projects Pty Ltd ("**Revelop Projects**") for the draft, design, manufacture, supply and installation of furniture work at a site.

First Instance

The plaintiff pleaded, and it was admitted, that Revelop Projects was the holder of a contractor's licence. Accordingly, both defendants pleaded that the contract sued on was unenforceable against them by reason of the *Home Building Act* ('**HBA**') because s 7 of that Act had not been complied with. Section 7 requires that a contract for more than a prescribed amount of $20,000 be in writing, be signed by each of the parties to it, and contain prescribed information. In addition, both defendants also pleaded that the said contract was unenforceable as the plaintiff did not have a contract of insurance, as required by the HBA, for the residential building work the subject of the proceedings.

The learned magistrate found that RBD was indebted to the plaintiff in the sum of $46,919.54 This included all of the amounts claimed by the plaintiff, except for the last invoice of $4,736.54 which the plaintiff accepted was only payable upon completion.

The Appeal

The plaintiff's grounds of appeal can be summarised as follows:

Procedural Fairness

1. The learned magistrate erred in law by failing to accord the plaintiff procedural fairness by finding that the plaintiff's contractor's license [sic] did not permit the plaintiff to do the works and was unlicensed work;
2. The learned magistrate erred in law by failing to accord the plaintiff procedural fairness by finding that there was a novation of the contract;

Drawing the wrong inference of fact

3. The learned magistrate erred by drawing the wrong inference of fact from the primary facts, or alternatively, finding as fact in the absence of evidence of the fact, that there was a novation of the contract;

Failure to give reasons

4. The learned magistrate erred by failing to give reasons and adequate reasons, respectively, for the decision that:
    a. The contractor's license did not permit the plaintiff to do the works and is unlicensed work; and
    b. That there was a novation of the contract.

Through proposed amended summons, the plaintiff sought leave to add a further ground that:

5. "The learned magistrate erred in law by failing to apply the legal principle to the facts as found by her, namely that the contract price is relevant as evidence on the question of amount that should be awarded to the plaintiff on a quantum meruit basis."

Decision:

White J determined that the plaintiff was not denied procedural fairness. Relevantly, the plaintiff alleged that the learned magistrate erred by not giving reasons for not upholding the plaintiff's objection to the defendants' being allowed to rely upon the defence. However, White J held that it is not every objection raised by a part that needs to be addressed in a judge's reasons. White J also noted that even if the magistrate ought to have provided reasons for not upholding the plaintiff's objection, her failure to do so did not affect the outcome, and in any event, the plaintiff was not denied procedural fairness. In addition, without any finding as to whether the plaintiff's failure to complete the works was caused by the second defendant's failure to complete the installation works, and in the absence of findings as to whether the contract was terminated by one party accepting the other's repudiation, it was not possible for White J to conclude that the plaintiff was not entitled to any further payment because final work was admittedly incomplete. Thus, the appeal and amended summons were dismissed.

Robust Builders Pty Ltd v Bhardwaj

[2020] NSWCATAP 24

Coram: S Thode (Senior Member), J Currie (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 21 February 2020

APPEAL – Home Building – No error of Law

Facts:

These proceedings concerned an internal appeal from an application brought to the Tribunal by Mr and Mrs Bhardwaj ('**owners**'). The owners entered into a contract with Robust Builders Pty Ltd ('**builder**') for the construction of a two-storey residence on the owner's land in Kellyville.

First Instance

The owners brought a claim against the builders for damages for a breach of statutory warranty. The builders then filed a cross-application seeking damages for loss of profit and unpaid variations. The builder contended that there were 3 building contracts between the parities, namely:

1. A "first contract" which was signed and dated by the parties and stated a price of $350,000 plus $50,000 for variations, inclusive of GST;
2. a "second contract" where the parties signed a "Letter of Acceptance" and a new contract. The builder asserted that this was done because Mr Bhardwaj wanted to expand the scope of the works by adding new building work; and
3. a "third contract" where it was alleged by the builder that the parties amended and increased the contract price to $595,000 by this contract an allegation denied by the owners.

However, at first instance, the builder was ordered to pay the owners the sum of $154,463. The Tribunal was not impressed with the builders evidence or his actions in carrying out the contract works. Additionally, the Tribunal emphasised that the builder was not competent in preparing contract documents that comply with legal requirements.

