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BUILDING AND CONSTRUCTION CASES 2021

A REVIEW OF BUILDING AND CONSTRUCTION CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2021

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Anjoul v Anjoul

[2021] NSWSC 592

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 25 May 2021

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Residential building work — Consequences of failure to obtain contractor licence and insurance — Where the owner-builder defendant pleaded that the Act barred the plaintiff from being entitled to recover any money under a deed in respect of the residential building works because he did not have a contractor licence or insurance as required by the Act — Where the Court found that the Act did not prohibit the plaintiff from enforcing the deed if it was enforceable or from obtaining proper restitution if the deed was not unenforceable

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Facts:

These proceedings concerned a dispute between former in-laws as to who should pay for renovations to a residential property at Winston Hills. No written contract was entered into between the parties, those being, Ashley Anjoul ('**the defendant**') who was the former sister-in-law of Jerry Anjoul ('**the plaintiff**'). The parties' submissions and evidence significantly diverged on what the facts were, including how the renovations came to be, the person responsible for the renovations and the payments that had been made. However, it was common ground that the plaintiff had asked numerous subcontractors to work on the renovation. There were no written contracts with the subcontractors nor was there any evidence of payment tendered to the court.

Following the completion of the renovation, the plaintiff contended that the defendant and her husband had promised, but failed, pay for the renovation in full. As such, the plaintiff paid for the works and claimed that he was entitled to reimbursement. The defendant contended that she believed her husband and the plaintiff were responsible for determining the plaintiff's reimbursement. The defendant further contended that the plaintiff was prohibited from any reimbursement as he was not licensed and no building contract existed, as required by the *Home Building Act 1989* (NSW) ('**the Act**'). The Act requires that unless parties have entered into a written contract, they are not entitled to damages or to enforce any other remedies for breach of contract.

Subsequently, the parties signed a deed of acknowledgement of debt ('**the deed**') which provided that the defendant acknowledged a debt of around $743,000 was owed to the plaintiff by the defendant. Further, the deed provided that if the defendant divorced her husband, she would be required to pay any outstanding amounts to the plaintiff immediately. The deed also enabled the plaintiff to lodge a caveat over the property.

The defendant contended that the deed was unenforceable on numerous different grounds:

(1) There was in fact no debt due;

(2) The deed did not create a charge over the property;
(3) The requirement to immediately repay debt upon her divorce was a penalty;
(4) The deed was an unjust contract under the *Contract Reviews Act 1980* (NSW); and
(5) She entered into the deed under duress or due to unconscionable conduct and it was unenforceable under applicable equitable principles.

Decision:
The Court dismissed the first three contentions made by the defendant, and held that the deed was enforceable and created a charge over the property in favour of the plaintiff. As such, the plaintiff’s contractor's licence for specialist work did not prohibit the claim, as the plaintiff had carried out some work and paid for other trades and materials as agent for the defendant as an owner-builder, not under a contract between himself and the defendant. Therefore, the plaintiff was therefore not prohibited under the Act from claiming for the renovation works.

Nonetheless, the Court accepted the defendant’s fourth and fifth contentions. Despite finding the deed was voidable and should be set aside, the Court deferred making such an order on the basis that the defendant was not entitled to the entire benefit of the renovations for free. As such, the lack of payment evidence made it difficult for the Court to make an assessment, and the parties were given further time to make potential reimbursements.

B&W Windows (Residential) Pty Ltd v Sibilia

[2021] NSWCATAP 271

Coram: K Rosser, D Robertson

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 13 September 2021

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Statutory Warranties – Duty to mitigate loss – Section 18BA – Duty to provide access – Extent of duty to provide access to attempt rectification of defective windows which had previously been removed and replaced – Breach of statutory warranties – Measure of compensation – Onus lies on applicant to establish that building costs incurred were required in order to bring the work into conformity with the contract

Facts:

These proceedings concerned an internal appeal from an application made by Carlo Dominic Sibilia and Renee Horgan ('**the respondents**') against B & W Windows (Residential) Ply Ltd ('**the appellants**') under the *Home Building Act 1989* (NSW) ('**the Act**').

The parties entered into an agreement whereby the appellant was to manufacture, supply and install windows, doors and screens at the respondents' residence in Marrickville. Relevantly, the contract included the following terms:

(1) Waterproofing membrane to the sill was to be provided by the respondent's builder;
(2) The appellant was responsible for waterproofing of windows only. "If structure if not waterproofed correctly, warranties are avoided"; and
(3) The appellant's "liability is limited to replacing the goods or repairing the goods".

Following the appellant's installation of the windows and doors, a dispute arose in respect of an allegation by the respondents that three of the windows leaked through the window frames and sills. The parties entered into a Deed of Settlement and Release ('**deed**'), whereby the appellant agreed "without admission of liability" to perform and complete rectification work, which included the removal, refabrication and re-installation of the three windows. Also pursuant to the deed, the appellant agreed that the statutory warranties set out in the Act applied to its work and would apply for two years from the date of practical completion in respect of all defects, and for six years for a breach that results in a major defect.

The respondents asserted that even after the original windows were removed and reinstalled, the windows still leaked. The appellant claimed that they had offered to rectify such issues, but maintained that it had then been excluded from the site and had been denied the opportunity to repair the leaking windows. The respondents maintained that all three windows required replacement because they were missing a small joint sealer, relying on an expert report. Further, the respondent's case was that the appellant was refused access to repair the windows because the appellant would not disclose the manner in which it proposed to rectify the issues. The respondents subsequently employed a different window contractor to manufacture replacement windows.

First Instance:

The respondents commenced proceedings in the Tribunal seeking from the appellant the cost of the replacement windows, three invoices from the respondent's builder and the cost of the scaffolding. The Tribunal concluded that all three windows were leaking and therefore defective because the appellant had not utilised small joint sealer in the re-manufacture. Accordingly, the Tribunal found the appellant liable for the reasonable cost of rectification of the leaking windows and awarded the respondents the following:

(1) The amount of an invoice for the supply and installation of the replacement windows;

(2) Around \$29,600 in respect of loss and damage in connection with the removal and replacement of the windows; and

(3) Around \$9,500 for the supply of scaffolding.

The total amount awarded by the Tribunal was therefore around \$50,800, and the appellant was ordered to pay the respondents' costs.

The Appeal:

The appellant appealed the decision on a question of law and also sought leave to appeal on the grounds that the decision was not fair and equitable, and that the decision was against the weight of evidence. Ultimately, seven grounds of appeal were relied upon by the appellant.

The first ground of appeal related to the respondent's contractual obligations regarding the waterproofing. The appellant argued that they were only responsible for waterproofing, and that the waterproofing membrane to the sill was to be provided by the respondent's builder. On this ground, the Tribunal held that the question of who was responsible for the installation was not relevant to the question of whether the appellant was responsible for the cost of replacement of the windows. Accordingly, ground 1 was rejected as it involved neither an error of law nor a conclusion that was not fair or equitable or against the weight of evidence.

The fourth ground of appeal concerned the Tribunal failing to address the issue that the respondents had failed to comply with s 18BA of the Act. However, the Appeal Panel decided that the Tribunal the tribunal had found that the respondents had not unreasonably refused the appellant access to rectify the breaches of statutory warranties regarding the windows. As a result, s 18BA did not make it necessary for the Tribunal to consider the respondents' refusal to allow the appellant access to undertake rectification. Therefore, as the Tribunal made factual finding which meant it was not required to address s 18BA, it could not have been said that the Tribunal made an error of law, nor was that conclusion not fair or equitable, or against the weight of evidence. Accordingly, Ground 4 was rejected.

The fifth ground of appeal concerned the award of damages in respect of the three invoices from the respondents' builder. The appellant submitted that the Tribunal had placed the onus of proof on the appellant in respect of the proof of damage, failed to take into account the contractual provisions regarding responsibility for waterproofing, and failed to give adequate reasons for concluding that the work referred to in the invoices was work required in consequence of the appellant's breach of the contract. The Appeal Panel agreed with the appellant and held that the Tribunal had made an error of law in finding the appellant liable for the builder's invoices. Accordingly, the Tribunal's decision to the extent that it awarded the respondents the amount of the invoices must be set side. In light of that conclusion, it was unnecessary to deal with the second or third grounds, as they were limited to a challenge to the award of the amount of the invoices.

The sixth ground of appeal related to the failure to install the small joint sealer in the remanufacture of the windows. However, the Appeal Panel held that this finding was supported by the evidence of an expert, and was not persuaded that this finding was against the weight of evidence or not fair and equitable. Accordingly, ground 6 was rejected.

The final ground of appeal concerned the cost of the scaffolding. The appellant's case was that, in awarding $9,240 in respect of scaffolding, the Tribunal had failed to recognise that the respondents' claim in respect of scaffolding had been reduced to $3,960 at the outset of the hearing. Accordingly, the Appeal Panel reduced the judgment sum.

Bingo Holdings Pty Ltd v GC Group Company Pty Ltd

[2021] NSWCA 184

Coram: Meagher JA, Payne JA, Brereton JA

Court: New South Wales Court of Appeal

Date: 23 August 2021

CIVIL PROCEDURE – pleadings – amendment – where applicant sought to plead an apportionable claim under s 34 of the Civil Liability Act 2002 (NSW) – where Part VIA of the Competition and Consumer Act 2010 (Cth) was the relevant statutory scheme – application for leave to appeal dismissed

Facts:

GC Group Company Pty Ltd ('**the respondent**') was a subcontractor in a large residential development project at Albion Park. The respondent purchased recycled aggregate from at least one of the applicants, Bingo Holdings Pty Ltd, Bingo Recycling Pty Ltd, Bingo Waste Services Pty Ltd and Wollongong Recycling (NSW) Pty Ltd (collectively, '**the applicants**').

First Instance:

The respondent alleged that the aggregate supplied by the applicants was contaminated and that by using it, the respondent suffered loss and damaged because it was obliged to effect substantial reconstruction work at its own cost. As such, the respondent alleged that the applicants were liable to it in damages for breach of contract, for engaging in misleading and deceptive conduct and for breaches of the consumer guarantees. The primary judge ordered that certain paragraphs, which sought to establish that the respondent's claim against the applicants was an "apportionable claim, be struck out.

The applicants then sought to re-plead a proportionate liability defence, but the primary judge held that this was not sufficient to establish that such registered owners delivered material to the facility. The applicant made a further application to re-plead; however this was also refused. The proposed amendments sought to identify over 700 registered owners of vehicles that delivered waste to the applicants, who it was alleged may have caused the contamination of the recycled aggregate.

The Appeal:

The application for leave to appeal was a result of the primary judge's refusal. The applicant maintained that any contaminated material it delivered was supplied to it by one or more of

710 customers, and that it was one of the 710 customers who was potentially the wrongdoer. As such, the applicant submitted that it did not require to plead that specifically one of those customers was the wrongdoer in question. Instead, the applicant alleged that it was sufficient that any of the identified parties may be a concurrent wrongdoer. This contention relied upon the applicant's allegation that, to the extent that the contamination came from them, the suppliers owed a duty of care to the applicant's customers. The respondent opposed the amendment application by arguing that the applicant was required to identify the person or party as a current wrongdoer under Part 4 of the *Civil Liability Act 2002* (NSW) ('**the Act**').

Decision:

The Court concluded that section 34 of the Act does require the identification of the alleged concurrent wrongdoer, and how their actions caused the loss or damage to the subject claim. As such, the Court held that the applicant's argument was not correct, as a mere allegation of a potential wrongdoer who may have caused loss or damage was not sufficient. Therefore, as the applicant could not identify individually any party or person who had caused the damage of the respondents complains, the appeal was dismissed.

Bonnici v Signature Plumbing and Excavating Pty Ltd

[2021] NSWCATAP 133

Coram: G Curtin SC, D Goldstein

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 14 May 2021

BUILDING AND CONSTRUCTION – contract – assignment – termination – rights accruing before termination date – accrued rights survive termination – onus of proof – appellant failed to discharge onus of proof that work requested or done after termination date

Facts:

These proceedings concerned an appeal by Martin Bonnici (‘**the appellant**) from the orders of the Tribunal ordering him to pay Signature Plumbing and Excavating Pty Ltd (‘**the first respondent**’) the sum of $21,300 for plumbing work done by the first respondent.

The dispute arose from an agreement made during the time that the first respondent completed work at the site, between the appellant and MCN Constructions Pty Ltd (‘**the second respondent**’). These parties agreed between themselves that the second respondent would take over the job from the appellant on the same contract, and with the same sub-contractors, which included the first respondent.

The Tribunal indicated that although the parties did not turn their minds to these questions at the time, this agreement constituted an assignment of the appellant’s rights under the subcontract. As such, although it is legally possible for contracting parties to assign their rights under contracts, if is not legally possible for the appellant to assign any obligation he owed to the first respondent to pay it for work done under the subcontract to the second respondent. Further, the subcontract prohibited an assignment in the absence of the first respondent’s prior written consent.

First Instance:

The first respondent commenced proceedings in the Tribunal against the appellant and the second respondent for four invoices, amounting to $21,300. The Tribunal held that the agreement did not purport to assign any obligation the appellant had to pay the first respondent under the subcontract. The result was that the appellant remained liable to the first respondent for any amounts arising.

The Appeal:

The appellant appealed on the following four grounds:

1. The first ground of appeal concerned that the Tribunal failed to find that the subcontract had terminated automatically and therefore, there was no liability for the invoices. The Tribunal indicated that for the appellant to succeed, he bore the burden of proving that the work relating to the disputed invoices was done after the subcontract had been terminated. However, the appellant was unable to satisfy the Appeal Panel that there was any evidence of the date the work was done, and therefore that ground failed;
2. The second ground stipulated that the first and second respondent could not be liable for the same invoices, and thus because the second respondent was liable, the appellant could not be liable. This ground failed because it is possible for two contractors to both be liable for the same debt;
3. The third ground of appeal related to the fact that the appellant had not appeared to the hearing at first instance because he was incapacitated, however, there was no evidence of lack of incapacity, so this ground failed; and
4. The final ground of appeal was that the appellant had a cross-claim against the first respondent for defective work. However, the Appeal Panel held that there was no claim brought by the appellant for the alleged defective work, and that such a claim could not be advanced for the first time on appeal.

Therefore, the appeal was dismissed.

Burns v Hogg Constructions Pty Ltd

[2021] NSWCATAP 417

Coram: S Thode, D Robertson

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 23 December 2021

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Cost plus contract – repudiation by owner – measure of damages

Facts:

These proceedings concerned an appeal by Brian Burns ('**the appellant**') against Hoggs Construction Pty Ltd ('**the respondent**') in relation to a contract for construction of a granny flat on the appellant's land for $200,000. The contract was purportedly terminated by the respondent and then the appellant the next day. The respondent filed an application in the Tribunal seeking a sum of around $78,250, for loss of expectation damages and interest. The appellant also filed proceedings seeking an order for payment to him in the amount of around $43,000, which he asserted was the value of the work carried out by the respondent and the cost of rectifying defective work, and accordingly, he was entitled to around $43,000 repayment.

The appellant raised a number of matters by way of defence to the respondent's claim, including breach of implied terms, termination of the contract, breach of statutory warranties implied by the *Home Building Act 1989* (NSW), breach of contract, overpayment, misleading and deceptive conduct and the assertion that the contract was void. The appellant also claimed a set-off to the alleged overpayment.

The respondent alleged in dispute of the appellant's claim that the appellant had directed the respondent not to proceed with the works, which resulted in an automatic suspension of the work. Further, it was pleaded that the respondent had also suspended work because the appellant had failed to pay money owing under the contract, and disputed that the appellant had been entitled to terminate the contract. As such, the respondent maintained that by reason of the appellant's purported termination of the contract, the appellant had repudiated the contract, which repudiation the respondent had accepted.

First Instance:

The Tribunal found that the appellant was liable to pay the respondent the amount claimed in one of the progress claims, as it had not been paid. The Tribunal also awarded the respondent interest on that amount, which was calculated at around $15,000. The Tribunals also held that such a failure to pay the progress claim was a default under the contract, which entitled the respondent to issue a Notice of Default and that the appellant's failure to remedy that default entitled the respondent to terminate the contract. Further, the Tribunal held that the appellant's failure to pay the progress claim entitled the respondent to suspend the works and that the failure to remedy the non-payment was a further default under the contract, which in turn, also entitled the respondent to terminate the contract.

Accordingly, the Tribunal awarded the respondent $19,700 as damages arising on the termination of the contract due to the appellant's default. As such, the Tribunal rejected the appellant's claim for around $43,000 and dismissed the appellant's application. Finally, the Tribunal awarded the respondent the sum of $73,609.73, against which the Tribunal offset the sum of $5,234, being the cost of rectification of defective work, and ordered the appellant to pay the respondent the sum of $68,375.73.

The Appeal:

The appellant maintained that there were five grounds od appeal asserting questions of law, which can be summarised as follows:

(1) The operation of clause 2A of the contract;
(2) The award of expectation damages;
(3) Implied terms;
(4) The application of clauses 1(e)and 1(f); and
(5) The builder's representations.

Ground 1: The Operation of Clause 2A

The appellant submitted that clause 2A operated to qualify what was set out in the payment provisions of the building contract, particularly clauses 17(a) and 17(b). As such, the appellant maintained that the Tribunal erred in finding that clause SA did not operate to relieve the appellant from the obligation to pay imposed by clause 17. The appellant submitted that the correct interpretation would have been that clause 2A:

a. qualified the obligation imposed on the appellant to pay the builder;
b. created a procedure for the amount to be paid. Including a review of the work done and costs incurred;
c. required an adjustment to the work that was done taking into account the appellant's capacity to pay; and

d. disentitled the builder to any further payment until those clauses had been complied with which they were not.

Ground 2: The award of expectation damages

The appellant relied upon clause 2A to submit that the Tribunal erred in assessing the loss sustained by the respondent. This was submitted by reason of the appellant's wrongful termination of the contract on the basis that, if the contract had not been terminated, the respondent would have completed the contract work and received its 15% margin on the work which it had yet to carry out. The respondent submitted that this challenge was merely a restatement of earlier grounds relating to the operation of clause 2A.

Ground 3: Implied terms

The appellant submitted that the Tribunal erred in failing to find that the contract contained implied terms alleged by the appellant, that was, that the respondent must use best endeavours to carry out building works within the estimate. The appellant further submitted that the Tribunals' finding overlooked the fact that the implied term need not be necessary in the sense that, without it, the contract would be ineffective. The respondent submitted that it was not necessary to imply the second implied term to give business efficacy to a cost plus contract and that it was not so obvious that it went without saying.

