

***A Troika of Major Issues:
Damages, Appeals & Jurisdictional Error***

Legalwise 10th Annual Construction Law Symposium

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TOPICS COVERED BY THIS SESSION

1. Proving damages in building and construction matters post *Pisano v Williams* where the cause of action is pursuant to the *Australian Consumer Law*
 - What is the test?
 - What lay and expert evidence do I need?
2. *Civil and Administrative Tribunal Act 2013* (“NCAT Act; “NCAT) jurisdiction in building matters with 2 pathways to appeal: internal, to the NCAT Panel and external to the court
 - Analyse and compare the respective threshold tests for appellability and the pros and cons of each ‘pathway’, including as to aspects on which leave to appeal is required, and also costs.

TOPICS COVERED BY THIS SESSION

3. Security of Payment:

Analysis of recent cases to discern patterns in Supreme Court decisions post *Kirk*, *Chase Oyster Bar and Shade Systems v Probuild*

- How is one to demonstrate ‘jurisdictional error’?
- Is *Brodyn* dead?
- Has the gateway to review narrowed or widened?

***Williams v Pisano* [2015] NSWCA 177**

DAMAGES UNDER THE ACL IN BUILDING MATTERS

What is the proper measure of damages, where a plaintiff has been misled in purchasing a property that contains building defects.

- Is it the costs of rectification?
- Is it diminution in value?
- If diminution in value, then what probative value (if any) is there to evidence of costs of rectification?

***Williams v Pisano* [2015] NSWCA 177**

DAMAGES UNDER THE ACL IN BUILDING MATTERS

- The Pisanos had purchased a home in Dover Heights which Pat Williams and his wife Georgia Dandris had owned, and which was substantially renovated prior to sale. The Pisanos alleged building defects, which would cost over \$1m to rectify. The claim against the defendants included that the sale had been in trade or commerce and the marketing brochure was misleading or deceptive.
- There was no suggestion of intention to mislead.
- The Plaintiffs invoked s 18 and s 30(1)(e) *ACL*

Williams v Pisano [2015] NSWCA 177

DAMAGES UNDER THE ACL IN BUILDING MATTERS

- The measure of damages must conform to the *remedial purpose* of the ACL and “to the justice and equity of the case”: at [99]; must “fairly” reflect the liability imposed by ss 18 and 30 of the *ACL* (at [112]).

NOTE: one does *not* see such statements in damages actions for breach of contract or in tort.

***Williams v Pisano* [2015] NSWCA 177**

DAMAGES UNDER THE ACL IN BUILDING MATTERS

- In many cases, the measure of damages in tort is the appropriate guide in determining an award of damages under s 236.The central requirement under s 236 is to establish a causal connection between the loss claimed and the contravening conduct.....general principles for assessing damages may have to give way to solutions better adapted to give the injured claimant an amount that will *most fairly compensate* for the wrong suffered.”

DAMAGES: RECTIFICATION V DIMINUTION IN VALUE

- *“It is overly simplistic to say that the correct measure of loss in a case such as this is diminution in value, arrived at by subtracting costs to rectify from the purchase price of the property.”*

See paras [104] – [105] per Emmett JA

- An alternate basis on which the appeal was upheld was that the Pisano’s only led evidence of the costs of rectification, *not* diminution in value: and the two measures did not necessarily lead to the same number.

NCAT APPEALS in *BUILDING MATTERS* – SOME RULES AND PRACTICE TIPS

- Sec 80 *NCAT Act* provides for internal appeals from a decision of the Tribunal at first instance.
- Internal appeals are to the NCAT Appeal Panel: *NCAT Guideline 1 on Internal Appeals, November 2019* (available online).
- *NCAT Rules 25-26, 38 and 38 A* deal with the procedure for External and Internal Appeals, including replies eg lodging notices; using approved forms; time limits and the like.

NCAT Appeals: Seeking a stay; requesting reasons

- When appealing an NCAT decision, consider:

1. seeking a *stay*.