The Appeal

Following this decision, the builder appealed on three grounds which can be summarised as follows:

<u>First Contract</u>

1. The Member erred in law in finding that the ‘plans and specifications’ referred to in the Development Certificate were contract documents which the builder was contractually obliged to comply with, and formed the scope of works within the first contract;

<u>Third Contract</u>

2. The Tribunal erred in law in finding that the third contract was not binding on the owners, being a finding against the weight of evidence; and
3. The Tribunal erred in finding that the contract price of the third contract had been altered from reading $400,000-$540,000 after the owners had signed, being a finding against the weight of evidence.

Grounds of appeal concerning the second contract were not pressed and are not relevant for the purpose of the reasons for decision.

The owners submitted that all ground of appeal require leave, as none constitute errors of law, and all grounds are essentially an attempt of the builder to revisit findings of fact. The appeal panel agreed with the owners.

Decision

Although the builder contended that the finding of Senior Member Goldstein constituted an error of law, the Appeal Panel were not satisfied with this contention. As such, the Appeal Panel indicated that the builder had not identified any grounds that would justify any grant of leave to appeal, nor had the builder established a substantial injustice. Therefore, the appeal was dismissed.

Vagg v Routledge

[2020] NSWSC 88

Coram: Ball J

Court: New South Wales Supreme Court

Date: 20 February 2020

BUILDING AND CONSTRUCTION – Breach of statutory warranties in the Home Building Act 1989 (NSW), s 18B –Whether 2014 amendments to s 18E Home Building Act 1989 (NSW) retroactive – Expert evidence not compliant with Uniform civil Procedure Rules 2005 (NSW) – Where plaintiffs delayed in repairing defects – Availability of damages for Solatium

Facts:

These proceedings concerned Mr and Mrs Vagg ('**plaintiffs**') seeking to recover damages for defective building work carried out by Mr Routlegde ('**defendan**t') on their beach residence, constructed between April 2009 and December 2010. It should be noted that the defendant filed a cross-claim in the District Court on 1 May 2017, seeking to recover amounts said to be due to them under the building contract, or on a quantum meruit basis. However, no evidence was filed in support of the defendants' cross-claim, so it was therefore dismissed with costs.

<u>Limitation period for claims brought under breaches of statutory warranty</u>

The claim brought by the plaintiff sought to reply on breaches of the warranties implied by s 18B of the *Home Building Act 1989* (NSW) ('**HBA**'). However, the first issue posed to the Court was that the building contract was entered into in February 2009. At that time, s 18E of the HBA provided for a limitation period for claims of a breach of a statutory warranty of seven years from the date the work was completed. Such provision was amended in 2011, so as to provide for a limitation period of six years for a breach resulting in a structural defect, or two years in any other case. Section 18E was then further amended in 2014 by essentially replacing the words 'structural defect' with 'major defect' and provided a definition of the phrase 'major defect'.

Thus, in these proceedings, it was not entirely clear how the amendments introduced in 2014 affect the limitation period in respect of work done under contracts that were entered into before the amendments introduced in 2011 took effect. Ball J indicated that as no contrary argument was put before the Court, the relevant limitation period was accepted as one that applied before the 2011 amendments.

The plaintiff's claim was essentially divided into three parts. First, they sought to recover the estimated costs of rectifying a number of substantial defects which had not yet been rectified. Second, they sought to recover the costs they claimed to have incurred in rectifying the defects. Lastly, they made a claim for solatium.

1. Cost of rectifying substantial defects

The plaintiffs relied principally on evidence given by a licensed builder, who provided detailed reports which describe the nature of the defects and explain why the relevant work was not done with due care and skill or in accordance with the plans and specifications that formed part of the contract. In accordance with such reports, and additional oral evidence provided, Ball J accepted the evidence and found that the total amount recoverable to the plainitff was $1,457,126.88.

2. Amounts paid by the Plaintiffs

Ball J made individual findings for a number of defects that the plaintiffs rectified at their own expense and found that the plaintiffs were entitled to recover $11,882.93 in respect of costs they have incurred. Where evidence supported the individual cost incurred, Ball J upheld the plaintiffs entitlement to such amount.

3. The claim for solatium

Ball J indicated that the plaintiffs would only be entitled to an award of solatium if they could establish that the severity of their disappointment and distress was at least 15% of a most extreme case. However, it was found that there was no evidence to support such a claim, and as such, the claim for solatium was rejected.