Ground 4: The application of Clauses 1(e) and 1(f)

The appellant submitted that, on proper construction of the contract, the fact that Part E of Schedule 1 had not been ticked did not mean that budget reports were not required to be provided in accordance with clause 1(e). The respondent submitted that the Tribunal did not err in contracting the contract that if it was not ticked, then a budget report was not required.

Ground 5: The builder's representations

The appellant submitted that the Tribunal erred in finding that the builder did not engage in misleading and deceptive conduct. However, the appellant did not identify any error of law in the Tribunal's conclusions regarding the builder's representations

Decision:

Ground 1: The Operation of Clause 2A

The Appeal Panel held that the appellant had not maintained a case that he had sustained loss by reason of the respondent's failure to comply with its reporting obligations under clause 1 and 2A. Unlike the precedent relied upon, the appellant did not suggest that any failure by the respondent to provide regular reports had caused the appellant to incur costs he would not otherwise have incurred. Therefore, the appellant's first ground of appeal was rejected.

Ground 2: The award of expectation damages

The Appeal Panel held that the appellant did not terminate or suspend the building works pursuant to the provisions of clause 2A. In circumstances where the appellant utilised other builders to compete the works after requiring the respondent to leave the site, the appellant could not say that he had suspended or terminated the building works by reason of his lack of capacity to pay for further works. Therefore, the second ground of appeal also failed.

Ground 3: Implied Terms

The Appeal Panel noted that at first instance, the Tribunal accepted that the respondent was only entitled to recover costs that had been reasonably and properly incurred. Therefore, there was no reason to imply a further term that the respondent should use best endeavours to carry out the building works within the estimate. As such, there was no error in the Tribunal's findings concerning the implied terms relied upon the appellant, and this ground was accordingly rejected.

Ground 4: The application of Clauses 1(e) and 1(f)

The Appeal Panel held that the absence of a tick in the box next to the heading of Schedule 1 Part E did not have the effect that the respondent was not required to provide budget reports. Accordingly, the Appeal Panel held that the Tribunal did err on a question of law, however, that conclusion did not throw any doubt upon the correctness of the Tribunal's decision.

Ground 5: The builder's representations

The Appeal Panel accepted the Tribunal's reasoning and decision on this issue, and that it could not be suggested that the reasoning was so inadequate as to amount to an error of law.

Accordingly, the appeal was dismissed.

Cappello v Hammond & Simonds NSW Pty Ltd

[2021] NSWCA 57

Coram: Macfarlan, Leeming and McCallum JJA

Court: New South Wales Court of Appeal

Date: 14 April 2021

CONTRACT – cost plus contract for building work – claim in debt following non-payment of final invoice – belated submission that condition precedent requiring provision of details of cost of building works accompany builder's invoice not satisfied – submission not made to trial judge – whether point available on appeal

CONTRACT – building contract – claim for defective work – owner directed re-pouring of lowered slab – whether that work was a consequence of incorrectly built ceiling – whether owner entitled to damages

CONTRACT – quantification of damages – building contract – delay in performance – whether owner entitled to damages for diminution in market value of residential house – whether owner entitled to general damages for limited use and loss of amenity while building works continued

PLEADINGS – conditions precedent – implied allegation that all conditions precedent to plaintiffs' claim satisfied – obligation on defendant to identify with specificity non-satisfaction of condition precedent to plaintiffs' claim – Uniform Civil Procedure Rules 2005 (NSW) rr 14.11, 14.14 – history of rules – consequences of failure to comply with rules

Facts:

These proceedings concerned Hammond & Simonds NSW Pty Ltd ('**builder**') entering into a construction contract with Mr and Mrs Cappello ('**owners**') on a costs-plus basis to undertake renovation work to the ground floor of a two-storey residence in Haberfield. The work completed under the contract was around seven months late and departed from the plans in certain respects. The builder issued a final invoice to the owners in the amount of $156,113.54, of which $75,000 was paid. The builder then terminated the contract following non-payment of the balance of the invoice, and claimed further payment for works that had not been invoiced.

First Instance:

The owners commenced proceedings in the Supreme Court seeking damages for defective works, overcharging and for delay. As such, the owners claimed $370,000 for the decrease in the value of the property between the time it should have been completed and the time it was completed, and a further $30,000 for general delay damages.

The builder cross-claimed the damages in the amount unpaid on its final progress claim, and a quantum meruit for other work performed. As such, the builder contended that the owners were merely entitled to recover an amount of $1 per day, pursuant to the contractual provisions relating to liquidated damages. The builder further contended that by making provision for liquidated damages, the parties were taken to have intended to exclude a right to general damages.

The primary judge found in favour of the builder in respect of its claim in debt, but dismissed its quantum meruit claim. His Honour also dismissed the owners' claim, allowing around $10,000 in respect of six of the seventeen claims relating to defective works and overcharging, and $152 in liquidated damages under the contract for delay. Further, the owners' claims for general damages for physical inconvenience and diminution in value of their property associated with the builder's delay were also dismissed.

The Appeal:

The owners raised the following issues on appeal:

(1) Whether the final progress claim made by the builder was invalid because it did not comply with the requirements in cll 15.4 and 15.5 of the contract;
(2) Who should bear the costs associated with re-pouring an internal slab, which had been done so that the ceiling height would comply with the plans;
(3) Whether the builder was entitled to amounts paid in respect of hours worked by its employees where the costs incurred by the builder in connection with these employees had not been established and rates charged for three of the builder's employees had not been specified in the contract, and
(4) Whether the owners were entitled to damages for diminution in value of the property associated with the delayed completion of the building works.

Decision:

(1) The validity of the final payment claim

The Court of Appeal unanimously agreed that it was for the owners to identify, in advance of the trial, whether they wished to put this ground in issue, thereby disentitling the builder from suing on the debt created by the final invoice. As such, the Court held that a new point could not be taken on appeal where, had the issue been previously raised, evidence could have been given which could have prevented the point from succeeding. Therefore, as the point was not permitted to be raised on the first time on appeal, this ground was rejected.

(2) Costs associated with re-pouring the slab

The Court held that Mr Cappello's instruction to lower the floor by re-pouring the slab was a consequence of the ceiling having been built inconsistently with the plans. Despite the expert evidence suggesting the work could not be regarded as a defect, given it had been requested by Mr Cappello, the request was held to be a natural consequence of the builder's breach. As such, it was held that the owners were not required to pay for this work carried out.

(3) Claim for wages

The contract entitled the builder to recover, as part of the "cost of the building works", the "costs of labour and services supplied wholly in connection with the building works". A substantial part of the owners' claim was the recovery of amounts they had paid representing wages. As pleaded, this was $49,700, plus the builder's margin insofar as it was based on those wages. The Court held that the builder was not required to receive an invoice from or incur a liability to Mr Re (the director of the builder). The builder was required to only identify time spent by Mr Re. As such, the Court held that the owners were not permitted to raise on appeal submissions based on the absence from the contract of the hourly rates charged for the builder's other three employees.

(4) Claim for delay damages

The Court agreed that the owners were not entitled to damages representing the difference between the value of the property at the time of actual delivery and the value of the property had the contract been performed as promised. Instead, the owners were entitled to damages for breach of contract to place them in the same situation as if the contract had been performed as promised. However, in circumstances were there was no guarantee that the owners' residence could be sold of the price indicated in the valuation report, and because the owners had no intention to sell after the renovation was complete, the Court held that no loss was made out.

It followed that the owners were unsuccessful, except in relation to the costs associated with re-pouring the ground floor slab, which amounted to $26,413.36. Therefore, it was ordered that the judgment for the builder in the sum of 76,510.68 be set aside, and entered into instead for the sum of $50,097.32. The appeal was otherwise dismissed, and the owners were ordered to pay 75% of the builders' costs of the appeal.

Cohen v Double Bay Bowling Club

[2021] NSWSC 295

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 26 March 2021

CIVIL PROCEDURE – Pleadings – Amendment –Application to amend Technology and Construction List Statement – Whether contentions as to duty and breach of duty were made with sufficient particularity

Facts:

These proceedings concerned a residential property in Double Bay, in which Gregory Cohen and Mariela Sverdloff ('**the plaintiffs**') were the registered proprietors, and Double Bay Bowling Club ('**the first defendant**') owned an adjoining property. The plaintiffs alleged that the first defendant engaged a building company, Brianda Pty Ltd ('**the second defendant**') to construct a dual occupancy on the first defendant's land and that the second defendant engaged a piling contractor, CF Group Piling Pty Ltd ('**the third defendant**') to carry out excavation and piling works. The plaintiffs alleged that such works had removed support to their land and caused damage to their home.

Following a two-year history of proceedings, the plaintiffs sought leave to amend their Technology and Construction List Statement. The defendants made detailed criticism of the manner in which these amendments were formulated, especially concerning the lack of particularity of the numerous allegations made. Such ambiguity was said to be compounded by the plaintiffs' alleged failure to respond adequately to requests for particulars made in respect of earlier iterations of the plaintiffs' List Statement. One of the difficulties that the Court outlined was that the proposed List Statement alleged that the defendants owed three different kinds of duties to the plaintiffs, which were pleaded at a high level of abstraction.

Decision:

Stevenson J held that the Court was not prepared to grant the plaintiffs leave to amend the List Statement in the form proposed, emphasising the importance of the List Statement containing all of the allegations will full particularity. Accordingly, the plaintiff's notice of motion was dismissed.

Cohen v Double Bay Bowling Club (No 2)

[2021] NSWSC 872

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 20 July 2021

BUILDING AND CONSTRUCTION – statutory duty under s 177 not to do something that removes support from supporting land to supported land – allegation that vibrations from work on supporting land caused removal of support by supporting land to supported land – where proposed Technology and Construction List Statement did not allege facts that if proved would show how vibrations removed such support - where the only geotechnical evidence adduced by plaintiffs was to effect that the vibrations themselves have caused damage to supported land - where plaintiffs also alleged that breach of statutory duty constituted by failure of owner of supporting land to contract with its builder to prevent builder using vibratory equipment

CIVIL PROCEDURE – amendment – Technology and Construction List Statement - claim for breach of the statutory duty in s 177 of the Conveyancing Act 1919 – where earlier application to amend List Statement refused - where proceedings on foot for two years – whether proposed List Statement alleged facts that if proved could amount to a breach of such statutory duty

Facts:

These proceedings concerned a residential property in Double Bay, in which Gregory Cohen and Mariela Sverdloff ('**the plaintiffs**') were the registered proprietors, and Double Bay Bowling Club ('**the first defendant**') owned an adjoining property. The plaintiffs alleged that the first defendant engaged a building company, Brianda Pty Ltd ('**the second defendant**') to construct a dual occupancy on the first defendant's land and that the second defendant engaged a piling contractor, CF Group Piling Pty Ltd ('**the third defendant**') to carry out excavation and piling works. The plaintiffs alleged that such works had removed support to their land and caused damage to their home.

The first defendant filed a notice of motion seeking an order that the proceedings against them be dismissed. On the day of the hearing of the notice of motion, the plaintiffs sought leave to file an amended list statement which outlined their case against the first defendant based on section 177 of the *Conveyancing Act 1919* (NSW). Section 177 establishes a statutory duty of care not to do anything on or in relation to land (the supporting land) that removes the support provided by the supporting land to any other land (the supported land). As such, the plaintiffs alleged, amongst other things, that the first defendant was responsible for the actions of the third defendant on the basis that the duty of care imposed by section 177 was non-delegable.

Decision:

Stevenson J refused leave to the plaintiffs to file the amended List Statement to the extent it affected the first defendant, and ordered that the proceeding against the first defendant be dismissed.

Non-delegable duty

The Court indicated that the question was whether it could be shown that the first defendant 'delegated or otherwise entrusted' the piling works to the third defendant, pursuant to section 5Q of the *Civil Liability Act 2002* (NSW). On this issue the Court found that the plaintiffs' List Statement did not establish that the first defendant had delegated the piling works to the third defendant. Instead, it was held that the plaintiffs had pleaded that the third defendant engaged the second defendant to carry out the works. In other words, the work was not delegated to the third defendant, the piling contractor, but to the second defendant, the building company. Therefore, it could not be held that the first defendant had breached any duty in ensuring the third defendant took reasonable care in carrying out the piling works.

Breach of Duty

The plaintiffs alleged that the piling works carried out by the third defendant caused excessive vibrations on their property and the first defendant's land, removed the support provided by the first defendant's land to the plaintiffs' property, and accordingly was a breach of the duty of care imposed by section 177. However, his Honour indicated that the duty of care imposed on the first defendant by section 177 was not to 'do' anything on or in relation to the first defendant's land that removed support provided by the first defendant's land to the plaintiffs' land. As such, the Court held that the plaintiffs' amended list statement simply made the assertion, without any proof, that the piling works led to the removal of support by the first defendant's land to the plaintiffs' land.

Accordingly, the proceedings were dismissed against the first defendant, however the Court indicated that the matter would proceed against the second and third defendants.

CPB Contractors Pty Ltd v Transport for NSW

[2021] NSWSC 537

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 May 2021

CONTRACTS – Expert determination regarding contract to perform road widening works on Pacific Motorway – where expert determined issue adversely to plaintiff – where plaintiff commenced proceeding to reagitate that issue – whether plaintiff precluded by the terms of the contract from litigating that issue– whether an expert determination that no further compensation is payable is a determination that does not involve paying a sum of money

CONTRACTS – provision for expert determination – whether there was a deficiency or error in determination that disclosed expert did not make a determination in accordance with the contract

PRACTICE AND PROCEDURE – expert determination as to part of the claim the subject of the proceedings – whether proceedings commenced in the face of an expert determination should be stayed in part

Facts:

CPB Contractors Pty Ltd (‘**the plaintiff**’) and Transport for New South Wale (‘**the defendant**’) entered into a contract for works relating to the widening of the M1 Pacific Motorway. In the course of carrying out the work, the plaintiff accumulated excess non contaminated spoil, and the defendant issued a series of site instructions to remove that spoil. The parties fell into dispute regarding the rate to be used to calculate the amount that the plaintiff was entitled to be paid for the spoil removal works. The plaintiff made six payment claims amounting to $11.4 million which were rejected by the defendant, because the plaintiff sought payment calculated in accordance with a contract schedule rates – on a per square metre basis – instead of the $1.4 million payable on the dayworks rate contended for by the defendant.

The contract provided that disputes of this nature be referred to expert determination. Following to referral of four of the six payment claims, the expert determined that the plaintiff was not entitled to further payment for the four works. The contract also provided that an expert determination is final and binding unless the determination does not involve paying a sum of money, or, that it requires one party to pay the other an amount over $500,000.

The plaintiff commenced proceedings in reliance on the first exception, that is, that the determination does not involve paying a sum of money. Accordingly, the plaintiff argued that the question was what the ‘determination’, not the ‘matters for determination’ involved. As such, the plaintiff argued that in a case where the issues involved a claim for the payment of money, the determination that *no money* was payable was in effect a dismissal of the claim.

Decision:

The Court stayed the proceedings in part on the basis that the expert determination was final and binding. Accordingly, Stevenson J held that the use of both ‘involve’ and requires’ in subsequent subclauses meant that there was a difference between the two terms, and therefore the two terms held different meanings in the context of the contract. As such, his Honour concluded that the determination where a party was not entitled to compensation did in fact involve the paying of a sum of money, and any other interpretation was a narrow interpretation of the exception clause. Accordingly, the expert determination did involve the paying of money.

Crown Green Square Pty Ltd v Transport for NSW

[2021] NSWSC 1557

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 3 December 2021

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – where development approval required developer to carry out work to train station pedestrian tunnel and comply with second defendant's requirements – where first to third plaintiffs and defendants entered into written contract for works to train station pedestrian tunnel – where fourth plaintiff issued payment claim for services works in the train station pedestrian tunnel – whether services works undertaken under an "arrangement" between the fourth plaintiff and defendants separate to the written contract – no separate arrangement found as works within scope of written contract and arrangement inconsistent with dealings between parties

Facts:

These proceedings concerned an agreement for works relating to a development linked to a train station via an underground pedestrian tunnel. The parties to the development agreement were three of the plaintiffs and the defendants in the proceedings. Crown Construction ('**the fourth plaintiff**') was not a party to the agreement, but was a related entity to the first three plaintiffs. The fourth plaintiff had undertaken works to design and install certain electronic, mechanical and fire safety services as part of the development of the tunnel, and issued an invoice claiming payment of around $867,000 for some of that work to one of the defendants. That defendant failed to provide a payment schedule in response to that invoice, so the fourth plaintiff sought judgment for around $867,000 under the *Building and Construction Industry Security of Payment Act 1999 (*NSW) ('**the Act**').

The defendants argued that there was no construction contract between them and the fourth plaintiff, and further, that the invoice was not a payment claim that engaged the operation of the Act. The plaintiffs contended that, pursuant to 4(1) of the Act, there was an 'other arrangement' which could support a valid payment claim that engaged the operation of the Act. As such, the plaintiffs claimed that the fourth plaintiff was entitled to judgment, relying on the defendant's failure to provide a payment schedule in response within the time provided for by the Act. Therefore, the primary issue that required the Court's determination was whether the invoice constituted a payment claim under the Act.

Decision:

Henry J held that there was no ‘other arrangement’ between the fourth plaintiff and the defendant, and therefore, the invoice was not able to engage the operation of the Act. His Honour held that the requirement to carry out the works arose as part of, and as required by, the development agreement. Therefore, because the fourth plaintiff was not a party to this agreement, alongside the fact that there was no evidence to support the existence of an ‘other arrangement’ to which the fourth plaintiff was a party. Accordingly, as the invoice was not served in respect of the contract relied on by the plaintiffs, it followed that the relief sought was refused.

Day v Quince Quality Building Services Pty Ltd

[2021] NSWCATAP 296

Coram: I R Coleman, R C Titterton

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 30 September 2021

BUILDING AND CONSTRUCTION – construction and interpretation of home building contract – cl 14 of the BC4 Residential Building Contract – whether Tribunal erred in interpretation and application of the clause

Facts:

These proceedings concerned a residential building contract entered into by Mr and Mrs Day ('**the appellants**') and Quince's Quality Building Services Pty Ltd ('**the respondent**') for the construction of duplex dwellings. The respondent had contracted to supply and install two underground rainwater tanks under the decks, which had been quoted in the amount of $56,500. However, with the approval of the appellants, the builder suggested and installed an above-ground rainwater tank at the side of the building at a cost of $40,480. Further, the original agreement for the supply and installation of hardwood timber cladding and painting services was also substituted with a different product. The parties then fell into dispute regarding the defects of the respondent's work and adjustments to the contract sum.