Reason: NCAT decisions take effect from the date on which they are delivered: Sec 61 *NCAT Act* ; and there is no automatic stay Sec 43 (2) (Appeals to the Panel) & Sec 83 (5) *NCAT Act* (appeals to the SC).

2. seeking *written reasons* for the decision pursuant to Sec 62 of the *NCAT Act*. Note the strict time limits.

Without reasons, it may not be possible to demonstrate appellable error.

NCAT: Appeals to the NCAT Appeal Panel

- Most of the final decisions at first instance in relation to the *Home Building Act* are internally appellable: e.g. *NCAT Act*, Sec 32
- Appeals to the Appeal Panel can be on various bases.
 1. error of law, which requires no leave.
 2. where the matter involves issues of principle, questions of public importance or a clear injustice: leave to appeal from the Panel is required.

NCAT Guideline No 1 Internal Appeals

- “[24] In the case of appeals from the Consumer and Commercial Division *where leave is required*, cl 12 of Schedule 4 to the Act says that leave can only be granted if the Appeal Panel is satisfied that the appellant may have suffered a *substantial miscarriage of justice because*: (a) the decision was not fair and equitable; (b) the decision was against the weight of the evidence; or (c) significant new evidence has arisen (that was not reasonably available at the time of the original hearing).

[25] The operation of these provisions was considered in *Collins v Urban* [2014] NSWCATAP 17 at [65] to [79].”

NCAT Appeals: Suitor's Fund Certificates

- Sec 6 of the *Suitors Fund Act* does not authorise an Appeal Panel of the Tribunal to award certificates under that Act:

Gaynor v Burns [2015] NSWCATAP 150 at [61] and

Berger v Boulder Projects [2015] NSWCATAP 274 at [43]

- Cf appeals to the Supreme Court, which Court is authorised by that Act to issue certificates.

NCAT Appeals: Costs

- Where the amount in issue in the proceedings is more than \$30,000 and the appeal is brought from the Consumer and Commercial Division, it is not necessary to find special circumstances before making an order in respect of the costs of the appeal.
- Otherwise, the costs of an internal appeal to the Appeal Panel usually borne by the unsuccessful party: NCAT Rule 38 A (applied in para [36] of *Littles*).

NCAT Appeals - special circumstances

- The expression “special circumstances” in the costs rule provision in s60 of the *NCAT Act* means:

“circumstances that are out of the ordinary, they do not have to be extraordinary or exceptional. Further, the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs.....” *Flat Glass Industries Ltd v MCS Builders Pty Ltd* [2015] NSWCATAP 148 at [43] ([11]).

See further *Liang v University of Technology Sydney* [2019] NSWCATAP 17

APPEALS FROM NCAT PANEL TO THE SC

- Appeals against Panel decisions are available pursuant to Sec 83 of the *NCAT Act*, where there has been an *error on a question of law*; with *leave* of the Supreme Court.
- Exception: the decision the Registrar of the Tribunal.
- As to how to demonstrate an error of law, see paras [53] ff of *Wilson v Brisbane; Wilson v Chan & Naylor Parramatta Pty Ltd* [2019] NSWSC 1598.
- Procedure: Summons filed in the SC seeking leave to appeal, filed with the Supreme Court of NSW within 28 days of the date of the Appeal Panel's decision.
- The party seeking leave may file the reasons for the decision when they become available but not later than 3 days prior to the hearing of the Summons for Leave to Appeal (*UCPR* 50.12).

APPEALS TO THE SUPREME COURT— PRINCIPLES REGARDING LEAVE

- An applicant for leave must demonstrate something more than that the Appeal Panel was arguably wrong in the conclusion arrived at.
- Where small claims are involved, it is important that there be early finality in determination of litigation, *“otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute.”*

APPEALS TO THE SUPREME COURT— PRINCIPLES REGARDING LEAVE

- Ordinarily it is appropriate to grant leave to appeal “only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, *in the sense of going beyond what is merely arguable.*”
- The Supreme Court should not read the Appeal Panel’s reasons “*with an eye finely tuned for error*”.