Decision

It follows that the plaintiffs were entitled to judgment in the sum of $1,469,009.81 ($1,457,126.88 plus $11,882.93).

TWT Property Group Pty Ltd v Cenric Group Pty Ltd

[2020] NSWSC 72

Coram: Stevenson J

Court: New South Wales Supreme Court

Date: 14 February 2020

BUILDING AND CONSTRUCTION – whether service of payment claim an abuse of process by reason of an Anshun estoppel in earlier proceedings

BUILDING AND CONSTRUCTION – adjudication – review of an adjudicator's determination under Building and Construction Industry Security of Payment Act 1999 (NSW) – where adjudicator wrongly concluded that payment claim not served within 12 months after commencement of works to which it related – whether such decision reviewable

Facts:

TWT Property Group Pty Ltd ('**developer**') entered into a contract with Cenric Group Pty Ltd ('**builder**') for the demolition of a structure and excavation of a site. The developer excluded the builder from the site on 19 March 2018, and instead, sought to contract with the builder's subcontractor to complete the excavation works. Accordingly, the builder commenced proceedings ('**2018 Proceedings**') against the developer and the subcontractor for damages arising from the exclusion. The Court held that although the builder should not have been excluded from the site, this had not proved any damages to be claimed.

Relevantly, the builder had claimed for work performed up to 19 March 2018 as a set-off to the developer's cross-claim in the 2018 Proceedings, but led no evidence in support of the claim and withdrew the claimed set-off through closing submissions.

First Instance

On 14 December 2018, the builder served a payment claim on the developer totalling to $444,726 in respect to the work completed before its exclusion from site ('**December Claim**'). The developer served a payment schedule for $nil. Following this, the builder made an adjudication application in which the adjudicator found that:

- It was 'common ground' that the only work undertaken during the 12 months preceding the payment claim was excavation of the sandstone and the December Claim included no amount for excavation of sandstone;
- The payment claim was not served within 12 months after the construction work to which the claim related was last carried out, and therefore the payment claim was not

valid under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘**Act**’);

- The adjudicator therefore had no jurisdiction to determine the matter; and
- The builder was not entitled to a progress payment.

The Supreme Court Proceedings

The builder purported to withdraw this first adjudication application and then sought to make a further adjudication application (also regarding the December Claim). The developer commenced proceedings in the Supreme Court to challenge the December Claim or uphold the first adjudication.

The issues posed to the court can be summarised as follows:

- Whether it was an abuse of process of the Act for the builder to make the December Claim by reason of an Anshun estoppel arising from the builder's failure to pursue in the 2018 Proceedings a claim for work done before its exclusion from site; and
- If there is no Anshun estoppel, whether the adjudicator's decision was amenable to challenge because, as a matter of objective fact, the December Claim related to work carried out within 12 months of service of the December Claim.

Decision

The court made orders restraining the builder from proceeding with the second adjudication by dealing with the above issues separately.

<u>The Anshun Question</u>

Stevenson J held that the December Claim arose from the same facts as those considered in the 2018 Proceedings and that it was unreasonable, and indeed, inexplicable that the builder did not include the December Claim in the 2018 Proceedings. In these circumstances, the builder was estopped from bringing such a claim in later proceedings, including by way of adjudication under the Act. Accordingly, the builder had contended that a letter from the builder's solicitor to the developer's solicitor on the eve of the hearing of the 2018 Proceedings indicated an agreement to hold a separate inquiry into amounts owing to the builder (and therefore address the December Claim) and this justified the builder's failure to pursue a claim for payment in the 2018 Proceedings. Stevenson J rejected this argument by finding the builder's interpretation of the letter unconvincing.

<u>The first adjudication – was there a breach of natural justice?</u>

Stevenson J also indicated that the December Claim related to work carried out by the builder within 12 months of service of the December Claim.

In coming to that conclusion, Stevenson J decided that compliance with of the Act arose a jurisdictional fact as to when the work was carried out, but an error by an adjudicator in determining that fact is not one that is reviewable by the court. However, had the court been required to determine the issue, Stevenson J would have found that the adjudication determination was void, because in coming to the finding on what was 'common ground' between the parties, the adjudicator must have failed to consider the builder's submission that the excavation works the subject of the December Claim did relate to sandstone excavation. Stevenson J therefore decided that such a failure breached natural justice.