First Instance:

The appellants commenced proceedings in the Tribunal, arguing that – in accordance with clause 14(f) of the contract – the works were 'decreased' or there were 'omissions' from those works, because of the substituted work carried out and related materials used. Accordingly, the appellants contended that the contract price be reduced, and sought damages amounting to around $159,000. The respondent argued that the clause be read as a whole, in that, the only credit that arose from those works was 'now not required to be done'. The Tribunal accepted this and found in favour of the respondent, determining that the respondent was entitled to retain the difference in the costs between what was contracted for and what was in fact provided.

The Appeal:

The appellants appealed the Tribunal's determination on the following four grounds:

(1) The Tribunal misconstrued clause 14(f) and failed to find that where the works are decreased or omissions from the works are made, the cost of the work ‘not now required’ was to be deducted from the contract price;
(2) The Tribunal failed to determine material issues raised by the appellants, being the claims for damages in respect for delay in completing the works;
(3) The Tribunal failed to find that the respondent be renumerated on a quantum meruit basis and the basis in which that was to be calculated. Further, the appellants contended that the Tribunal failed to consider the reasonableness of the amounts claimed by the respondent, and failed to determine that the contract rates provided the ceiling upon the reasonable renumeration on the quantum meruit basis in circumstances where the parties did not sign written details of the variations as required by the contract; and
(4) The Tribunal failed to afford procedural fairness and conduct proceedings in accordance with the rules of justice.

Decision:

Construing Clause 14(f)

The Appeal Panel concluded that the Tribunal had erred in its approach and construction, and it should have directed its attention to the question of whether the works had decreased, or whether there were omissions from the works, such that there was ‘work not now required’ to be done. Therefore, in the context of a building contract in which the parties agreed that the scope of the works may be varied, the owners were entitled to a reduction in the contract sum.

Failure to determine the appellants’ damages claim

The Appeal Panel found that the appellants had identified the claim, however it had failed to consider the issue. Therefore, this ground of appeal was also accepted.

Renumeration on a quantum meruit basis

The Appeal Panel held that contract rates are a ceiling for quantum meruit claims arising where parties do not document variations in writing. Therefore, this ground of appeal was accepted, and it was found that the Tribunal failed to have regard to the upper limit imposed by the contract.

Procedural Fairness

The Appeal Panel rejected this ground of appeal, as the appellants’ primary submission was that the Tribunal failed to allow the appellants to cross-examine the respondent’s witnesses, which was not accepted.

Accordingly, the Appeal Panel allowed the appeal, set aside the Tribunal's decision at first instance, and remitted the matter to the Tribunal for redetermination.

Douglas t/as D&C Pool & Landscape Creations v Luscombe

[2021] NSWCATAP 403

Coram: M Harrowell, G Burton SC

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 14 December 2021

HOME BUILDING – reasons for findings on expert evidence concerning aggregate size – no issue of principle

Facts:

These proceedings were an internal appeal against a decision made in the Tribunal concerning an application brought by homeowners Mr and Mrs Luscombe (‘**the respondents**’) against builder Mr Douglas trading as D&C Pools and Landscaping Creations (‘**the appellant**’) under the *Home Building Act 1989* (NSW) (‘**the Act**’). The claim involved the installation of a swimming pool and spa supplied by Narellan Pools, pursuant to a contract between the parties for residential building work at the respondents’ home.

First Instance:

The respondents commenced proceedings against the appellant and also sought a money order against a concreter and tiler for defective work relating to the pool surrounds and paving work, however, he did not appeal the orders made against him at first instance. The Tribunal held that the pool had not been properly installed and awarded the respondents around $68,000 for the cost to remove and reinstall the pool shell, being net remediation cost 30% overheads and 10% GST and $50 for a missing skimmer lid.

The Appeal:

The appellants appealed the numerous aspects Tribunal’s determination on nine grounds. It is convenient to deal with the first five grounds of appeal together, as they all related to the Tribunal’s findings concerning whether the pool was floating and whether the backfill material was inappropriate or not properly placed in the manner in which the Tribunal treated evidence on these issues.

The appellant contended, in accordance with the sixth ground of appeal, that the Tribunal erred in making finding, unsupported by evidence, that an engineer gave an opinion that the pool had buckled upward. Further, the eighth ground of appeal contended that the Tribunal had reversed the onus of proof such that it did not require the moving party to undertake the appropriate testing to make out their case, resulting in an error of law. In addition, the ninth ground of appeal challenged that the Tribunal failed in finding that the opinion of a building consultant witness in the proceedings could not amount to that of a structural engineer. Therefore, in relying on the building consultant's opinion in the manner that it did, the appellant contended that the Tribunal denied them procedural fairness. Finally, given the Tribunal's conclusion that the appeal failed on the other grounds concerning the pool floating and backfill, it was unnecessary to consider the seventh ground of appeal.

Decision:

Grounds 1-5: whether the pool was floating and whether the backfill material was inappropriate or not properly placed in the manner in which the Tribunal treated evidence on these topics

The Appeal Panel found that the experts accepted that no expert had entered the pool to test where the respondent's observations were correct, and as such, there was no evidence to contradict the respondent. Therefore, the Tribunal was entitled to accept the respondent's observations and there was no relevant absence of reasoning. Similarly, there was no evidence to contradict the findings concerned the constitution of the backfill. Accordingly, these grounds were not made out.

Ground 6 – no evidence to support the finding that the engineer had given an opinion that the pool had buckled upward

The appellant contended that the statement from the engineer was made in a report of a meeting of experts, and the minutes of that meeting was never tendered into evidence. The Appeal Panel indicated that it was clear that the Tribunal took account of various other evidence in reaching the view concerning the engineer. Therefore, it was held that irrespective of the status of the meeting notes, the content of the notes was not the foundation for the Tribunal's decision, and that ground was also rejected.

Ground 8 – failure to give reasons why the Tribunal rejected the appellant's argument that the respondents had failed to undertake appropriate testing to prove the pool floated

The Appeal Panel held that it had accepted the evidence of the respondents and their experts over that of the appellant's and its experts. As such, the Tribunal said that this of itself did not constitute a reversal of the onus of proof. Therefore, in circumstances where there was no reversal of proof, this ground was also rejected.

Ground 9 – no evidence to support finding that the building consultant had provided a structural engineering opinion

The Tribunal held that the building consultant's skills and expertise that he brought to the report made adequately clear that he had experience. As such, the Tribunal found that his qualifications were disclosed and the appellant had every opportunity to ask the witness any questions concerning his qualifications and/or observations and opinions. Therefore, this ground of appeal was not made out.

Accordingly, leave to appeal was refused and the appeal was dismissed.

Dyna Constructions Pty Ltd v Bocco Developments Pty Ltd

[2021] NSWDC 507

Coram: Scotting DCJ

Court: District Court of New South Wales

Date: 23 September 2021

BUILDING AND CONSTRUCTION — Australian Consumer Law

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Insurance — False or misleading applications

Facts:

These proceedings concerned Bocco Developments Pty Ltd (‘**the defendant**’) running a tender process for the construction of a residential apartment complex that it was developing in Narrabeen (‘**the project**’). Dyna Constructions Pty Ltd (‘**the plaintiff**’) was a building company that submitted a tender to construct the project, and it was subsequently identified by the defendant as its preferred tenderer. It was then agreed that the plaintiff would be proceeding with the defendant on the project. The parties commenced negotiations in relation to the construction contract, however the defendant’s financer decided it would not fund the construction of the project with the plaintiff as the builder. This required the defendant to identify a new financier, who then chose a different builder.

The plaintiff commenced proceedings claiming that the defendant repudiated the agreement and accordingly that the plaintiff was entitled to loss of bargain damages, being the profit it would have made from the construction of the project. The plaintiff made two separate claims. The contract claim concerned the defendant accepting the plaintiff’s tender by advising that they would proceed with the plaintiff on the project, and therefore, a binding agreement had been formed between the parties. The plaintiff’s second claim was that the defendant’s conduct amounted to misleading or deceptive conduct, and alleged that the defendant made four representations during the course of the tender process that led the plaintiff into error, thereby entitling the plaintiff to damages pursuant to s 236 *Australian Consumer Law* (‘**ACL**’).

The issues in the plaintiff’s contract claim were the following:

(1) Was there a binding agreement between the parties; and

(2) If so, what is the appropriate award of damages?

The issues in the plaintiff's misleading and deceptive conduct claims were the following:

(1) Were the first, second, third and/or the silence representations conveyed and, if so, were any of them misleading or deceptive or likely to mislead or deceive; and
(2) If so, what is the appropriate aware of damages?

The contract claim

On this issue, the terms of the tender were of key significance. As such, the defendant's invitation to tender set out three prerequisites to a tender being accepted, namely, that a tender would not be accepted unless and until:

1. A notice in writing of such acceptance was sent by email to the successful tenderer;
2. Negotiations and contract documents were completed; and
3. The contract document had been vetted by the lawyers representing each party.

The plaintiff's primary claim was that an email from the project manager of the project amounted to an acceptance of the plaintiff's tender and that the parties were immediately bound by the terms that they had agreed on, notwithstanding that they had intended to enter into a formal contract in substitution that would also contain additional terms.

The defendant contended in response that this did not constitute a binding agreement due to the following reasons:

1. The surrounding circumstance's did not indicate the existence of a binding agreement; and/or
2. The alleged agreement did not contain all essential terms; and/or
3. The requirements of the *Home Building Act 1989* (NSW) were not satisfied and accordingly the contract was not binding and could not be enforced by the plaintiff.

The misleading and deceptive conduct claim

This claim was based on representations alleged to have been conveyed by both the invitation to tender and in subsequent conversations between the parties. As such, the plaintiff pleaded that the defendant made four representations at different times that were each misleading and deceptive in contravention of s 18 ACL.

Decision:

The contract claim

The Court was not convinced that the email stating the defendant had agreed to proceed on the project with the plaintiff necessarily satisfied the first requirement. Nonetheless, the second and third requirement were not made out. Rather, his Honour found that the negotiations between the parties were still ongoing at the time the plaintiff was claiming a contract had been formed. This included negotiation of price alongside numerous other contract clauses which were still being marked up. Accordingly, the Court was not satisfied that the defendant's conduct amounted to an acceptance of the tender within the meaning of the invitation to tender. Thus, no agreement came into existence.

The misleading and deceptive conduct claim

The Court found that the four pleaded representations had not been made out. Though, his Honour went on to consider the damage that may have flowed from those representations if that conclusion was wrong. Accordingly, the Court made a determination that had the representations been made out, the plaintiff may have been entitled to damages.

EQ Constructions Pty Ltd v A-Civil Aust Pty Ltd

[2021] NSWSC 1604

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 10 December 2021

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) (the SOP Act) – second defendant adjudicator determined adjudication application by first defendant sub-contractor in respect of a payment claim served on head contractor – plaintiff head contractor contended that adjudicator's determination was void for jurisdictional error on several bases, including that the adjudicator had failed to form an opinion that the payment claim had been served within the 12 month time period stipulated in s 13(4)(b) of the SOP Act (or, alternatively, had erred in forming that opinion) – whether s 13(4)(b) of the SOP Act is a "jurisdictional fact" in the first category or second category identified in Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339 – held that s 13(4)(b) is within the second category – adjudicator did not form an opinion that the payment claim had been served within the period stipulated by s 13(4)(b) – adjudicator's determination void for jurisdictional error on that basis – not necessary to consider other alleged jurisdictional errors.

Facts:

These proceedings concerned EQ Constructions Pty Ltd ('**the plaintiff**') seeking to set aside an adjudication determination purportedly made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act**'). The determination involved an amount that was payable by A-Civil Aust Pty Ltd ('**the defendant**') to the respondent in respect of a payment claim that the plaintiff contended was not served within the time period stipulated by s 13(4)(b) of the Act. The plaintiff contended that this was because none of the construction work to which the claim related had been performed within 12 months prior to the service of the payment claim. Accordingly, it was argued that the determination be quashed for jurisdictional error due to the defendant's failure to serve the claim within that time period. The plaintiff also relied on other alleged jurisdictional errors.

The defendant's response was that the adjudicator determined that it had undertaken some work, namely, the removal of a site container and related tools and equipment within the 12-month period to service of the payment claim. The Court indicated that the parties' submissions raised a threshold question about whether this was a matter to be determined objectively by the Court on an application for judicial review of an adjudicator's decision on the grounds of jurisdictional error.

The plaintiff submitted that the question whether a payment claim (that is the subject of an adjudication application under the Act) has been served within the 12-month time period specified in s 13(4)(b) was a jurisdictional fact within the first category of *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 ('**Icon**'). As such, the plaintiff submitted that the Court had jurisdiction to quash an adjudicator's determination for jurisdictional error if the adjudicator wrongfully determined that the payment claim was served within that 12-month period.

The defendant submitted that s 13(4)(b) fell into the second category referred to in Icon. That is, provided that the adjudicator was satisfied that the payment claim was served within the requisite 12-month period and the opinion is lawfully formed, the determination of the payment claim was not amenable to judicial review on the grounds that the payment claim was served outside the 12-month period.

Decision:
The Court held that s 13(4)(b) of the Act fell into the second category of jurisdictional facts identified in Icon. Therefore, the defendant was required to demonstrate that the adjudicator did not lawfully form an opinion that the construction work to which the payment claim related included at least some construction work that was last carried out within the 12-month period. Accordingly, the Court accepted the plaintiff's submissions that the adjudicator did not form any opinion at all about such an issue. It was found that the adjudicator did not address whether the payment claim related to any such construction work performed during the 12month period prior to service of the payment claim.

Therefore, the Court found that the requirement in s 13(4)(b) of the Act was a jurisdictional fact that can be satisfied if an adjudicator lawfully forms the opinion that a payment claim was served within the stipulated time period. Although an erroneous finding by an adjudicator about that question does not constitute jurisdictional error, the adjudicator in these proceedings made no findings at all about whether the payment claim was served within the 12-month time period. Thus, the adjudicator's determination was set aside for jurisdictional error on that basis.

Equa Building Services Pty Ltd v KLG Trading Pty Ltd

[2021] NSWSC 1674

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 17 December 2021

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – service of copy of adjudication application – where adjudication application provided electronically to adjudication authority and adjudicator – where hard copy of adjudication application and USB drive served on plaintiff respondent – where plaintiff respondent initially could not open file on USB drive to view video – where some minor differences between hard copy served on plaintiff respondent and electronic copy provided to adjudication authority and adjudicator – whether what was served was a copy of that provided to adjudication authority and adjudicator – whether substantial compliance with requirements of s 17(5) of the Building and Construction Industry Security of Payment Act sufficient – whether plaintiff respondent denied procedural fairness – whether adjudicator failed to perform his statutory function

STATUTES – proper construction – whether s 17(5) of the Building and Construction Industry Security of Payment Act 1999 requires strict compliance – whether service of copy adjudication application in substantial compliance with s 17(5) effective

Facts:

These proceedings concerned an adjudication determination pursuant to s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (‘**the Act**’), which determined that Equa Building Services Pty Ltd (‘**the plaintiff**’) pay KLG Trading Pty Ltd (‘**the defendant**’) around $394,000. The plaintiff had engaged the defendant to perform façade works at a development in Miranda.

The plaintiff sought an order in the nature of certiorari quashing the adjudication determination. As such, the plaintiff contended:

(1) that the defendant did not serve a copy of the adjudication application, pursuant to s 17(5) of the Act;

(2) it had been denied procedural fairness; and

(3) the adjudicator did not exercise his statutory function under s 22(2)(d) of the Act to consider the payment schedule that the plaintiff served on the defendant and any duly made submissions.

Decision:

The adjudication application served on the plaintiff

The two issues that the Court required for this question was whether what was served by the defendant was a 'copy' of the adjudication application, and if not, whether the result was that the service was ineffective. Stevenson J indicated that there were very minor, and entirely inconsequential, difference between what was supplied electronically to the adjudication authority and adjudicator, as opposed to what was served on the plaintiff. The Court concluded that, because of the slight degree to which it was served on the plaintiff was less than an exact 'reproduction', it was not a 'copy' of the adjudication application for the purposes of s 17(5) of the Act. Therefore, it constituted substantial and sufficient compliance with the requirements, and the service could not be rendered ineffective.

Denial of procedural fairness

The plaintiff submitted that even if what was served on it a 'copy' of the adjudication application, or alternatively, what was served was sufficient compliance with the requirements of s 17(5), the manner and form in which the material was served amounted to a denial of procedural fairness. However, Stevenson J held that there was no practical injustice in this case. As such, his Honour indicated that the plaintiff did not evidence any difficulties that the plaintiff had preparing its adjudication response by reason of the very slight differences between the copy served on it and the copy made available to the adjudication authority and adjudicator. In circumstances where there was no difference to the plaintiff's ability to respond to the adjudication application, the Court was not satisfied that the plaintiff had been denied procedural fairness.

Failure of the adjudicator to exercise his statutory function

Section 22(2)(d) of the Act required the adjudicator to consider the plaintiff's payment schedule and any 'duly made' submissions. The plaintiff alleged that the defendant had not rectified unspecified defects in its payment schedule. However, the adjudicator found that the works were practically complete and but for the plaintiff's contentions about the defects, the defendant was entitled to be paid the full contract sum. The adjudicator subsequently dealt with the plaintiff's contentions about the defects. In those circumstances, Stevenson J held that there was no call for the adjudicator separately to consider whether the work had been done or its value. As such, his Honour could not conclude that the adjudicator failed to exercise his statutory function.

Accordingly, the plaintiff's challenge to the adjudication determination failed, and the summons were dismissed with costs.

Gaskell and Bourke v Northshore Homes Pty Ltd and Nazha

[2021] NSWCATCD 33

Coram: D Goldstein

Court: New South Wales Civil and Administrative Tribunal Consumer and Commercial Division

Date: 7 June 2021

BUILDING and CONSTRUCTION – Misleading and deceptive conduct – Director's liability for statements made on behalf of company – Scope of section 74(3) of the Fair Trading Act 1987(NSW) – Jones v Dunkel inferences

Facts:

These proceedings were brought By Aaron Gaskell and Serena Bourke ('**the owners**) against Northshore Homes Pty Ltd ('**the builder**') and Sami Nazha ('**director**'). The builder had performed defective building work at the owners' property, but was put into liquidation before the proceedings finalised. As such, the owners sought damages against the director of the builder, claiming that he had made the following two misleading and deceptive representations, contrary to s 18 of the ACL:

(1) the builder's website had asserted it had won awards, which it had not ('**website representation**'); and

(2) the director asserted to the owners that, under regulation 35 of the *Work Health and Safety Regulation 2017* (NSW) (which requires WHS risks to be eliminated or minimised), 'as a principal contractor I have the right to fire or hire any subcontractor, engineer, certifier, etc. ('**engineering representation**').