Authorities in respect of the above principles collected by As J Harrison in *Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange* [2019] NSWSC 897.

NCAT appeals: case study of an appeal to the Panel

***Littles v J & K Homes Pty Ltd* [2017] NSWCATAP**

- The learned Senior Member dismissed a building claim for defects and incomplete works, on the basis that a claim for damages cannot be sustained where the contract is on foot and has not, as at the date of hearing, been terminated.

Reliance was placed by him on *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248.

NCAT appeals: case study

***Littles v J & K Homes Pty Ltd* [2017] NSWCATAP**

- Section 48MA of the *Home Building Act* states that when deciding a building claim involving an allegation of defective work undertaken by a party to the proceedings, the Tribunal is to have regard to the principle that *rectification of the defective work* by that party is the *preferred outcome*.

NCAT appeals: case study

Littles v J & K Homes Pty Ltd [2017] NSWCATAP

- The proposition I advanced on appeal (and which was accepted) was that the primary remedy being sought was an order for rectification of the work (not damages) for breaches of statutory warranty, the learned Senior Member erred in law in concluding that the Littles had no claim so long as the contract remained on foot.

i.e. what was being sought by the Littles was a species of *statutory specific performance* and to seek that remedy, the contract *must* be on foot.

***SOPA*: CERTIORARI IN RESPECT OF JURISDICTIONAL ERROR OF LAW**

- The debate as to whether there is certiorari or not in relation to the determination of an adjudicator, and if so, whether for “mere” error of law by an adjudicator, or only error of law that also amounts to jurisdictional error, arises because the Acts themselves do not make any express reference to this matter. It is left to courts to divine Parliament’s intention.
- 2003: *Musico v Davenport* [2003] NSWSC 977: judicial review was available in NSW for jurisdictional error of law, and this included considering whether the adjudicator had power to make the determination.

SOPA / CERTIORARI cont'd

- 2004: certiorari fell out of vogue in NSW post the NSWCA decision in *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 , which held that an *injunction* was the appropriate remedy.
- *Brodyn* said that rather than reviewing the decision of an adjudicator on the basis of jurisdictional and non-jurisdictional error of law, an adjudication would be valid unless it failed to comply with one of the 5 “basic and essential” requirements of the Act.

SOPA / CERTIORARI cont'd

- *2010:*

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190, which departed from its previous decision in *Brodyn* by holding that held that determinations by adjudicators are in principle amenable to orders in the nature of certiorari for *jurisdictional error*.

SOPA / CERTIORARI cont'd

- 2016:

the High Court held in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence* [2016] HCA 52 that a reference date for making a progress claim, was a jurisdictional fact necessary as a pre-condition for there to be a valid payment claim, and hence a valid determination.

However, their Honours warned against placing too much stock on viewing the proceedings through the lens of jurisdictional fact, which they said embodied merely the conclusion being contended for.

SOPA / CERTIORARI: EXAMPLES

Since the decision in *Chase Oyster Bar*, the following have been identified as examples of jurisdictional error:

(i) Where, on the face of the adjudicator's reasons, the adjudicator did not perform their statutory function: *Bauen Constructions Pty Ltd v Westwood Interiors Pty Ltd* [2010] NSWSC 1359 (18 November 2010).

SOPA / CERTIORARI: EXAMPLES

(ii) here, delay being in issue, “[r]ather than approaching the matter by way of determining whether any delay had been established, the adjudicator found delay because, as she put it, the plaintiff had offered no alternative explanation. This approach discloses no logical or rational reasoning process for the conclusionthe adjudicator did not carry out the task given to her by the Act and fell into jurisdictional error”: *St Hilliers Contracting Pty Ltd v Dualcorp Civil Pty Ltd* (2011) 27 BCL 437; [2010] NSWSC 1468.

The next update to my loose leaf service on *Injunctions: Law & Practice*, published by Thomson Reuters will have a comprehensive review of all the latest cases. The update ought go to press in the next few months.