Chen v City of Parramatta Council

[2020] NSWLEC 1059

Coram: Clay AC

Court: New South Wales Land and Environment Court

Date: 13 February 2020

BUILDING CERTIFICATE – conciliation conference – enclosed balcony – minor internal work – orders

Facts:

These proceedings concerned an appeal against the decision by the City of Paramatta Council ('**Respondent**') to refuse an application for a building certification in respect of glazed balcony screen enclosure, the repositioning of dining area and an addition of a glass door and panel for a Strata Plan in Parramatta.

Decision:

Clay AC presided over a conciliation conference between the parties prior to these proceedings. At such conference, the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to both parties. The proposed decision was to allow the appeal and direct the Respondent to issue a Building Information Certificate. Thus, it was merely required that the proceedings be disposed in accordance with the parties' agreement, if the proposed decision is a decision that the Court could have made in the proper exercise of its functions.

As such, there was no jurisdictional prerequisite to the making of such an order other than that there is a lawful application before the Court. Therefore, the court was satisfied that a proper building certificate application could be made, and the appeal was allowed.

Steele Associates Pty Ltd v Downie

[2020] NSWCATAP 289

Coram: T Simon (Principal Member), J Lonsdale (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 4 February 2020

HOME BUILDING - leave to appeal, s 18F defence, against the weight evidence, expert evidence, water ingress

Facts:

These proceedings concerned Steele Associates Pty Ltd ('**builder**') lodging an internal appeal against a decision made in the Tribunal, whereby it was ordered that the builder pay Downie ('**owner**') a sum of $308,275.44 in respect of a building claim and defects.

The Appeal

The builder sought to appeal the decision on three grounds as follows:

1. An error of law occurred on the basis that the Tribunal refused to accept an email relating to the asserted defence of the appellant;
2. Leave to appeal the Tribunal's acceptance of moisture readings was sought as they were against the weight evidence; and
3. Leave to appeal on the basis that the Tribunal incorrectly found a lack of damp course and flashings was also sought. Further, the builder alleged that decision was not fair and equitable and against the weight of evidence.

Decision

Ground 1 - Declining to accept email

The builder contended that the email was an instruction, and that the relevant test that the Tribunal should have considered is whether there was a significant possibility and a chance which was fairly open of achieving a more favourable result. The builder also submitted that the refusal to admit the email into evidence was an error of law. However, the Appeal Panel found that such refusal did not constitute an error of law, as directions were made for the parties to provide documents prior to the hearing, but the email was produced by the builders during cross-examination on the second day of the hearing. Thus, the Appeal Panel was not satisfied that there had been an error of law or a miscarriage of justice which would warrant leave to appeal, and therefore, this ground of appeal failed.

Ground 2- Meter readings

The builder argued that the Tribunal failed to properly consider the variations in relation to meter readings and data produced by the readings. The builder had put into evidence advice from the manufacturer of the operation of the water moisture reader regarding possible limitations in relation to the reading from that meter. Having considered the reasoning of the Tribunal at first instance, the Appeal Panel was not satisfied that the decision amounted to being against the weight of evidence or unfair and unjust. As such, in these circumstances, the Appeal Panel indicated that this could not be contended because the Senior Member at first instance had clearly considered the totality of the evidence.

Ground 3 - Findings on lack of damp course and flashings

The builder submitted that the Tribunal had also failed to consider compelling evidence adduced by the appellant in the form of photographs that he submits demonstrate a damp course and flashings. However, the Appeal Panel held that it was clear from the Senior Members' finding at first instance that the finding related to the construction of the property and not, as is asserted by the builder, an absence of a damp course or flashings. Therefore, the Appeal Panel was not satisfied that the Tribunal failed to consider compelling evidence adduced by the builder.

Decision

It then follows that the Appeal Panel refused leave to appeal, and therefore, dismissed the appeal on all grounds.