Following the termination of the owners' engineer, the builder's engineer certified defective work carried out by the builder that was not qualified to be certified, where rectification was likely to cost $221,344. However, the director submitted that an order for $221,344 would overcompensate the owners by exceeding the cost of rectification.

Decision:

Website representation

The Tribunal found that that the director was not engaged in the conduct relating to this representation, pursuant to the requirements of s 18 of the ACL. The Tribunal accepted the director's evidence that, although the director caused the website to be created and maintained, a co-director was responsible for the website. Further, the Tribunal accepted that the director had viewed the website but not gone through it properly, despite understanding that members of the public would read it. Therefore, the Tribunal found that the director did not make the website representation.

Engineering representation

The Tribunal held that the director's engineering representation was in fact misleading and deceptive, as it directly led to the owners into error by causing them to believe that there was no choice other than to permit the director to terminate the engagement of the owners' engineer. Accordingly, the Tribunal rejected the director's submission that the engineering representation did not cause the owners to suffer loss or damage because the engineer's plans remained in place and were not altered. It was found that, but for the engineering representation, the owners would have continued to engage their engineer to inspect the work in progress on an ongoing basis. The Tribunal also inferred that, but for the engineering representation, it was highly likely that the rectification cost of $221,344, for work that was improperly certified, would have been avoided.

The director's overcompensation claim

The Tribunal rejected the director's submission that an order for $221,344 would overcompensate the owners by exceeding the costs of rectification

Accordingly, the director was ordered to pay the owners the rectification sum of $221,344.

Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd

[2021] NSWSC 290

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 26 March 2021

CONTRACTS – implied terms – good faith – where subcontract provided for an extension of time regime including a power for the contractor to extend time "in its absolute discretion" and with "no obligation to extend, or to consider whether it should extend" – contractor not obliged to act reasonably with regard to the prevention principle or in good faith due to contractual scheme and language used

CONTRACTS – remedies – liquidated damages – penalty – where residential building subcontract provided for delay damages at a rate of $3,500 per day – stipulated rate not penal in character

Facts:

The dispute in these proceedings arose out of four subcontracts entered into by Growthbuilt Pty Limited ('**the builder**') as head contractor, and Modern Touch Marble & Granite Pty Limited ('**the subcontractor**') in respect of four residential building projects. The subcontractor agreed to design, supply and install stone, primarily for kitchens and bathrooms, for the building projects. The relevant extension of time ('**EOT**') clauses in the subcontracts made the subcontractor's compliance with the procedures for submitting an EOT claim a condition precedent to any entitlement. Relevantly, clause 11 provided that:

> *'Growthbuilt may in its absolute discretion at any time and for any reason, without prejudice to its rights or the Subcontractor's obligations under this Subcontract, extend the Date for Completion, but Growthbuilt is under no obligation to extend, or to consider whether it should extend, the Date for Completion.'*

The subcontractor commenced works under each of the subcontracts, however, there were delays in the process. The builder subsequently terminated each of the subcontracts on the basis that the subcontractor had failed to complete the works on time. The builder then commenced these proceedings seeking liquidated damages, post-termination completion costs and the cost of certain materials. The subcontractor cross- claimed against the builder seeking to recover unpaid invoices.

The builder submitted that, as the subcontractor had not claimed an EOT or pleaded an EOT entitlement, any of the subcontractor's evidence relating to the builder causing delay was of no legal consequence. Further, the builder contended that the subcontractor was not entitled to rely on the prevention principle. However, the subcontractor submitted that the builder's unilateral power to extend the dates for completion in clause 11 meant that the prevention principle remained an issue.

Therefore, the issues requiring the Court's determination was whether the subcontractor could rely on the prevention principle, and, whether the liquidated damages clause within one of the four subcontractors was unenforceable as a penalty.

Decision:

EOT Clause

It was determined that the language of the EOT clause, which provided the builder with an 'absolute discretion' but 'no obligation' to extend the date for completion, represented a clear intention of the parties to confer a discretionary power on the builder. Further, the Court determined that the builder had no obligation to exercise that power to extend the date for completion. Accordingly, as the subcontractor had not complied with the contractual mechanism for claiming an EOT, the subcontractor could not rely on the prevention principle, time was not 'at large' and liquidated damages applied.

Liquidated damages clause

The Court considered that the stipulated sum of liquidated damages of $3,500 per calendar day was on the "high side", particularly given that one of the subcontract prices was $60,500. However, the Court was not satisfied that the subcontractor had discharged its burden of proving that the sum was 'extravagant, out of proportion or unconscionable' compared to the greatest loss which may be suffered by the builder.

Accordingly, the Court rejected the subcontractor's submissions and found that the builder was entitled to judgment in the amount of $1,126,119.79, comprising the liquidated damages plus completion costs of the four subcontracts.

H & M Constructions (NSW) Pty Ltd v Golden Rain Development Pty Ltd

[2021] NSWSC 708

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 16 June 2021

COSTS – security for costs – where no dispute that Court's jurisdiction to order security enlivened – whether plaintiff's claim should be seen as defensive – where defendant foreshadowed possible cross-claim but eschews current intention to bring a cross-claim

Facts:

These proceedings concerned a construction contract, entered into by a construction contractor, H & M Constructions (NSW) Pty Ltd ('**the plaintiff**') and a developer, Golden Rain Development Pty Ltd ('**the defendant**'). The plaintiff commenced these proceedings in the Supreme Court of Victoria seeking ex parte relief to restrain the defendant from calling on a bank guarantee under the contract. The security had already been converted into cash, but a continuing restraint on recourse to that cash was ordered by consent and remained in place. As such, the plaintiff plead breach of the contract, unconscionable conduct under the *Australian Consumer Law* ('**ACL**') and sought the return of security and damages.

Those proceedings were subsequently transferred to the Supreme Court of New South Wales, whereby the defendant sought security for costs. Further, the defendant sought substantive relief, pleading breaches of the construction contract and unconscionable conduct under the ACL. The defendant also sought security in the sum of around $643,000. The defendant contended that this figure was representative of the amount of costs which would be recoverable by the defendant on an assessment were it to be successful in the proceedings, as adduced from a costs assessor's evidence.

Decision:

Stevenson J held that, in circumstances where the parties had agreed to attend a mediation, the appropriate amount to order for security was the amount that the costs assessor held as being the defendant's recoverable costs up to and including mediation, being $350,000. Therefore, the plaintiff was ordered to provide security in the sum of $350,000 in respect of the costs of the defendant up to and including the mediation. The plaintiff was ordered to pay the defendant's costs of this application.

Howell v Talevski

[2021] NSWSC 708

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 7 September 2021

BUILDING AND CONSTRUCTION – residential building work – construction of duplex – whether proceedings brought out of time – whether building work carried out with due care and skill

Facts:

Mrs Jenny Howell ('**the plaintiff**') was the registered proprietor of a property in Mosman, and Mr Peter Talevski ('**the defendant**') was a licensed builder and civil/structural engineer. In 2007, the plaintiff decided to demolish her residence and construct a duplex, and engage the defendant. The parties entered into a building contract that year, which specified that the date for completion was '32 calendar weeks from the date the work is due to commence'. The contract also indicated that the parties could vary the contract by written agreement.

The defendant commenced work in August 2007 and, as a result of numerous delays, continued the work until August 2012. Not only were the causes of the delays heavily disputed between the parties, with each party blaming the other in the proceedings, but there were numerous requests for extensions of time. Although the defendant promised that the project would be complete, the plaintiff terminated the contract with the works remaining incomplete.

The plaintiff commenced proceedings against the defendant in 2018 for breach of the statutory warranties implied into the contract under s 18B of the *Home Building Act 1989* (NSW) ('**the Act**') and expressly incorporated into the general conditions. Whilst the Act has since been amended, at the time of the contract, s 18E of the Act required claimed to be commenced within seven years after the date the work was completed or not completed. The defendant submitted that the work was not complete when the building contract was terminated, so it followed that the proceedings were out of time for the purposes of s 18E(1)(b) of the Act as they were not commenced within the seven-year period.

Decision:

The Court held in favour of the plaintiff by determining that the proceedings had been commenced in time and within the limitation period. Further, it was held that at the time the contract was terminated, the work was not complete under the contract, and therefore, the Act was an applicable for determining whether the proceeding had been brought within the seven-year limitation period.

Although the contract had originally specified that the completion date would be 32 weeks after the work was due to commence, the Court could not determine a precise completion date. However, the Court found that the numerous communications between the parties during the time of construction, particularly when the defendant promised the plaintiff that it would complete the works, had the effect of varying the contract and extending the completion date well beyond the date originally agreed between the parties.

Ultimately, through analysing such communications, Stevenson J held that the parties had effectively agreed to extend the completion date until sometime in mid-2012. Accordingly, given the proceedings had been commenced within seven years of that general period, his Honour held that they had been brought within time.

Iridium Developments Pty Ltd v A-Civil Aust Pty Ltd

[2021] NSWSC 1601

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 10 December 2021

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) (the SOP Act) – second defendant adjudicator determined adjudication application by first defendant contractor in respect of a payment claim served on principal – plaintiff principal contended that adjudicator's determination was void for jurisdictional error on the basis that the adjudicator erred in forming the opinion that the payment claim had been served within the 12 month time period stipulated in s 13(4)(b) of the SOP Act – whether s 13(4)(b) of the SOP Act is a "jurisdictional fact" in the first category or second category described in Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339 – held that s 13(4)(b) is within the second category – adjudicator formed the opinion that the payment claim had been served within the period stipulated by s 13(4)(b) – no allegation that the opinion was not lawfully formed – adjudicator's determination was not void for jurisdictional error.

Facts:

These proceedings concerned A-Civil Aust Pty Ltd ('**the first defendant**') undertaking certain civil works for Iridium Developments Pty Ltd ('**the plaintiff**') in respect of a property development in Cronulla. The parties fell into dispute when the first defendant issued a progress claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act**') for $3,702,858. The plaintiff responded by issuing a payment schedule denying any payment in respect of the said progress claim, on the basis that a claim can be made only within 12 months of the date of the last construction work was carried out. As such, the plaintiff contended that the progress claim was invalid, void and of no effect.

The first defendant lodged an adjudication application under s 17 of the Act for an adjudication determination of the disputed payment claim. The application was referred to the adjudicator ('**the second defendant**') to determine the claim. The plaintiff's response contended that the second defendant lacked jurisdiction to adjudicate the payment claim under the Act. The outcome was that the plaintiff was liable to pay the first defendant the sum of around $665,000 In respect of the progress claim.

The plaintiff subsequently commenced these proceedings. The issue requiring the Court's determination was whether the second defendant had committed a jurisdictional error in the adjudication determination. Accordingly, the plaintiff submitted that the second defendant's determination that some of the works included in the payment claim were carried out within the requisite 12-month period was incorrect. As such, it was submitted that this was a jurisdictional matter that the Court could only determine for itself on an application to set aside or declare void an adjudicator's determination under the Act for jurisdictional error. Further, the plaintiff submitted that the evidence before the second defendant did not support his finding that some of the works were performed within the 12-month period. This was the only alleged jurisdictional error relied upon by the plaintiff in these proceedings, as the plaintiff has withdrawn a submission premised on the denial of natural justice.

Decision:

Williams J found that the plaintiff's submission raised the same threshold questions that was considered and determined in *EQ Constructions Pty Ltd v A-Civil Aust Pty Ltd* [2021] NSWSC 1604, namely, whether s 13(4)(b) of the Act was a matter to be determined objectively by the Court on an application for judicial review of an adjudicator's decision on the grounds of jurisdictional error. In that case, Williams J held that s 13(4)(b) of the Act is a jurisdictional fact within the second category referred to in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339. The reasons of that judgment addressed the substance of the parties' submissions in this case.

Therefore, for the same reasons, her Honour found that the second defendant's determination – that the payment claim included some construction work that had been carried out within the 12-month period prior to the service of the payment claim – was sufficient to enliven his statutory jurisdiction to determine the adjudication application. Further, Williams J indicated that it is not for the Court to determine whether the finding was correct or erroneous. Accordingly, the second defendant's adjudication determination was not found to be void for jurisdictional error, and thus, the proceedings were dismissed.

Jabbcorp (NSW) Pty Ltd v Strathfield Golf Club

[2021] NSWCA 154

Coram: Basten JA, Leeming JA and Emmett AJA

Court: New South Wales Court of Appeal

Date: 27 July 2021

CONTRACT – construction – design and construct contract – contractor claimed additional payment for works required pursuant to development consent – whether works were “Excluded Works” – significance of definition commencing “Notwithstanding any other clause” – significance of grammatical meaning of clause – clause required to be read as a whole, harmoniously with other provisions in contract

Facts:

These proceedings concerned the appellant, Jabbcorp (NSW) Pty Limited (‘**the builder**’) entering into a contract with Strathfield Golf Club (‘**the golf club**’) to design and construct a new clubhouse, an access road and associated works. Before entering into the contact, the parties engaged in negotiations relating to the contract price and contract inclusions. The builder submitted a tender for a total price of $27.15m but later submitted a revised tender for a total price of $22.5m, which included numerous cost reductions and qualifications. The golf club offered the project to the builder for a contract price of $22.5m on a guaranteed maximum price (‘**GMP**’) basis.

First Instance:

The builder commenced proceedings in the Supreme Court of New South Wales seeking payment for variations, a bank guarantee fee and to recover amounts withheld for back-charges and liquidated damages. The work that was the subject of the variations and back-charges was outside the footprint of the clubhouse and access road. Therefore, one of the issues requiring the Court’s determination at first instance was whether such work was included in the contract sum, despite the builder arguing that it constituted the “excluded works” as stipulated in the contract. The term “excluded works” was relevantly defined as any work required on the golf course and outside the construction boundary of the site. The Court dismissed the builder’s claim and found that the work the subject of the variations was within the scope of the original contract, and therefore included in the contract sum. Further, the builder was not entitled to claim variations or recover amounts withheld for back-charges and liquidated damages.

The Appeal:

The appellant proceedings, commenced by the builder, was premised on the question of construction of the definition and scope of “excluded works” in the contract. Although the builder accepted that the works subject of the variations were works which had to be completed under the contract, it argued that all the works falling within the variations were also “excluded works” and did not form part of the contract sum. In doing making this submission, the builder relied on what was asserted to be the ordinary literal meaning of the definition as stipulated in the contract. The golf club contended that if the builder accepted that the works subject of the variations were works which had to be done under the contract, then the builder could not successfully argue that they were also “excluded works”.

Decision:

The Court of Appeal held in favour of the golf club, and ultimately dismissed the builder’s argument that all the works falling within the variations were “excluded works”. The Court also acknowledged that the legal meaning of the definition could not be resolved by mere grammatical considerations alone, and that the clause must be read as a whole. Finally, the Court argued that there was an oddity in the builder’s construction that work the subject of the variations was works but also “excluded works”.

Accordingly, the appeal was dismissed with costs.

Jandson Pty Ltd v James

[2021] NSWCATAP 274

Coram: K Rosser, D Roberston

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 15 September 2021

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Statutory warranties - Application made outside statutory warranty period for original contract – Whether new contract entered into or original contract varied – Offer and acceptance – Consideration – Forbearance to sue – Completion date

Facts:

These proceedings concerned Brett James and Liza James (‘**the owners**’) entering into a contract with Jandson Pty Ltd (‘**the builder**’) to construct a residential building in 2009. Practical completion was reached, and a final occupation certificate was issued, in 2010 However, the owners complained about alleged breaches of the statutory warranties under the Home Building Act 1989 (NSW) (‘**the Act**’), namely, due to water penetrations in various locations. The builder attended on numerous occasions to rectify the issue, however, the water penetration continued.

In 2017, the owners made their complaints known to the builder, proposing that the builder undertake the scope of works outlined in the owner’s expert draft report (‘**owners’ letter**’). Following an on-site meeting, the builder rejected the solution and instead proposed an alternative scope to rectify the water penetration (‘**builder’s letter**’). The builder commenced the works stipulated in its letter, but did not complete them.

First Instance:

The owners commenced proceedings in the Tribunal claiming that the works were defective, and asserting that the proceedings were brought within the seven-year statutory limitation period, as the builder’s letter constituted a separate contract. The Tribunal found in favour of the owners, ordering the builder to carry out the works specified in the owner’s expert report.

The Appeal:

The builder appealed the decision on grounds which included that the Tribunal made errors of law in respect of contract formation, consideration and the completion date.

Decision:

The Appeal Panel allowed the appeal and found that the owner's application to the Tribunal was out of time as the parties did not enter into a new contract or vary their original contract. In addition, the relevant building works were completed under the contract before the final occupation certificate was issued.

Grounds 2, 3 and 8: Contract Formation

The Appeal Panel concluded that it was not open to the Tribunal to find that the builder's letter satisfied the requirements of a new contract. Although acceptance of the owners' letter did constitute an order, this was expressly rejected in the builder's letter, which was found to constitute a counteroffer. In addition, the Appeal Panel found that there was no evidence that the owner was aware of the builder's counteroffer, as it was sent to the owner's solicitors. Therefore, as the evidence did not support a conclusion that the owner's solicitor had accepted the offer, the Appeal Panel held that a contract had not formed.

Grounds 4 and 5: Consideration

In light of the abovenamed conclusions, the Appeal Panel indicated that it was not strictly necessary to determine the adequacy of consideration, but nonetheless purported to do so. The Appeal Panel noted that a promise not to sue is valid consideration, but is only good consideration where it is a promise to defer bringing a claim which is honestly made, which is distinct from a promise to forbear temporarily. It was held that the consideration was good, amounting to more than a temporary forbearance to sue, because it was sufficiently evident that had the builder agreed to undertake the scope of the works proposed by the owners, the owners would not have sued.

Ground 6 and 7: Completion Date

The Appeal Panel concluded that the date in the final occupation certificate was not the date which the building works were completed and from which the statutory period ran. As such, under s 3B(1) of the Act, it was held that the statutory period should have commenced when the works reached practical completion, being July 2010.

Accordingly, the appeal was allowed, and the orders made a first instance were set aside.