Samimi Commissioner for Fair Trading, Department of Customer Service

[2020] NSWCATAP 7

Coram: Dr R Dubler SC (Senior Member), Dr J Lucy (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 17 January 2020

APPEAL - Civil and Administrative Tribunal (NSW) – Home Building – Review of decision to refuse application for contractor licence – Whether Tribunal denied appellant procedural fairness – Whether Tribunal biased – Whether Tribunal had regard to an irrelevant consideration – Whether the Tribunal's decision was legally unreasonable

Facts:

These proceedings concerned an appeal from a review of a decision of the Commissioner for Fair Trading to refuse Mr Samimi's application for a contractor license. Mr Samimi was the holder of a contractor licence under the *Home Building Act 1989* (NSW). He was also the holder of a building authority in Queensland. However, his building license was cancelled in 2014, following proceedings and respective decisions made in the Queensland District and Supreme Courts, and in the Queensland Civil and Administrative Tribunal.

By way of brief history, Mr Simimi applied to renew his contractor license in October 2012 and October 2015. He failed to disclose that he had been the director of a company placed under external administration in either application. In October 2017, Mr Samimi's contractor licence was cancelled because the Commissioner was not satisfied that Mr Samimi was a fit and proper person to be the holder of a contractor licence. Following two attempts of applying for a new contractor license, Mr Samimi applied to the Tribunal for an administrative review. In turn, the Tribunal affirmed the Commissioner's decision, and it was also found that Mr Samimi was not a fit and proper person to hold a contractor licence.

The Appeal

On appeal, Mr Samimi essentially claimed that the Tribunal was biased, that it had regard to irrelevant considerations, that it acted unreasonably and that it ambushed him at the hearing.

Decision

<u>Bias</u>

It was not clear to the Appeal Panel whether this allegation was referring to actual or apprehended bias, as a result of a lack of substantial evidence, but in any event, the Appeal Panel found that no bias had occurred.

Taking into account irrelevant considerations

Mr Samimi submitted that the Tribunal took into account an irrelevant consideration, being the events which occurred in Queensland. The Appeal Panel indicated that the reason why this was contended was because Mr Samimi claimed that those events were irrelevant is because of his contention of not being guilty of any wrongdoing. However, the Appeal Panel held that Mr Samimi's conduct as a builder in Queensland was plainly relevant to the question of whether he is a fit and proper person to hold a contractor licence in New South Wales. Accordingly, the Appeal Panel asserted that Mr Samimi was entitled to, and did, present his version of events to the Tribunal and provided an account of his conduct which was the subject of the proceedings in the Queensland District and Supreme Courts, and in the Queensland Civil and Administrative Tribunal. However, this did not mean that the Tribunal should not consider the decisions of those courts and tribunal, or the circumstances underlying the disputes. As such, the Appeal Panel found that those matters are all relevant to Mr Samimi's fitness and propriety.

Unreasonableness

On this 'ground', the Appeal Panel indicated that the Tribunal was entitled to have regard to the failure to disclose matters on Mr Samimi's renewal application forms as a matter relevant to his fitness and propriety.

Decision

It goes without saying that, as a result of all grounds of appeal failing, the appeal was dismissed

Akbarian v Stibilj

[2020] NSWCATAP 1

Coram: D Charles (Senior Member), A Boxall (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 8 January 2020

APPEAL – home building – claim for variations on quantum meruit basis – leave to appeal refused – no error of law – leave to appeal declined

Facts:

These proceedings concerned an internal appeal against a decision made in the Tribunal in an application brought by Arash Akbarian ('**owner**'), against Vinko Stibilj trading as Stibilj Constructions ('**builder**'). The parties signed a written contract for residential building work, in the nature of alterations and additions, to an existing residence at the owner's property in Lindfield. The agreed contract price was in the sum of $152,659.86. Mr Neill was the owners' architect and project, as well as the contract superintendent.

The contract was preceded by various quotations culminating in a final quotation dated 14 August 2014. There were also signed architectural plans of March 2014, signed specifications of 2014, and engineering plans of 9 July 2014. The engineering plans were revised on 25 September 2014. The owner then signed an application to amend the development consent for the alterations and additions to his residence, to reflect the fact that he wanted to build a room under the dwelling. The application to amend the development consent included a letter from Mr Neill.

The builder commenced construction works at the property on 27 August 2014, and thereafter, the owner made progress payments to the builder in accordance with progress certificates issued by Mr Neill. In or about January 2015, the builder suspended work, as disputes had arisen with the owner about payments for work including variations.

First Instance

The initial proceeding before the Tribunal at first instance was the builder's claim, where it was found that the application was lodged and within time required by the *Home Building* Act 1989 (NSW) ('**HBA**').