Lahey Constructions Pty Ltd v The State of New South Wales

[2021] NSWCA 69

Coram: Bathurst CJ, Bell P and Gleeson JA

Court: New South Wales Court of Appeal

Date: 26 April 2021

CONTRACT – building and construction contracts – interpretation – expert determination clause – whether expert determination is final and binding – where parties' precluded from commencing litigation following expert determination unless value of the determination exceeded a threshold amount – where value of the determination to be calculated without having regard to amounts paid under the Building and Construction Industry Security of Payment Act 1999 (NSW)

Facts:

Lahey Constructions Pty Ltd ('**the appellant**'), as contractor, and the Minister for Education for New South Wales ('**the respondent**'), as principal, entered into two separate contracts on identical terms, under which the appellant was required to carry out building works at Manly Vale Public School and Bardia Public School. The parties fell into dispute regarding four variations under the Manly Vale Public School contract and two variations under the Bardia Public School contract. The respondent filed a cross-claim, raised defences and set-offs in response to each of these claimed variations. Such disputes were ultimately referred to expert determination under both of the contracts.

The contracts both incorporated standard government general conditions and identical 'issue-resolution' provisions for expert determination of issues that were unable to be resolved by the parties. The determination of the expert was to be treated as final and binding, and litigation was only permitted under the relevant exception clause where the determination exceeded the jurisdictional threshold amount of $500,000. In assessing whether the threshold had been met, the relevant clause required that the determined amount be calculated without having regard to 'any amount that had been paid pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW)' ('**the Act**').

The parties commenced expert determination of the unresolved issues under the contracts. In parallel with the expert determination process, the appellant made two adjudication applications under the Act, claiming amounts in respect of the disputed variations which were the subject of the expert determination process. Determinations were made in favour of the appellant, and the respondent paid the determined amounts, prior to the expert making his decision in the expert determination process.

First Instance:

Following the adjudication process, the expert made determinations that the plaintiff disagreed with, which led to the appellant commencing proceedings in the Supreme Court in relation to such issues that had been referred to expert determination. The respondent contended that the expert's determination under both the contracts was below the $500,000 threshold, and was accordingly final and binding. The Court ruled in the respondent's favour for summary dismissal of the proceedings.

The Appeal:

The appellant sought leave to appeal the orders for summary dismissal of the proceedings, challenging the decision on the following three grounds:

(1) the primary judge's construction of the clause;
(2) the application of that construction to the facts; and
(3) the conclusion of the primary judge that each of the determinations of the expert was final and binding.

Decision:

In applying settled principles of contractual construction, the Court of Appeal found that the contracts in this case required that any payment made under the Act, and not merely some of the payments, be disregarded when calculating the determined amount by the expert for the purposes of the jurisdictional provision. Further, the Court found that the primary judge's construction created a perverse incentive for the plaintiff not to resort to making progress claims for fear that it would lose the possible right to litigate disputes about important matters in respect of monetary significance. It was found that this result would be unreasonable and capricious. As such, on the proper construction of the contract, the threshold amount of $500,000 had been achieved, and the appellant was not precluded from bringing litigation in relation to the disputes under either contract.

Accordingly, the Court of Appeal granted the leave application, overturned the summary dismissal order and remitted the matter to the Supreme Court for hearing.

Lichaa v Boutros

[2021] NSWCA 322

Coram: Macfarlan JA, Gleeson JA and Rein J

Court: New South Wales Court of Appeal

Date: 16 December 2021

APPEALS — Procedural fairness — Failure to give reasons — Adequacy of reasons – failure to engage with the case presented by each party – duty to give reasons for rejecting evidence of expert or preferring evidence of one expert over another – whether the primary judge failed to adequately explain why the Appellant's expert evidence was rejected or why the Respondent's expert evidence was preferred.

BUILDING AND CONSTRUCTION — Contract — Termination — Repudiation – the Respondent, the builder, was shut out from site after repudiatory conduct by the Appellant, the owner – whether the owner repudiated the contract.

BUILDING AND CONSTRUCTION — Contract — Damages — Defects – relevance of repudiation to claims for damages for defects – whether repudiation by the owner not relevant – Appellant had accrued rights in respect of work carried out prior to determination of the contract.

BUILDING AND CONSTRUCTION — Contract — Damages — Defects – engagement of second builder to complete work of the Respondent including repair of defects of Respondent not exculpatory of Respondent and not relevant to the loss claimed in respect of defects solely the result of work performed by the Respondent – whether owner had accepted the defective work.

BUILDING AND CONSTRUCTION — Contract — Damages – proof of loss – adequacy of evidence supporting loss – where failure to mitigate damages not pleaded – whether evidence from the Appellant's expert that would enable the Appellant's loss to be calculated albeit on the basis of demolition of the building.

Facts:

These proceedings concerned a residential building contract entered into between a homeowner, Ms Odette Lichaa ('**the appellant**'), and a builder, Mr Maroun Boutros ('**the respondent**') in respect of first-floor additions to the appellant's property in Rockdale. At a time close to completion of the work stipulated in the contract, the parties fell into dispute. Particularly, the respondent claimed that the appellant had shut him out of the building site and repudiated the contract, which repudiation he had accepted. The appellant subsequently retained a new contractor whose contract ('**the new contract**') included an obligation to repair defects in the respondent's work.

First Instance:

The appellant commenced proceedings in the District Court of New South Wales, claiming that the works carried out by the respondent were defective in a number of respects (‘**the defects issue**’). The appellant provided an expert report in support of her contentions and for the cost of the demolition of the structure of the respondent’s work. Further, it was contended that the respondent was in breach of his obligations under the contract, as he had left the works incomplete and not properly protected, leading to flooding and damage to the building. As a consequence, the appellant contended that she had suffered loss and damages, the amount particularised being:

(1) a “restitutionary claim” in the amount of $137,000, this being all the monies paid by the appellant to the respondent before he was excluded from the site;
(2) rectification costs “yet to be quantified but no less than $230,203.50”; and
(3) damages for “loss of amenity” in respect of the property.

The respondent denied that any of his work was defective and denied liability to the appellant. He also contended that, given the appellant had precluded him from the site leading to the termination of the contract, he was not therefore responsible for completing, covering or protecting the unfinished works.

Another disputed matter was whether a quotation (‘**the quotation**’) was provided by the respondent to the appellant prior to or at the time of signing the contract. The quotation specified the work to be performed and indicated a price of $260,000, which was specified in the contract. The appellant alleged that she never received the quotation, whilst the respondent contended that he gave the appellant the quotation before the contract was signed and was incorporated into the contract.

The primary judge held that the appellant had repudiated the contract and rejected the appellant’s claim in respect of the alleged defects in the respondent’s work. Her Honour also held that the quotation prepared by the respondent formed part of the contract.

The Appeal:

The appellant appealed from the decision at first instance and sought judgment in the amount of $609,737.50, or alternatively, a new hearing. The following three issues were raised on appeal:

(1) whether the quotation formed part of the contract;
(2) whether the primary judge had adequately delt with the defects issue; and

(3) whether the primary judge erred in concluding that there was insufficient evidence of loss to support the appellant's claim.

Decision:

The quotation issue

The appellant challenged the primary judge's conclusion that the quotation was provided to the appellant prior to signing the contact. However, the Court of Appeal held that it was not necessary for the purpose of the appeal to express a concluded view on this issue because, eve assuming that there was no error in the conclusion that the quotation was part of the contract, the outcome of the defects issue led to the appeal being upheld. in relation to the finding of repudiation, the Court indicated that the primary judge did not err in concluding that the appellant had repudiated the contract. by informing the respondent that he would not be let back on site, the appellant had evinced an intention no longer to be bound by the contract. the repudiation issue was not otherwise relevant as the appellant's claims were in respect of defects in the work carried out prior to termination of the contract.

The defects issue

The Court of Appeal held that the primary judge erred in concluding that the appellant's claim, in relation to the defects issue, be dismissed. This was because the second builder was obliged under the new contract to repair defects in the respondent's work. Further, the Court found that the primary judge's reasons for rejecting the appellant's claim in respect of the defects failed to adequately explain why the primary judge rejected the appellant's expert evidence, or preferred the expert evidence called by the respondent. It followed that a very significant part of the appellant's case had not been adequately considered at trial and its rejection had not been adequately explained in the primary judge's reasons.

The Court of Appeal indicated that the Court must not order a new trial on any ground unless it appeared that some substantial wrong or miscarriage had been occasioned, pursuant to UCPR r 51.53. On this basis, the Court of Appeal was persuaded that a substantial wrong or miscarriage had occurred. Accordingly, the appeal was upheld and the matter was remitted for a new trial in the District Court but limited to specified issues. The respondents were ordered to pay costs of the appeal.

Maaz v Fullerton Property Pty Ltd

[2021] NSWCA 79

Coram: Basten, Gleeson and Brereton JJA

Court: New South Wales Court of Appeal

Date: 7 May 2021

BUILDING AND CONSTRUCTION – payment claim by builder – false statutory declaration in support of payment claim – statement by builder that all subcontractors paid – claim paid by principal – principal liable to unpaid subcontractors – Contracts Debts Act 1997 (NSW), s 5 – proceedings against builder for moneys paid by principal directly to subcontractors

EVIDENCE – admissibility – hearsay – exceptions – business records – where business records of subcontractor tendered to prove unpaid debt – whether authenticity of document may be determined on the basis of inferences drawn from its form, contents or source – whether production on subpoena necessary – provenance and accuracy of the documents not challenged

EVIDENCE – admissibility – business records –records of a party – whether records of third party warrant discretionary exclusion – whether weight sufficient to establish deceit

TORTS – deceit – misleading and deceptive conduct – false statutory declaration in support of payment claim – statement by builder that all subcontractors paid – statement known to be false – claim paid by principal – principal liable to unpaid subcontractors – loss suffered – payments to subcontractors recovered

Facts:

Mr Maaz (‘**the appellant**’) was the sole director of Project Built Pty Ltd (‘**the builder**’), a company contracted by Fullerton Property Pty Ltd (‘**the respondent**’) in 2015 for the construction of an apartment building in Bankstown. During the course of the work, the builder made claims for progress payments, for amounts which included payments made to subcontractors. The appellant signed statutory declarations in support of the builder’s claims asserting that all subcontractors had been paid. The respondent paid the builder in reliance on those statutory declarations. However, the subcontractors later claimed payment from the respondent for unpaid invoices rendered to the builder, and the respondent was forced to pay the subcontractors directly.

First Instance:

The respondent commenced proceedings against the appellant in the District Court of New South Wales alleging that the appellant had engaged in misleading or deceptive conduct. The respondent also claimed that certain statements, in relation to the builder not paying the subcontractors, in the statutory declarations by the appellant were untrue. The loss suffered by the respondent was calculated by reference to the later payments it had made directly to the subcontractors. The primary judge found in favour of the respondent, and the appellant was ordered to pay the sum of $388,318, including $50,000 for exemplary damages. The primary judge considered the documents created by the builder’s subcontractors containing statements that the subcontractors had not been paid by the builder, which was key evidence in the trial. The primary judge deemed the documents to be admissible on the basis that they constituted business records, and thus fell within a statutory exception to the hearsay rule.

The Appeal:

The appellant challenged the findings made at the trial with respect to the admissibility of the business records of the subcontractors, and contended that even if the statements were admissible, the primary judge should not have given any weight to them. Further, the appellant submitted that the award of damages was greater than what should have been awarded by reference to the terms of the contract, and there was no loss suffered by the respondent unless the cost of the development exceeded the fixed price set out in the contract.

Decision:

Admissibility

The Court of Appeal held that the primary judge upheld the primary judge’s decision to allow the evidence by way of an exception to the hearsay rule. It was found that although representations contained in the subcontractors’ records were hearsay by being made out of Court by persons not called as witnesses, they were admissible and properly admitted as business record. As to the weight that should have been given to such evidence, the Court concluded that this was a matter for the primary judge to decide, and in this case, the primary judge was entitled to treat the subcontractors’ documents as reliable. As such, it was held that although the documents relied upon were not obtained in response to a subpoena, there was no reason to doubt their authenticity or accuracy. The Court also noted that the appellant did not adduce any evidence to contradict them.

Assessment of damages

The Court indicated that the relevant contract was between the respondent and the builder, whereas the proceedings were brought by the respondent against the appellant in his individual capacity. Further, the Court noted that the claim against the appellant was in tort and under the ACL, and it was not in contract. As such, the contract did not control the loss suffered by the respondent for relying on false statutory declarations made by the appellant.

Accordingly, the appeal was dismissed, and the decision of the primary judge was upheld.

MGW Engineering Pty Ltd t/a Forefront Services v CMOC Mining Pty Ltd

[2021] NSWSC 514

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 11 May 2021

BUILDING AND CONSTRUCTION – whether payment claims under Building and Construction Industry Security of Payment Act 1999 served on 3 or 4 February 2021 – whether service was effected on 3 February by delivering personally or by lodging during normal office hours or in accordance with construction contract – meaning of delivering personally – meaning of lodging at ordinary place of business – whether service effected in the manner provided under the construction contract – whether provision in construction contract that delivery after 4pm taken to be effected the following day void by reason of s 34 of the Act – whether principal entitled to specific performance of obligation to produce steel and shop drawings

Facts:

MGW Engineering Pty Ltd, trading as Forefront Services ('**the plaintiff**') had entered four contracts with CMOC Mining Services Pty Ltd ('**the defendant**') to provide various services at the Northparkes copper and gold mine ('**the Mine**') at Goonumbla in central New South Wales. The Contracts were, relevantly, in the same form.

On 3 February 2021, at 5:15pm, an employee of the plaintiff personally delivered four SOPA payment claims totalling to $6,161,020.35 to an employee of the defendant. On 4 February 2021, the plaintiff electronically issued the payment claims to the defendant using the Aconex software platform. However, the defendant did not serve its payment schedule upon the plaintiff until 18 February 2021, which was more than 10 business days after 3 February 2021, as required by s 14 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act**')

The issue requiring the Court's determination was therefore whether the payment claims were served on the defendant on 3 February 2021 or 4 February 2021, pursuant to s 31 of the Act. If the payment claims were served on 3 February 2021, then the payment schedules were provided outside the time limited specified in section 14(4)(b)(ii) of the Act, which would entitle the plaintiff to judgment in the sum of $6,161,020.35. However, if the payment claims were not served until 4 February 2021, the payments schedules would be served within the time limited specified in the Act and the plaintiff would be entitled to no more than $180,912.05. The date of service of the payment claims was therefore of critical importance.

In accordance with the key provisions of s 31(1) of the Act, the Court considered the following questions to determine when the payment claims were deemed to be served:

(1) whether the payment claims were delivered '*personally'* on 3 February 2021;
(2) whether the payment claims were '*lodged'* during *'normal office hours'* at *'ordinary place of business'*; and
(3) whether the payment claims were served *'in a manner provided by'* the contracts.

Decision:
The Court held that the payment claims were served on 4 February 2021, and separately, that the plaintiff was not entitled to suspend works under s 15(2)(b) of the Act. The Court's reasons leading to the determination can be summarised as follows.

(1) *Payment claims were <u>not</u> personally delivered until 4 February 2021 - s 31(1)(a)*

The Court was not satisfied that that the plaintiff 'personally' served the payment claims on the defendant on 3 February 2021. As such, the Court held that a payment claim could not be served 'personally', as the Mine was not the defendant's registered office and the defendant's employee that received the claims was not a director of the company. As such, the Court held that the payment claims were not delivered to the person it was addressed to, and it could not have come to the addressee's attention until 4 February 2021.

(2) *Payment claims were <u>not</u> lodged with the defendant during normal office hours at the defendant's ordinary place of business on 3 February 2021 - s 31(1)(b)*

In the alternative, the plaintiff asserted that they had lodged the payment claims at the defendant's ordinary place of business during normal office hours on 3 February 2021. However, the Court held that the payment claims were not genuinely lodged with the defendant, as they were not brought to the attention of the relevantly responsible person. As such, merely leaving the documents with an employee was not enough. Further, alleged service did not occur within the defendant's normal 'office hours' of 8am to 5pm, which was held to be different from the Mine's standard 'operating' hours of 8am to 6pm. Therefore, any service outside the defendant's normal office hours was deemed to be outside of the normal office hours, and thus, the Court did not accept that the service was made at the defendant's ordinary place of business.

(3) Payment claims served were <u>not</u> served in a manner provided by the contracts - *s 31(1)(e)*

The plaintiff contended that the payment claim was served in a manner prescribed by the contract on 3 February 2021. The contract stipulated that if the documents are delivered to the Mine after 4pm on a particular business day, notice will be deemed to have been given at the commencement of business on the next business day. Given the payment claims were served after 4pm, Stevenson J held that they were given to the defendant on 4 February. The Court also confirmed that such a provision in the contract did not abrogate or modify any requirements of the Act. As such, if the plaintiff had met any of the requirements, then service would have been effective, despite that it breached the contract.

Accordingly, the Court held that the payment claims were served on 4 February 2021, and the summons were dismissed.

Owners Strata Plan 93810 v KCN Constructions Pty Ltd

[2021] NSWSC 176

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 3 March 2021

BUILDING AND CONSTRUCTION – Proceedings settled by Deed of Settlement entitling plaintiff to judgment against the first defendant in the event that the defendant did not carry out certain remedial building works, in particular in relation to fire safety – Deed included an undertaking by the first defendant to pay legal costs in three fixed instalments – Where first defendant breached the Deed – Plaintiff accordingly entitled to judgment

Facts:

In September 2019, the Owners Strata Plan 93810 (‘**the plaintiff**’) and KCN Constructions Pty Ltd (‘**the defendant**’) settled the principal proceedings in which the plaintiff had sued the defendant for damages said to have been suffered by the defective construction of a residential apartment complex.

The principal proceedings were commenced in the District Court and transferred to the Supreme Court. The plaintiff sued for breach of statutory warranties under the *Home Building Act 1989* (NSW), and its main contention related to fire safety inadequacies. Subsequently, the plaintiff and the defendant settled and entered into a Deed of Settlement (‘**Deed**’), which relevantly stipulated that:

(1) If the general works by the defendant were not completed by 16 January 2020, the plaintiff would be entitled to apply to the Court for, and the defendant would consent to, judgment for damages in the amount identified for each non-completed item in an independent report (‘**the WT report**’).; and

(2) If the fire safety works by the defendant were not completed by 18 December 2019, the plaintiff would be entitled to apply to the Court for, and the defendant would consent to, judgment for damages in the amount identified for each type of non-completed fire safety work in the WT Report. There were provisions for KCN to obtain an extension of time; and

(3) The defendant agreed to pay the plaintiff’s legal costs in three equal instalments of $60,000, which if not paid within 7 days after the respective dates, would entitle the plaintiff to judgment (to which the first defendant consented) for the unpaid amounts.