The owner then lodged a cross-claim disputing the matters claimed in the builder's application, and sought damages for additional engineering work that the owner submitted was required.

The Tribunal found that so long as the builder was able to establish the fair and reasonable compensation for labour and materials, he should be entitled to the variation claims sought, as it would be unfair for the owner to have the benefit from such variations without having to pay for them. Accordingly, following the weighing of evidence in respect to the claims for the variations, the Tribunal found that the builder was entitled to $34,757.77 and ordered the payment of that amount in the Builder's application.

The Appeal

These proceedings were not a case where the parties were self-represented, because the parties chose for a family member to represent each of them respectively at the appeal hearing and assist them in preparation for relevant appeal submissions in their respective cases. However, the documents provided as an attempt to illuminate any relevant grounds of appeal were found to have not been grounds of appeal statements, but rather, commentary on particular aspects of the Tribunal's decision. Therefore, having carefully considered the owner's written material for the appeal, the Appeal Panel were unable to identify or discern any error of law in the Tribunal's determination of the builder's quantum meruit claims.

Further, although the owner also expressed his dissatisfaction with the Tribunal's findings as to his unsuccessful cross-claim, the Appeal Panel affirmed the Tribunal's finding that it was not made out on the evidence. Therefore, the Appeal Panel indicated that they were satisfied that the findings of the Tribunal at first instance were not made against the weight of evidence, nor were they fair and equitable, and there is no new evidence which was not reasonably available at the time of the hearing.

Decision:

For the abovenamed reasons, the Appeal Panel decided to refuse leave to appeal and otherwise dismiss the appeal.

Al-Shinawa v NSW Fair Trading Department of Customer Service

[2020] NSWCATOD 1

Coram: S Leal (Senior Member)

Court: New South Wales Civil and Administrative Tribunal Occupational Division

Date: 6 January 2020

ADMINISTRATIVE REVIEW – Home Building – Application for contractor licence – general building work - where applicant does not meet requirements of an instrument - where the instrument is policy rather than delegated legislation – whether the applicant has experience in a wide range of building construction work - applicant cannot verify their own experience.

Facts:

These proceedings concerned Mr Al-Shinawa ('**plaintiff**') applying for a review of a decision made in the Tribunal, where his claim for a contractor license for general building work was refused. NSW Fair Trading ('**respondent**') refused such application, and confirmed the decision on internal review, because the plaintiff had not demonstrated that he had attained a minimum of two years acceptable relevant industry experience in a wide range of building construction work.

The relevant question posed to the Tribunal was whether the plaintiff attained a minimum of two years acceptable relevant industry experience in a wide range of building construction work. In his application for a contractor license in general building work, the plaintiff stated that his relevant period of building experience spanned from 7 October 2015 to 30 May 2018. Together with his application, the plaintiff submitted a statutory declaration that he had exceeded the minimum two years full-time building experience stipulated in the *Home Building Act 1989 (NSW) ('***HBA***')* through a construction company. The plaintiff contended that despite this experience, the director of the company had refused to sign off his referee statement.

First Instance

Following internal review, the respondent was not satisfied that the plaintiff had the two-year practical experience required to be issues with the requested building contractor licence for the following reasons:

1. The referee statement submitted by the plaintiff were unsigned and so could not be taken into consideration; and
2. The research conducted by the respondent could not support a finding that the plaintiff had attained the required two years acceptable relevant industry experience in a wide range of building construction work.

Instead, the respondent found that the plaintiff was eligible to receive a license in the categories of Carpentry and Kitchen Bathroom Laundry Renovator. In confirming the refusal of the application on internal review, the respondent was not satisfied that the plaintiff had demonstrated the achievement of practical competencies to be issued with a building authority in accordance with the HBA Act.

Decision:

Accordingly, the Occupational Division held that the plaintiff had provided insufficient information or evidence to conclude that he had experience in carrying out or supervising a wide range of building construction works. The Occupational Division also indicated that this case may be the situation that the plaintiff has the experience required but has not been able to demonstrate it. On the information before the Tribunal, however, it was not satisfied that the plaintiff possesses the relevant experience to be granted a contractor licence in general building work. As such, the decision under review was be affirmed in refusing the plaintiff a contractor license in the category of general building work.