In January 2021, the parties agreed to extend the time for the works to be completed to 30 September 2021. On 23 October 2021, the plaintiff moved against the defendant for judgment.

Decision:

The Court held that the evidence established that the defendant had failed to fulfill its obligations to carry out both the general and fire safety works, and failed to pay the third instalment of $60,000 due. The Court also noted that the WT Report established that the total amount identified for the non-completed items was $678,843.48, which the plaintiff was entitled to in damages. The Court held that the plaintiff was also entitled to judgment for the unpaid instalment of $60,000. Accordingly, the plaintiff was entitled to a total verdict of $739,969, including pre-judgment interest. The defendant was ordered to pay costs.

Paolucci v Makedyn Pty Ltd

[2021] NSWCA 215

Coram: Leeming, White, McCallum JJA

Court: New South Wales Court of Appeal

Date: 14 September 2021

CONTRACT – contract to transfer land, subdivide it and reconvey lots to vendor on which were constructed a House and Duplex – developer failed to provide Layout Plans to vendor of House and Duplex – plans ultimately provided – plans gave rise to dispute as to dimensions of "Duplex" – developer in breach of promise to reconvey lots with House and Duplex constructed – common ground that reasonable not to construct Duplex until dispute resolved – whether order for reconveyance of lots as vacant land plus Lord Cairns' Act damages appropriate – Soames v Edge (1860) Johns 669; 70 ER 588 considered – whether primary judge misapprehended plaintiff's case – whether anything turns on misapprehension of plaintiff's case – whether primary judge erred in proper construction of "Duplex" – whether primary judge erred in failing to address availability of contractual limitation of liability

SPECIFIC PERFORMANCE – nature and availability of remedy – relevance of historic breach – need to establish not just for plaintiff to be confined to damages – damages under Supreme Court Act 1970 (NSW), s 68 (Lord Cairns' Act) – nature and availability of remedy

Facts:

These proceedings concerned an appeal by Mrs Carmelita Paolucci ('**the appellant**') from orders made by Rein J on 17 December 2020, in proceedings commenced by the appellant against Makedyn Pty Ltd ('**the respondent**') in the Supreme Court. The appellant's claim was for "partial" specific performance of her agreement with the respondent and damages under s 68 of the *Supreme Court Act 1970* (NSW).

The appellant had transferred a large parcel of land to the respondent on terms that the respondent retransfer to the appellant two newly created lots on which the respondent was to have built a house and duplex. The parties had agreed this was to occur by May 2017, but it did not. In October 2018, the respondent belatedly provided layout plans of the house and duplex to the appellant, and in turn, a dispute arose as to the dimensions of the duplex.

Pursuant to a Deed of Agreement, the parties had agreed to negotiate in good faith and agree, among other matters, the layout plans. That did not occur. The subsequent reconveyance contract between the parties obliged the respondent to construct the house and duplex in accordance with the layout plans which were said to have been annexed. No such plans were annexed to the reconveyance contract. The reconveyance contract defined "duplex" to mean "a residential dwelling divided into two (2) three (3) bedroom residences on the one (1) lot of no less than $241.54m^2$". The appellant contended that each residence was to be no less than $241.54m^2$, whereas the respondent contended that the dwelling was to be no less than $241.54m^2$.

First Instance:

The appellant commenced proceedings seeking an order that the respondent convey the newly created lots to her as vacant lots and damages reflecting the diminished value of the reconveyed land. The appellant's pleadings also sought a declaration as to the dimensions of the duplex. The primary judge dismissed her claim, holding that while there had been delay in providing the layout plans, there was no basis for an order for specific performance or damages under s 68 of the *Supreme Court Act*. The primary judge also rejected the appellant's construction of the definition of "duplex", and declined to determine her submission that a contractual limitation of liability did not apply on the basis that no such claim had been pleaded.

The Appeal:

The appellant appealed, contending that the primary judge failed to deal with her case to the effect that if the respondent had provided the layout plans promptly, the dispute would have been resolved and the respondent would have built the house and duplex. Thus, the appellant contended that she was entitled to partial specific performance (the transfer of the lots) together with damages representing the difference in value between the vacant lots and the lots with a house and duplex constructed upon them. Secondly, the appellant contended that the primary judge erred in the construction of the dimensions of the duplex required by the contract. Thirdly, it was contended that the primary judge erred in failing to determine the contractual limitation of liability.

Decision:

The Court of Appeal unanimously held that the primary judge did not err in declining to order specific performance or damages under s 68 of the *Supreme Court Act*. As such, the Court indicated that even assuming all factual matters in favour of the appellant, the failure to provide the layout plans had long since been cured and the appellant had not shown that it was not just for her to be confined to a remedy in damages. Additionally, the Court indicated that despite the primary judge being mistaken in concluding that the appellant had abandoned reliance on the failure to supply the layout plans, nothing turned on that.

As to the second issue, the Court of Appeal held that the primary judge correctly concluded that the contract provided for the construction of two residences comprising the duplex which (together) were to be of no less than $241.54m^2$. As to the final issue, these grounds did not arise. In any event, the Court noted that the course taken by the appellant at trial stood in the way of making findings of deliberate or wilful or bad faith or unreasonable breach, such as to render the contractual limitation of liability inapplicable.

Accordingly, the appeal was dismissed with costs.

Payce Communities Pty Ltd v Canterbury-Bankstown Council

[2021] NSWSC 331

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 6 April 2021

BUILDING AND CONSTRUCTION – contract – damages – variation – where parties agreed that the Fit Out Agreement (FOA) Contract Price was $2.171 million – dispute as to the scope of work to be done for the FOA Contract Price – whether variations claimed by developer were in respect of work to be done for the FOA Contract Price

Facts:

These proceedings concerned a property development and investment company Payce Communities Pty Ltd (‘**the plaintiff**’) entering into an agreement with the Canterbury-Bankstown Council (‘**the defendant**’). Under a ‘fit out agreement’ (‘**FOA**’) executed by the parties in December 2015, the plaintiff agreed to construct the shell of a library at its own cost and pay the first $1.52 million of the library fit-out costs. Following the execution of the FOA, an independent certifier provided an estimate of the fit-out costs (‘**2015 estimate**’). In May 2016, the defendant retained its own quantity surveyor to provide an estimate of the fit-out costs (‘**2016 estimate**’). The difference between the 2015 and 2016 estimates was $346,425.

Subsequently, on 24 February 2017, the parties agreed to split the difference between the two estimates, which resulted in a FOA contract price of $2.171 million. The agreement stipulated that if the FOA contract price exceeded the provisional sum of $1.52 million, then any amount in excess would be paid by the defendant to the plaintiff progressively in order with the progress claims’ provisions set out in the FOA.

The issue requiring the Court’s determination was whether subsequent fit-out works were the result of a series of variations, or whether the works were included in the original agreement, scope and contract price. In determining this issue, the Court considered the following factors:

(1) The scope of the works covered by the agreed FOA contract price;
(2) Whether it was necessary for the plaintiff to have pointed to written directions to vary the works in order that it be entitled to variations; and
(3) The amount of the plaintiff’s entitlement for any variations.

Decision:

The scope of the works

The plaintiff contended that, although the FOA contract price was to be determined by reference to the agreement between the parties in February 2017, the scope of the works for that price was based upon the design drawings in 2015. The defendant contended that the price was based on that 2015 design, however, it was amended by subsequent discussion and agreements between the parties. The Court found that as both the independent certifier and the quantity surveyor premised their opinions on the same identified elements making up the 2015 design, such elements defined the scope of the work to be completed for the FOA contract price.

Written direction

Although a provision of the FOA required a direction in writing if the plaintiff initiated a variation, there was no requirement for a Council-directed variation. The Court held that evidence containing information that fit within the definition of direction was required to constitute a direction. As such, a document containing minutes of a meeting between the parties, which recorded agreements to the defendant's request for additional scope, sufficed.

Calculation of entitlement

The Court found that where the work has been carried out and the actual cost is known, that provides sound evidence of reasonable cost and should ordinarily provide the basis for damages.

Accordingly, the plaintiff was entitled to damages to compensate it for the defendant's failure to pay for the variations.

Pheonix Builders Pty Ltd v Deca Australia Pty Ltd

[2021] NSWSC 581

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 18 May 2021

BUILDING AND CONSTRUCTION – interim relief –applicant claims no construction contract – similar contention made to adjudicator, but withdrawn – adjudicator determined had jurisdiction – jurisdictional challenge now revived in this Court – respondent alleged to be insolvent – interim relief refused.

Facts:

These proceedings concerned an application by Pheonix Builders Pty Ltd (‘**the plaintiff**’) for an interim order restraining Deca Australia Pty Ltd (‘**the first defendant**’) from numerous actions in connection with an adjudication determination issued by the second defendant. The application also sought to restrain the second defendant from issuing an adjudication certificate in relation to the determination.

The first defendant, as subcontractor, entered into a contract to undertake demolition and excavations works for the plaintiff as the head contractor. The plaintiff alleged that a site meeting occurred at which it was agreed the following:

1. The subcontractor would be paid 65% of the contract price for all works completed;
2. The contract would come to an end; and
3. Any further construction work would be done on the basis of a new contract (‘**Agreement**’).

The plaintiff then paid 65% of the contract price to the first defendant, and it sent an email to the plaintiff which was said to amount to evidence of the new contract. Subsequently, the first defendant issued a payment claim. However, the plaintiff’s payment schedule alleged that the payment claim was not valid, as the original contract no longer existed and there was no entitlement to make the progress claim. The payment schedule did not address that the Agreement contemplated payment on a final basis.

The first defendant filed an adjudication application, however, the plaintiff’s response did not press any jurisdictional issues and had instead argued other inconsistencies with the Agreement alleged by the plaintiff. The adjudicator decided against the plaintiff in the amount of $240,805. Subsequently, the plaintiff requested details of the first defendant’s financial position.

The plaintiff then commenced these proceedings seeking an interim order to restrain the first defendant from enforcing the adjudication determination on the basis of the subcontractor's cash flow issues. It was not drawn to the attention of the Court that the jurisdictional challenge that was sought to be advanced had been put before the adjudicator, but then withdrawn. Therefore, the question in this application was whether interim relief should be granted.

Decision:

The Court denied granting an injunction having regard to the strength of the plaintiff’s claim and the balance of convenience. However, despite the strength of the plaintiff’s case, it was ultimately undermined by the inconsistent manner in which the issue was put to the adjudicator then withdrawn, but then pressed again in the proceedings. The Court also indicated that contractors should have their bills paid promptly, as cash flow is the life blood of the industry. Noting the adjudication determination amount of $240,805, the money which the first defendant was prima face entitled to was an amount which would likely address the cash flow problems.

RBV Builders Pty Ltd v Chedra

[2021] NSWCATAP 56

Coram: K Rosser, D Roberston

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 11 March 2021

BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Statutory warranty – Plans and specifications – Whether specifications included oral instructions – Defences – section 18F – Whether contract drawings constitute an "instruction given in writing" for the purposes of s 18F

COSTS – Relevant considerations

Facts:

These proceedings concerned a building contract to excavate and construct a new basement storage area, entered into by the owners, the Chedra's ('**the respondents**') and RBV Builders Pty Ltd ('**the appellant**'). The parties fell into dispute when water began penetrating walls following the appellant's construction of the basement area. The respondent's commenced proceedings in the Tribunal seeking recovery of the costs of investigating and rectifying the alleged defect.

First Instance:

The parties' experts prepared a joint report which concluded that the alleged defect was occurring at the base of the walls, as a direct consequence of its construction, which had the potential to have long-term effects on the stability of the basement. At first instance, the Tribunal found that the appellant's work in relation to the alleged defect, was in breach of the statutory warranties prescribed by the *Home Building Act 1989* (NSW) ('**the Act**'). However, the appellant sought to rely on the defences contained in s 18F of the Act. As such, it contended that the alleged defects arose from a design depicted on a drawing enclosed with the building contract, and that the drawing amounted to an instruction for the purpose of s 18F. The drawing contained a note which required the walls to be built to the "manufacturer's specification".

The Tribunal found that the drawings or plans included in the building contract were not instructions for the purposes of s 18F. Therefore, the Tribunal rejected the appellant's defence and found that the drawing specification required the appellant to construct the walls in accordance with the contract instructions, which was unaffected by any oral instructions on site.

The Appeal:

The appellant appealed the first instance decision on numerous grounds, including that the Tribunal erred in finding the drawing was not a written instruction for the purposes of a s 18F defence. The other grounds of appeal were clarified into six errors of law including: errors in the construction of the contract, errors in the construction or application of s 18F of the HBA, failure to give reasons, addressing the wrong issue, failure to deal with an argument and taking into account irrelevant considerations.

Decision:

The Appeal Panel held that the Tribunal was correct in concluding that the contract drawings were not an instruction for the purposes of s 18F of the Act. The Appeal Panel indicated that the provisions of clause 2 of Schedule 2 of the Act would have no work to do if a builder could rely upon s 18F(1) in defence of a claim that its work fails to comply with the Building Code or a development consent, simply because the relevant work complies with the contract drawings. In that regard, clause 2 requires that the contract make provision to that effect, which implies that the result is not intended to be automatic.

Further, the Appeal Panel held that the Tribunal made no errors of law at first instance, so therefore, the six grounds of appeal were rejected. Accordingly, leave to appeal was refused and the appeal was dismissed.

Sabouni v Revelop Building and Developments Pty Ltd

[2021] NSWSC 31

Coram: Black J

Court: Supreme Court of New South Wales

Date: 2 February 2021

CONTRACTS – construction contract – whether Plaintiff entitled to amount of second progress claim made prior to Defendant's termination of contract – whether Defendant entitled to recover additional costs of construction works incurred after termination of construction contract with Plaintiff

Facts:

These proceedings involved claims relating to the construction of a child care centre in Penrith, which were originally brought by OSC Constructions Pty Ltd ('**the first plaintiff**'), against Revelop Building and Developments Pty Ltd ('**the defendant**') in the Local Court of New South Wales. Subsequently, Mr Omar Sabouni ('**the second plaintiff**'') contended that he, rather than the first plaintiff, was the proper plaintiff. The defendant filed a cross-claim, and the proceedings were then transferred into the Supreme Court.

The second plaintiff's claim against the defendant

The second plaintiff pleaded that he and the defendant entered into a contract for constructions works under which he would perform specified works in accordance with the contract for a sum of $1,099,098. The second plaintiff further pleaded that he did in fact carry out the works, and that he issued a progress claim for around $100,000 which the defendant failed to pay. In addition, the second plaintiff accepted that the defendant had terminated the contract, but pleaded that notwithstanding termination, he was entitled to payment of that progress claim in full. In substance, the second plaintiff's case was that his right to the amount of the progress payment arose because the defendant did not respond to his claim for that payment within the time specified in the contract

The defendant's cross-claim against the second plaintiff

The defendant pleaded that the second plaintiff had breached their contract in a manner amounting to a repudiation of the contract which was accepted by the defendant. As such, the defendant claimed loss and damage referable to the rectification works carried out by the first plaintiff and the completion of works in the premises. Further, the defendant submitted that the second plaintiff breached the terms of the contract, in that, he caused serious delay in respect of the works, continuously caused variations without the defendant's consent, failed to meet agreed deadlines, and failed to carry out the works with due care and skill.

Decision:

Black J was not satisfied that the second plaintiff had accrued a right to payment of the progress payment by the time of the termination of the contract, where that progress claim did not comply with the timing requirements of the contract. Further, the second plaintiff was found to have included work in the progress claim which was not properly within the scope of that claim.

Whilst the Court accepted that there was evidence as to the costs incurred by the defendant to complete the premises, it was found that the defendant did not establish that the work which was done to complete those premises corresponded to that which the second plaintiff had contracted to complete. Further, the Court was not satisfied that the whole of the costs incurred in completing the premises, or any particular costs, resulted from the second plaintiff's repudiation or breach of the contract. Therefore, the defendant also failed in its claim for damages.

Accordingly, both parties failed in establishing its claim for damages against the other, so therefore, the second plaintiff's claim and the defendant's cross-claim were both dismissed.

Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan

[2021] NSWSC 1315

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 18 October 2021

ADMINISTRATIVE LAW – appeal pursuant to s 83 of the Civil and Administrative Tribunal Act 2013 (NSW) – decision of Appeal Panel of Civil and Administrative Tribunal that use of "Biowood" attachments to external walls of multi-storey residential buildings constitutes undue risk of fire spread – whether incorrect formulation and application of proper test and the Building Code of Australia – whether finding of undue risk made in absence of evidence – appeal dismissed

Facts:

The plaintiffs, Taylor Construction Group Pty Ltd ('**builder**') and Frasers Putney Pty Ltd ('**developer**), were the builder and developer of two-multi-story residential buildings in Ryde. The defendant ('**Owners Corporation**') was the registered proprietor of the common property of strata plan 92888 and the building. In these proceedings, the builder and developer sought to appeal from a decision of an Appeal Panel of the New South Wales Civil and Administrative Tribunal ('**NCAT**').

The Owners Corporation applied to NCAT for an order that the builder and developer carry out works to rectify alleged defects and non-complying works and/or pay the Owners damages for the cost of rectification. Further, it was claimed that, by using biowood, the builder and developer was in breach of the statutory warranties prescribed in s 18B(1)(c) of the *Home Building Act 1989* (NSW) ('**the Act**'). The Owners Corporation also claimed that biowood was not fit for purpose in breach of the statutory warranties in subsections 18B(1)b) and (f) of the Act.

First Instance:

The NCAT Senior Member identified two issues for determination at first instance, being:

(1) whether the biowood, as installed, as compliant with applicable codes and standards; and
(2) even if the cladding was compliant with the codes and standards, was the biowood, as installed, a material which was fit for purpose?

The Tribunal held that the use of biowood combustible cladding on parts of the external walls of the buildings did not comply with the then Building Code of Australia ('**BCA**'), because it constituted an undue risk of fire spread. As a result, it was found that the builder and developer breached the statutory warranties implied into residential building contracts under section 18B(1) of the Act. Further, the Tribunal held that biowood was not fit for purpose and breached the statutory warranty when used an attachment to a non-combustible external wall, as it presented an undue risk of fire spread and diminished the fire resistance of the external walls. The Senior Member relied upon the ‘common sense test’. Based on his findings, the builder and developer were ordered to rectify the breach of the statutory warranties by removing the biowood attachments installed in building and replacing them with attachments to the external walls which comply with the codes, standards and statutory warranties. Further, the builder and developer were ordered to pay the Owners Corporations’ costs as agreed or assessed on an ordinary basis.

The Appeal:

The NCAT Appeal Panel upheld the Senior Member’s decision at first instance, deeming biowood to be unfit for purpose and a breach of the statutory warranties in the Act. The Appeal Panel held that the Senior Member’s findings were “open and display neither an error of law nor a ground for the grant of leave to appeal.

The Supreme Court Decision:

The principal ground of appeal in these proceedings was whether the NCAT Appeal Panel erred in its formulation of the test when determining whether biowood constituted an undue risk of fire spread via the façade of the buildings. Following a review of the decision-making process undertaken by the Appeal Panel, the issue that required the Court’s determination was whether the builder and the developer had demonstrated that the Appeal Panel erred in law in its expression of the undue risk test mandated by the BCA, such as by misconstruing the scope and operation of the terms “undue risk” or in its formulation of the matters to which regard may be had. Accordingly, the Court was not persuaded that any such error had been established.

Instead, the Court considered that there were various other factors relevant, which included the combustibility and ignitability of biowood, the rate of flame spread of biowood and the gravity of the risk. On this basis, the Court confirmed the decision at first instance that biowood was a combustible material, and complies with the fire hazard properties prescribed by the BCA, however, that there was a risk that biowood would support fire spread between floor levels on the façade of the buildings. Further, the builder and developer’s other grounds of appeal were rejected.

Accordingly, the Court granted leave to appeal on the basis that the appeal raised issues of principle that may have some broader application to other cladding cases, but nevertheless dismissed the appeal.

The Estate of Sikos v TBPL1 Pty Ltd

[2021] NSWSC 1523

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 26 November 2021

BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – where s 25 judgment entered in favour of builder – where time to claim damages under building contract out of time – where earlier proceedings claiming damages under building contract discontinued – where principals now seek declaration of the parties' rights under the building contract purportedly in aid of injunction to restrain builder from being unjustly enriched by enforcing the s 25 judgment – whether such a claim is liable to be struck out

CIVIL PROCEDURE – stay of proceedings – application by reason of unpaid costs in earlier proceedings – whether same or substantially the same cause of action in these proceedings as in those earlier proceedings

COSTS – security for costs – relevant factors – impecuniosity – whether proceedings in substance defensive – other factors

Facts:

These proceedings concerned a design and construction contract, entered into by the late Mr Elias Sikos and Mistrina Pty Ltd (in liquidation) with TBPL1 Pty Ltd ('**the builder**'), formerly known as Jabbcorp Pty Ltd, in relation to a proposed development of land then owned by Mr Sikos and Mistrina. Work was subsequently suspended, and the builder terminated the contract. In these proceedings, commenced more than 11 years after work ceased on the site and more than 10 years after the builder terminated the contract, Mistrina and those representing Mr Sikos's estate sought to agitate a dispute under the contract.

In June 2010, the builder served a payment claim on Mr Sikos and Mistrina claiming an amount of $749,603.54. In September 2010, ad adjudicator determined an adjudicate amount owing by Mistrina and Mr Sikos to the builder of that same amount. Subsequently, the builder obtained an adjudication certificate which stated an amount of $776,855.34. the builder purported to file that certificate as a judgment ('**the 2010 judgment**'). The amount for which the 2010 Judgment was entered was $782,227.52, which was $5,372.18 more than the amount stated in the adjudication certificate.

In August 2014, Mr Sikos and Mistrina commenced proceedings (‘**2014 proceedings**’) against the builder seeking damages for alleged breaches of the contract. The alleged breaches concerned the allegedly defective design of the foundations of the development and the use of an unsuitable raft slab. Mr Sikos and Mistrina then discontinued the 2014 proceedings thereby became liable to pay the builder’s costs of the proceedings.

In these proceedings, Mr Sikos and Mistrina sought the following final relief:

(1) a final injunction restraining the builder from enforcing the 2010 judgment;

(2) a final injunction restraining the builder from enforcing any rights it had under s 23 of the *Building and Construction Industry Security of Payment Act 1999* (NSW);

(3) a declaration that there are no amounts owing from the plaintiffs to the defendant in respect of works carried out by the defendant pursuant to the contract.

The builder sought orders that the proceedings be stayed, by reason that Mistrina and Mr Sikos had not paid the builder’s costs of the 2014 proceedings, and sought to agitate the “same or substantially the same cause of action” as in the 2014 proceedings.

Decision:
The Court held that, in the 2014 proceedings, the cause of action upon which Mistrina and Mr Sikos relief was a claim for damages under the contract. However, in these proceedings, the Court outlined that the plaintiff sought to invoke an equitable right to injunctive relief to prevent the unjust enrichment of the builder. Thus, the Court concluded that these proceedings were not premised on the same or substantially the same cause of action as the 2014 proceedings. Further, the Court concluded that security for costs would be provided, as not only was there reason to believe Mr Sikos would be unable to meet the builder’s costs were it to be successful in these proceedings, but it had not paid the builder’s costs of the 2014 proceedings.

The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd

[2021] NSWSC 1498

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 22 November 2021

ARBITRATION – seek to set aside award – building dispute – whether agreement to appeal on questions of law – s34A(1), Commercial Arbitration Act 2010 (NSW) – principles at [31]-[32] – no agreement – whether estopped from denying agreement – no estoppel.

JURISDICTION of arbitrator – principles at [126] –declaratory relief – prevalence and utility of declaratory relief in contractual matters at [130]-[131] – challenge to claim as time barred does not deprive arbitrator of jurisdiction at [132].

PUBLIC POLICY – principles at [137]-[140]

ADEQUACY OF REASONS – principles at [142]-[148]

Facts:

These proceedings concerned a challenge of an arbitral award under s 31, 34 and 34A of the *Commercial Arbitration Act 2010* (NSW) (‘**the Act**’). The Nuance Group (Australia) Pty Ltd (‘**the plaintiff**’) operated a duty-free store at Melbourne International Airport. Shape Australia Pty Ltd (‘**the first defendant**’) was a contractor who undertook fit-out and refurbishment works. The plaintiff and the first defendant entered into a contract under which the first defendant would expand the store for $13.8 million, and the contract included an arbitration clause. Dr Richard Manly QC (‘**the second defendant**’) was the arbitrator in these proceedings.

The refurbish work was performed in five “separable portions”, known as 1a, 1b, 2, 3 and 4, this being intended to permit the plaintiff to progressively take back the store for trading purposes as the refurbishment advanced. As the date for practical completion drew near, the first defendant had not completed work in Separable Portion 4. In order not to delay the opening of the store, a superintendent appointed under the contract created new Separable Portion 4a (completed works) and Separable Portion 4b (incomplete works) and levied liquidated damages for both portions, which the plaintiff withheld. The first defendant issued a notice of dispute in 2017.

The arbitral hearing took place in 2020, which concluded that the first defendant's claims concerning latent conditions (clause 12) and contentious variations (clause 40) were largely time-barred by reason of clause 46.1 of the contract. In addition, the arbitrator concluded that the superintendent was entitled to create Separable Portions 4a and 4b (clause 35.4) but its certification of liquidated damages for Separable Portion 4b (clause 35.3) was void and of no effect. Of the $990,000 withheld for this portion, the plaintiff was only entitled to $32,699.04, and the arbitrator ordered the plaintiff to remit the balance.

The issues requiring the Court's determination can be summarised as follows:

(1) whether the arbitrator erred in his construction of clause 12 (latent conditions), clause 35.4 (separable portions) and clause 46.1 (time for notification of claims) need not be considered;

(2) did the arbitrator exceed his jurisdiction by dealing with the parties' claims otherwise than in accordance with the manner in which it was referred to him, such that the award is liable to be set aside under section34(2)(a)(iii) of the Act;

(3) did the award in respect of liquidated damages conflict with the public policy by reason of a failure to accord natural justice, such that it ought be set aside under section 34(2)(b)(ii) of the Act; and

(4) were the arbitrator's reasons in respect of latent conditions, separable portions, the time bar and his apparently inconsistent reasons in respect of liquidated damages (clause 35.3) inadequate to comply with section 31(3) of the Act such that the award should be set aside under section 34(2)(a)(iv) of the Act?

Decision:

The Court held that the fact that the second defendant found that the first defendant's claim for breach of clause 23 of the contract was time barred, did not mean that he lacked jurisdiction to determine any other claims that were not time barred. Further, the Court found that the second defendant did not exceed his jurisdiction when determining the first defendant's claim that the superintendent's certification of liquidated damages for Separable Portion 4B was void and of no effect. As such, that claim was not time-barred by clause 46.1, or at least the second defendant had made no such determination. It followed that, having found in the first defendant's favour, it was entitled to the relief sought, being the return of the $990,000.

Public Policy

The plaintiff was said to have been denied natural justice as the order requiring it to refund the liquidated damages to the first defendant was made contrary to the second defendant's finding that the first defendant's claim was time-barred. However, the Court held that the second defendant's findings were not of his own creation but sought by the parties, and thus, the plaintiff's claim also failed in this regard.

Adequacy of reasons

The plaintiff contended that the second defendant's findings were "completely inconsistent". It was argued that the portions of the arbitrator's award (where he found that the first defendant's claim in respect of liquidated damages was time-barred, notwithstanding which "and without providing any reasons"), the arbitrator proceeded to make declarations and orders obliging the plaintiff to repay the bulk of the liquidated damages for Separable Portion 4b. However, the Court held that arbitrator's reasons in respect of liquidated damages comply with section 31(3) of the Act. As such, the Court upheld the arbitrator's findings as consistent and explicable, and therefore, the plaintiff's claim also failed in this regard.

Accordingly, the summons was dismissed.

The Owners – Strata Plan No 85561 v Omaya Holdings Pty Ltd

[2021] NSWSC 918

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 27 July 2021

BUILDING AND CONSTRUCTION – claim against builder and developer for building defects – claim settled on date of hearing – settlement agreement – provision that rectification works be effected in accordance with remedial contract – provision in settlement agreement that if default occurs judgment to be entered in accordance with pre-signed short minutes of order – whether parties obliged to refer alleged dispute about whether there had been such default to expert determination – whether settlement agreement or remedial contract frustrated

Facts:

These proceedings concerned a development constructed pursuant to a contract between the first defendant, Omaya Holdings Pty Ltd ('**the builder**') and the second defendant, Al Maha Pty Ltd ('**the developer**'). The plaintiff was the Owners Corporation in respect of the residential development in Strathfield. The Owners Corporation commenced these proceedings against the builder and developer alleging that the building was subject to flammable cladding and waterproofing defects ('**the defects**').

Proceedings were listed for hearing, but the parties settled on that day. The settlement agreement stipulated that the developer agreed to rectify the defects by performing rectification work by 15 November 2020, pursuant to a remedial contract ('**Clause 4**'). Further, the settlement agreement provided that the builder and developer agreed to pay the Owners Corporation $243,394 by four equal monthly instalments concluding on 15 November 2020 ('**Clause 8**')

The parties subsequently fell into dispute as the developer had not performed the rectification work, and the builder and developer had only paid an amount equal to approximately two of the instalments, leaving an amount of $121,394 owing. The Owners Corporation alleged that the builder and developer had thereby made default under the settlement agreement. The builder and developer did not dispute these issues, but asserted an extension of time to do so.

Decision:

The Court held that there was no doubt that the builder and developer had defaulted on making payment of the instalments, nor could there be any dispute that the developer had not effected the rectification works. The Court did not grant an extension of time. Further, although the builder and developer contended that the matter be referred to expert determination pursuant to the settlement agreement, Stevenson J did not agree and found in favour of the plaintiff. As such, judgment was entered for the Owners Corporation against the builder and developer for $1,212,250.00.

The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)

[2021] NSWSC 1068

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 15 November 2021

BUILDING AND CONSTRUCTION – Design and Building Practitioners Act 2020 (NSW) – statutory duty under s 37 – application to amend Technology and Construction List Statement – whether sufficient merely to identify the alleged defects – whether necessary to plead the risks the builder was required to manage and the precautions the builder should have taken to manage those risks

Facts:

These proceedings concerned a building contract between the first defendant, Loulach Development Pty Ltd (‘**the developer**) and the second defendant, Loulach Steel Pty Ltd, (‘**the builder**’) (together, **Loulach**’). The plaintiff was the Owners Corporation in respect of the residential development in Parramatta. The Owners Corporation commenced these proceedings against Loulach alleging that the building was subject to a large number of defects in the development, principally concerning water ingress and defective cladding (‘**the defects**’).

Originally, the Owners Corporation’s claim was based upon alleged breaches of the statutory warranties implied into the building contract by the *Home Building Act 1989* (NSW) (‘**the HBA Act**’). In these proceedings, the Owners Corporation sought to amend its List Statement to add a claim relying on an alleged breach of the statutory duty of care created by s 37 of the *Design and Building Practitioners Act 2020 (NSW)* (‘**the DBP Act**’). The Owners Corporation’s application to amend its claim to incorporate a claim under the DBP Act had been on foot for over a year. The DBP Act was enacted to alleviate the need for a party like the Owners Corporation to prove a duty of care owed to it by the builder.

The Owners Corporation submitted that due to the fact that there was a defect in the building, which was shown to constitute a breach of the HBA Act statutory warranties, it also established that the defect was the result of a breach by the builder of the statutory duty of care. Loulach opposed leave being granted to the Owners Corporation to plead a statutory duty of care this way by contending that, whilst there can be no dispute as to the existence of the statutory duty of care, a pleading in the form proposed leaves the question of breach of that duty wholly unarticulated.

Decision:

Stevenson J did not agree with the Owners Corporation's submissions. The authorities that were analysed to determine this issue established that a plaintiff alleged a breach of duty of care by the builder must include a breach of the statutory duty of care, must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks. As such, in this case, the Court held that it was not sufficient simply to assert a defect and allege that the builder was required to take whatever precautions were needed to ensure that the defect not be present. Accordingly, the Court declined to grant the Owners Corporation leave to amend its List Statement in the form proposed.

The Owners – Strata Plan No 87265 v Saaib; The Owners – Strata Plan No 87265 v Alexandrova

[2021] NSWSC 150

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 1 March 2021

AGENCY – whether implied actual authority to enter building contract – where builder did not sign contract – where numerous documents signed in name of builder – whether builder authorised nephew to enter into contract on his behalf – no authority found from the circumstances

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – statutory warranties – whether defects part of lot property or common property

CONSUMER LAW – misleading or deceptive conduct – causation or reliance – where home warranty insurance issued due to misleading representations made by insurance broker – whether representations sufficiently causative of loss to Owners Corporation

EVIDENCE – tendency evidence – conduct – whether evidence of builder performing favours for friends characterised as tendency evidence of conduct regarding commercial development

Facts:

This concerned the plaintiff, the Owners Corporation of 11 townhouses in Marrickville, bringing separate proceedings against Tony Saaib (‘**the builder**’) and Ms Alexandrova (‘**the insurance broker**’). The Owners Corporation alleged that the work that had been done by the builder was in breach of the warrantied implied by the *Home Building Act 1989* (NSW) (‘**the Act**’), seeking damages for over $3.5 million. The Owners Corporation contended that the builder had authorised his nephew, Mr Zaatini, to enter into the contract on his behalf and to deal with his insurance broker to arrange home warranty insurance to cover the construction works. The Owners Corporation further contended that Mr Zaatini had signed the builder’s signature on both the contract and insurance documents.

The separate proceedings were against the insurance broker who lodged documents to obtain home warranty insurance for the property. The Owners Corporation contended that the insurance broker engaged in misleading or deceptive conduct pursuant to s 18 of the ACL, or s 42 of the *Fair Trading Act 1987* (NSW). The Owners Corporation also asserted that the insurance broker had represented that the was authorised by the builder to submit the documents to obtain home warranty insurance, when in fact she was not authorised, and the documents did not contain the true signature of the builder.

The principal issue in the first proceedings related to whether the builder authorised Mr Zaatini to enter into the contract on his behalf. While it was accepted that the builder did not sign the contract, there was conflicting evidence as to whether the builder indicated such authority to the builder and whether the builder gave directions for the insurance broker to assist with and put his name on documents for home warranty insurance.

Decision:

The Court found that the builder had not authorised Mr Zaatini to enter into the contract on his behalf, and therefore dismissed the first proceedings against the builder. While ultimately deciding that neither witness was particularly reliable, Henry J held that the objective facts, contemporaneous materials and logic of events did not support the inference that the builder consented to Mr Zaatini acting as his agent and approved of him entering into the contract.

In the second proceedings, Henry J held in favour of the Owners Corporation against the insurance broker, finding that she had impliedly engaged in misleading or deceptive conduct in representing that she had authority to apply for home builder's insurance on the builder's behalf. This was determined on the basis of the previous findings that the builder had not authorised Mr Zaatini to enter into the contract and had not authorised the insurance broker to obtain home warranty insurance. Therefore, the Court held that the insurance broker's representations, in submitting the insurance documentation, were with an intention to lead the insurer into erroneously believing the contract with the builder's name was made with his authority and that he had signed them, neither of which was truthful.

The Owners – Strata Plan 64757 v Sydney Remedial Builders Pty Ltd

[2021] NSWSC 536

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 May 2021

PRACTICE AND PROCEDURE – application to amend List Response to allege proceedings out of time – whether building contract made date in Certificate of Practical Completion conclusive as to when completion took place

Facts:

These proceedings concerned an application by Sydney Remedial Builders Pty Ltd (‘**the defendant**’) to amend its List Response, which on 11 May 2021, the Court granted. The Owners Corporation (‘**the plaintiff**’) resisted the proposed amendment. The application was to include a claim that the proceedings were statute barred by reason of having been commenced more than seven years after the time limit specified in s 18E of the *Home Building Act 1989* (NSW), in the form that it was at the relevant time.

The basis on which the plaintiff resisted the amendment was its contention that a plea that the proceedings were out of time was inconsistent with an admitted fact, which was that the defendant issued a document called Certificate of Practical Completion, on a day less than seven years before the date on which the proceedings were commenced. The plaintiff submitted that, on the proper construction of the relevant building contract, the defendant’s provision of this document was conclusive of the question of when practical completion took place.

Decision:

Stevenson J was not satisfied that there was a clear tension between the defendant’s admission of sending a Certificate of Practical Completion and the assertion that completion took place earlier than was stated in its certificate, to warrant leave to amend being refused. Accordingly, the Court ruled in favour of the defendant and granted it leave to file an amended List Response.

The Owners – Strata Plan No 89005 v Stromer

[2021] NSWSC 853

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 14 July 2021

BUILDING AND CONSTRUCTION – civil procedure – application to amend Technology and Construction List Response – proposed amendment to limitation defence based on construction of Home Building Act 1989 (NSW), ss 18C and 18E and schedule 4, clause 109 – defendants had previously withdrawn limitation defence – prejudice to the plaintiff if limitation defence now re-introduced – whether consistent with overriding purpose and dictates of justice to grant leave to amend – leave refused

CIVIL PROCEDURE – application for leave to file a cross-summons and list cross-claim statement against sub-contractors of the defendant builder – where no material facts pleaded or alleged defects particularised in support of the allegations – application dismissed

Facts:

These proceedings concerned a contract entered into before February 2012, by the first to third defendants, Mr Thomas, Simone and Nathan Stromer (‘**the developers**’) and the fourth defendant, Farad Electric Co Pty Ltd (‘**the builder**’). The contract involved the construction of a residential apartment, and works were to be completed by 19 November 2013. The Owners Corporation (‘**the plaintiff**’) were the registered proprietors since registration of the strata plan in respect of the residential development.

The plaintiff commenced proceedings against the builder and developers (together, ‘**the respondents**’) for breach of the statutory warranties in section 18B of the *Home Building Acct 1989* (NSW) (‘**the HBA**’). The respondents argued that, pursuant to section 18E of the HBA (in the version of the HBA that applied at the time the proceedings commenced):

a. the alleged defects were not 'major defects';
b. the relevant limitation period was 2 years from the date the works were completed; and
c. the owners' claim was therefore time barred.

On 3 February 2020, the Owners Corporation notified the respondents that the relevant limitation period was the 7-year warranty period for all types of defects, being the limitation period in force before the 2011 amendments to the HBA came into effect (‘**2011 amendments**’). The Owners Corporations argued that such limitation period applied as, pursuant to s 109 of Schedule 4 of the HBA, the 2011 amendments do not apply to a contract for residential building work entered into before 1 February 2012. The respondents subsequently filed an amended List Response, whereby the respondents withdrew the limitation defence and did not introduce any additional limitation issue.

In June 2021, the respondents sought leave to amend their List Response to re-introduce the limitation defence and to cross-claim against five subcontractors. The respondents submitted that, if the applicable HBA was the version in force at the time the works were completed on 19 November 2013, then the alleged defects were not structural defects. Further, the respondents submitted that the statutory warranty period was 2 years from the completion of the works and, therefore, the Owners Corporation's claim was time barred. This was argued because the 2011 amendments to section 18E in the HBA applied to the notional contract between the owners and the developer, and not to the construction contract between the builder and the developer.

Decision:

In the context of attempting to re-plead the limitation defence in respect of the notional contract, over a year later in June 2021, the Court considered that the respondents were the cause of any prejudice they may suffer. As such, the Court did not grant the respondents leave to amend their pleadings to raise the limitation defence on the basis that it would be contrary to the overriding purpose and dictates of justice. The court balanced the possible prejudice the owners may suffer if leave were to be granted versus the possible prejudice the respondents may suffer if leave was not granted.

Further, the Court held that, if leave to amend were granted to the defendants, the plaintiff would be prejudiced by the loss of the opportunity to apply to plead these additional claims and to join the subcontractors as defendants to the proceedings as an insurance policy against the defendants' limitation defence. In balancing these considerations, the respondents' application for leave to amend was refused.

The Owners – Strata Plan No 93543 v Zhang

[2021] NSWSC 277

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 22 March 2021

PRACTICE AND PROCEDURE – application to withdraw admissions – admission in List Response that plaintiff owners corporation was entitled to benefit of statutory warranties – further admissions that defendant entered into a contract with the builder of the strata development and that the builder entered into contracts with contractors on behalf of defendant – application to withdraw admissions made on first day of a 5 day hearing – where admissions said to have been made as a result of an error by counsel then briefed and by present solicitor – where withdrawal of admissions would cause plaintiff to seek to investigate further facts hitherto admitted and result in vacation of hearing dates

Facts:

Mr Zhang ('**the defendant**') was the owner of property on which the residential strata development, the subject of these proceedings, in Cabramatta was built. Following the registration of the strata plan, the Owners Corporation ('**the plaintiff'**) became the owners. The plaintiff commenced these proceedings alleging that there were defects in the building that the defendant, as the builder and/or developer of the complex, was liable to compensate it for by reason of the statutory warranties prescribed by the *Home Building Act 1989* (NSW) ('**the Act**')

By notice of motion filed the day before this hearing, the defendant purported to withdraw admissions made by him in his List Response, namely, that:

(1) he entered into building contracts with various contractors in connection with the residential building work on the subject land;
(2) a company, ZH International Pty Ltd, of which he was a director and shareholder and which was in liquidation, entered into contracts on his behalf with contractors in relation to that residential building work; and
(3) the plaintiff was entitled to the benefit of the statutory warranties.

The defendant accepted that, by reason of the provisions of s 3A of the Act, and in the events that have happened, he was the developer of the project. The defendant further contended that ZH International was the builder. As such, the defendant contended that the abovenamed admissions were contrary to the facts, and was made as a result of an error of his former counsel and his solicitor. As to the admission that the plaintiff was entitled to the statutory warranties, the defendant submitted that this admission was also made in error as, notwithstanding that he was the developer of the project, the defendant was not liable to the plaintiff under the statutory warranties, because there was no contractual relationship between the defendant and ZH International.

Decision:

The Court refused to grant the defendant leave to withdraw the admissions, as not only would that have required that the proceedings be adjourned, but it would be profoundly unjust to the plaintiffs to vacate the hearing dates in those circumstances. Further, the plaintiff had not previously needed to investigate the matter of whether there was a contractual relationship between the defendant and ZH International, because the defendant had admitted the plaintiff was entitled to rely upon the statutory warranties. For those reasons, both requiring that the proceedings be adjourned, the Court refused to grant the defendant leave to withdraw the admissions.

Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)

[2021] NSWCA 93

Coram: Bell P, Macfarlan JA, Leeming JA

Court: New South Wales Court of Appeal

Date: 19 May 2021

BUILDING AND CONSTRUCTION – contract – damages – defects – whether the contractor was responsible for defects in materials supplied by a third party – where the relevant contractual warranty was confined to "works required to be performed by the contractor"

BUILDING AND CONSTRUCTION – contract – termination – quantum meruit – whether the contract operated to generate release and waiver of subsequent claims for payment by the contractor – where the contractor had suffered irreversible detriment by incurring liability to pay for materials prior to the principal's insistence upon strict adherence to the contract

BUILDING AND CONSTRUCTION – contract – variation – implied promise to pay – whether the works constituted "variations" as defined in the contract – where the principal requested that the contractor supply materials that it had originally insisted upon supplying itself – where written approval was sought by the contractor in respect of all other variation works

CONTRACTS – breach of contract – consequences of breach – right to damages – estoppel – promissory estoppel – whether it was unconscionable for the principal to resist payment for the performance of certain works – where the principal was positively encouraging the contractor to complete outstanding works – where such encouragement followed the principal's purported departure from the assumption that it had approved these works

EQUITY – estoppel – promissory estoppel – general principles and maxims – equity will not permit detriment to be visited upon or remain with the party who has not been sufficiently clearly disabused of the counter-party's intended departure from the relevant assumption inducing reliance

ESTOPPEL – promissory estoppel – detrimental reliance – whether the principal discharged its duty to inform the contractor labouring under an assumption that the basis for that assumption had "materially changed" – where such material change must be communicated in sufficiently clear terms – where the relevant communication did not expressly refer to or address the topic of the assumption – where the principal was positively encouraging the contractor to complete outstanding works in respect of materials that the principal knew it had originally undertaken to supply itself

Facts:

Valmont Interiors Pty Ltd ('**the appellant**') entered into a contract with Giorgio Armani Australia Pty Ltd ('**the respondent**') by which the appellant agreed to provide construction and fit-out works for a new Emporio Armani store at the Sydney International Airport. The contract sum of $989,819.00 was described as a "fixed project price inclusive of all items – excluding those supplied by client". The contract specified four "Client Supply Items", one of which was “joinery (as specified).” Because of its status as a “Client Supply Item”, the parties agreed that the joinery was to be supplied by the respondent without allowance from the contract sum. The respondent indicated to the appellant that it would engage a Chinese firm, Sun Bright Construction Co Ltd (‘**Sun Bright**’), to supply the joinery for the project.

Works were originally due to commence on 11 January 2016 and to be completed on 5 March 2016. On 1 February 2016, Sun Bright indicated to the respondent that it could not meet the tight schedule for delivery of all the necessary joinery. Subsequently, on the same day, the respondent directed the appellant to supply those items of joinery which Sun Bright was not able to supply. The appellant did supply the balance of the joinery, but the respondent refused to pay for it, claiming that the appellant was precluded from claiming for it by reason of its failure to adhere to the procedure specified in cl 15 of the contract. As such, the respondent argued that the respondent was taken to have released or waived any claim, including to quantum meruit. The respondent also refused to pay for the other variations on the basis that the appellant had not followed the cl 15 procedure.

First Instance:

The appellant commenced proceedings in the District Court of New South Wales seeking damages for breach of contract or alternatively quantum meruit. The primary judge entered judgment for the appellant in the sum of $130,973.00. This sum included an amount for certain variations in respect of the store’s façade incurred prior to 11 April 2016. The significance of 11 April 2016 was that, in an email of that date, the primary judge considered that the respondent had made it clear that it would rely on the cl 15 procedure being followed thereafter.

Accordingly, the primary judge held that the costs were recoverable by the appellant notwithstanding its failure to comply with the variation procedure specified in cl 15 of the contract, as the respondent was estopped from relying on cl 15 in relation to work performed up to 11 April 2016. After that date, however, it was held that the respondent was able to rely on the appellant’s failure to adhere to the cl 15 procedure. The primary judge rejected the appellant’s claim relating to the joinery, finding that the costs for the joinery were almost exclusively incurred after 11 April 2016 when any estoppel had ceased to operate.

Further, the respondent cross-claimed in relation to certain allegedly defective work performed by the appellant. The primary judge also entered judgment for the respondent, on its cross-claim, in the sum of $235,611.29.

The Appeal:

The appellant commenced appellant proceedings from the decision at first instance. The principal issue on appeal was whether the estoppel, which precluded reliance by the respondent on the contractual waiver and release in cl 15 of the contract, continued to operate after 11 April 2016 in respect of the supply and installation of joinery by the appellant.

Decision:

The Court of Appeal unanimously allowed the appeal in part, and made the following determinations:

(1) the estoppel which precluded reliance by the respondent on the waiver and release in cl 15 of the works contract continued to operate, at least as far as the joinery was concerned, after 11 April 2016 and did not come to an “abrupt halt” as at that date;

(2) the 11 April 2016 email was not sufficiently clear to have had the effect that it was no longer reasonable for the appellant to assume that the respondent would meet the cost of the balance of the joinery;

(3) the fact that the appellant never sought the respondent’s written approval to supply the balance of the joinery, in circumstances where it did seek approval in respect of other work, was consistent with the appellant proceeding on the assumption that the respondent’s approval was not required, as it was implicit in its original direction to the appellant to supply the joinery; and

(4) it was in all of the circumstances unconscionable for the respondent to resist payment for the provision of the balance of the joinery by the appellant.

Accordingly, the orders of the primary judge were set aside and in lieu, the Court of Appeal ordered that judgment be entered for Valmont in the amount of $255,493.

Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty Ltd

[2021] NSWSC 1534

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 30 November 2021

BUILDING AND CONSTRUCTION – adjudication – payment claim seeks payment in respect of multiple construction contracts – case law review at [10]-[26] – section to be construed in the singular (at [27]-[33]) – s13(1) Building and Construction Industry Security of Payment Act 1999 (NSW) requires payment claim in respect of one contract – adjudication determination based on such a payment claim is void (at [34]-[42]) – obiter in Ausipile v Bothar Boring [2021] QCA 223 plainly wrong – no "arrangement" where there is a contract – clauses providing that work orders comprise a new agreement do not exclude, modify or restrict operation of the Act.

Facts:

These proceedings concerned a fire asset maintenance subcontract, entered into by BSA Advanced Property Solutions (Fire) Pty Ltd ('**the subcontractor**') and Ventia Australia Pty Ltd ('**the head contractor**'), which enabled the head contractor to issue 'work orders' to the subcontractor for particular works. The subcontract stipulated that where a work order was issued, it would result in the formation of a separate agreement between the parties for the carrying out of the relevant work.

The subcontractor made a payment claim for works undertaken for more than one work order, and subsequently made an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('**the Act**') on the basis on that payment claim. The adjudicator made a determination in the subcontractor's favour.

The head contractor challenged the adjudication determination on the grounds that the underlying payment claim was not a valid one, because it claimed payment under more than one construction contract. Therefore, the issue requiring the Court's determination was whether a payment claim served under section 13 of the Act can seek a progress payment in respect of more than one construction contract.

Decision:

The Court held that the requirement that a payment claim be made in respect of one construction contract only was a jurisdictional fact, which was necessary to the existence of an adjudicator's jurisdiction to make an adjudication determination under the Act. As such, the

Court rejected the subcontractor's argument that the fire asset maintenance subcontract was an overarching 'arrangement' within the meaning of the definition of 'construction contract' in the Act, so the payment claims spanning multiple work orders were essentially submitted under one construction contract. The Court indicated that the parties had agreed to the formation of fresh contracts with each 'work order', and could not overlook the express contractual regime for something that might meet the definition of an 'arrangement'. The Court also rejected the subcontractor's submission that the clauses providing for each 'work order' to result in a new contract were contracting out of the Act, and therefore void.

Accordingly, the Court allowed the application for judicial review and quashed the adjudication determination.

Woodward v Warwick Green Building Pty Ltd

[2021] NSWCATAP 210

Coram: K Rosser, D Robertson

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 14 July 2021

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW)- – Contract not complying with the Home Building Act - Quantum meruit – Whether do-and-charge building contract an entire contract – Where owner had paid invoices issued by builder but failed to pay further invoices – Whether assessment of value of benefit received by owner should include work the subject of invoices which had been paid – Sufficiency of evidence - Whether builder had established the reasonable value of work performed.

Facts:

These proceedings concerned work carried out on a house in Boambee by the respondent, Warwick Green Building Pty Ltd (‘**the builder**’) of which the appellant, Leonie Woodward (‘**the owner**’) was the registered proprietor. In July 2018, the builder filed an application in the Tribunal seeking payment for work performed for the owner. As such, the builder sought the payment of unpaid invoices issued to the owner, for a total amount of $168,155.65. The builder contended that a contract was signed by the owner and the builder in 2017. However, it was not disputed that the document relied upon by the builder, in contended that there was a contract, did not comply with the requirements of s 7 of the *Home Building Act 1989* (NSW). The builder’s claim proceeded in the Tribunal as claim for a quantum meruit, and succeeded on that basis.

In September 2018, the owner filed a cross-claim alleging defects in the work undertaken by the builder. The Tribunal ordered that the owner pay the builder the sum of of $152,579.65 in respect of the builder’s claim and ordered the builder to pay the owner the sum of $6,012.60 on the owner’s claim. Further, in July 2020, the Tribunal ordered that the owner pay the builders’ cots on the ordinary basis, save for the costs of an expert report and one half of the amount payable to that expert. Accordingly, the owner sought to set aside both the order for payment in the primary judgement and the costs order.

The Tribunal concluded that the amount in which the builder was entitled to was to be calculated on quantum meruit basis in accordance with the value of the work on the unpaid invoices. As such, the Tribunal assessed the reasonable amount to be awarded in respect of the builder’s quantum meruit claim was at $152,579.65.

The owner appealed that decision on grounds which can be be summarised as follows.

Grounds 1 and 2: Entire Contract

These grounds were contingent upon the proposition that the contract between the owner and the builder was an entire contract, that was, that the obligation of the builder was to complete the entirety of the building work, and that the contract did not entitle him to any payment unless the entirety of the work was complete. The builder submitted that, as there was no written contract, the terms of the contract was to be found in the words and conduct of the parties. Further, the builder contended that, due to the nature of the works and the payment arrangement, the agreement was not an entire contract.

Ground 3 and 4: Procedural Fairness

The owner submitted that the Tribunal denied her procedural fairness by failing to alert her to the possibility that the Tribunal might assess the builder's quantum meruit claim by reference to the unpaid invoices, and thereby failing to provide the owner with a fair and reasonable opportunity to respond to such an approach. The builder contended that its outline of submissions provided at the commencement of the hearing did advance an alternative quantum meruit claim based upon the unpaid invoices.

Ground 5, 6 and 7: the builder's challenge to the Tribunal's assessment of reasonable value

Although the owner acknowledged that the evidence before the ribunal included time sheets recording the hours of labour charged in the unpaid invoices, the owner submitted that there was no material which had any probative value to establish the reasonableness of the amount of labour hours for which the Tribunal awarded payment.

Ground 8 and 9: rejection of the relevance of the estimated cost of the works

The Court's conclusion in respect of Grounds 1 and 2 was sufficient to dispose of Grounds 8 and 9. Those grounds relied upon the proposition that the Tribunal should have considered the builder's estimate of the amount that the work would cost in assessing the reasonable value of the work.

Decision:

Ground 1 and 2: Entire Contract

The Appeal Panel found that the contract was not an entire contract, and therefore, the Tribunal's approach to the amounts paid by the owner was correct. The Appeal Panel noted that those payments were made in respect of work that the builder had carried out, and were not open to reassessment in ascertaining the reasonable value of the work performed by the builder for which it had not been paid. Accordingly, these grounds were rejected.

Ground 3 and 4: Procedural Fairness

The Appeal Panel did not agree that the owner did not have an opportunity to address the issue or that the owner was unfairly taken by surprise by the Tribunal's reference to the content of the unpaid invoices in assessing the value of the work that the builder had not been paid for. Accordingly, these grounds were rejected.

Ground 5, 6 and 7: the builder's challenge to the Tribunal's assessment of reasonable value

The Appeal Panel held that the Tribunal did not make an error of law in assessing the reasonably value of the work in the way that it did. Further, the Appeal Panel was not persuaded that the Tribunal's conclusions in this regard were not fair and equitable or were against the weight of evidence. Accordingly, these grounds were rejected.

Therefore, all grounds of appeal having failed, the appeal was dismissed.