Civil and Administrative Tribunal

New South Wales

Case Name:	Shanahan v Erwin Fornasier t/as Enhance Building
Medium Neutral Citation:	[2021] NSWCATAP 158
Hearing Date(s):	15 March 2021
Date of Orders:	31 May 2021
Decision Date:	31 May 2021
Jurisdiction:	Appeal Panel
Before:	The Hon F Marks, Principal Member D Robertson, Senior Member
Decision:	(1) The appeal is allowed in part. (2) The Tribunal's orders dated 27 October 2020 are set aside. (3) The proceedings are remitted to the Consumer and Commercial Division of the Tribunal for determination consistent with these reasons, including determination of the cost of rectification of the work associated with the construction of the concrete slab. (4) The orders of the Tribunal dated 19 February 2021 relating to the costs of the proceedings are set aside. (5) The issue of the appropriate orders relating to the costs of the proceedings at first instance, including both the initial hearing and the remittal hearing, is remitted for determination by the Tribunal hearing the remitted proceedings. (6) Any application in respect of the costs of the appeal is to be made by written submissions filed and served within 14 days of the date of publication of this decision. (7) If either party files submissions in accordance with order (6) above the other party may file and serve submissions in response within a further 14 days. (8) Submissions strictly in reply to any submissions filed in accordance with order (7) above may be filed and

	served within a further 7 days.
Catchwords:	BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Statutory warranty – Compliance with the law – Construction work carried out that did not comply with development consent or construction certificate – Whether in breach of statutory warranty – Whether builder entitled to payment for work – Whether builder repudiated contract – Whether builder entitled to terminate contract by reason of the owner's non-payment of a progress payment and the exclusion of the builder from the site.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) s 80(2), Sch 4 Cl12(1) Home Building Act 1989 (NSW) ss18B,18F,18G
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 The Owners - Strata Plan No 66375 v King [2018] NSWCA 170
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Rebecca Shanahan (Appellant) Erwin Fornasier t/as Enhance Building (Respondent)
Representation:	Counsel: B DeBuse (Appellant) H Mann (Respondent) Solicitors: Watson & Watson Solicitors (Appellant) Mayweathers (Respondent)
File Number(s):	2020/00371190 (AP 20/49486)
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal

Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	27 October 2020
Before:	C Paull, Senior Member
File Number(s):	HB 19/34168; HB 19/36519

REASONS FOR DECISION

1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal (the Decision) by which the appellant, Rebecca Shanahan (owner), was ordered to pay the respondent, Erwin Fornasier t/as Enhance Building (builder), the sum of $67,962.60.

2 That sum was calculated as the sum of: the builder's unpaid invoice in respect of demolition works carried out by the builder on the owner's property - $28,500; an amount held to be payable by way of quantum meruit in respect of work performed by the builder in relation to the construction of a concrete slab on the property - $17,426; the builder's loss of profit arising by reason of the owner's termination of the building contract between the parties - $20,040; and reimbursement of expenses incurred by the builder in relation to acoustics and asbestos removal - $1,996.06.

3 By a separate decision dated 19 February 2021 (the Costs Decision), the Tribunal ordered the owner to pay the builder's costs on the ordinary basis up to 16 April 2020 and on the indemnity basis thereafter.

Background

4 The owner and the builder entered into a written contract for the renovation of the owner's house in Leichhardt, including demolition of part of the existing structure and its replacement with a new structure. The contract was a standard form Home Building Contract for Work over $20,000. The contract was executed by both parties and dated 14 May 2019, although it was common ground that the contract was not executed until June 2019, by which time work had already commenced on site.

5 Clause 1 of the contract specified the documents which formed part of the contract. The documents specified included a document identified as “email job proposal” dated 14 May 2019 as well as the “DA conditions” dated 30 November 2018, the construction certificate dated 10 April 2019, and plans and other documents prepared by R&L Starr Architects dated May 2018. The document identified as “email job proposal” included a schedule of work which was also attached to the contract and initialled by the parties.

6 Clause 3 of the contract required that the builder comply with the statutory warranties arising pursuant to s 18B of the *Home Building Act* 1989 (NSW) (HBA) and “comply with all relevant Australian Standards, laws and the requirements of the relevant local Council and all statutory authorities with respect to the work”.

7 Clause 4 provided for the payment of a deposit of $28,500, which was just under 10% of the total contract cost of $285,900.

8 Clause 12 provided for progress payments. The first two progress payments were:

(1) Demolition - $57,000 (of which the contract noted that 50% was payable by way of the deposit) leaving a balance of $28,500; and

(2) Concrete slab - $28,500.

9 Clause 12 provided that the progress payments were to be paid within 5 business days of the completion of the stages of work nominated in the schedule of progress payments, and further provided that “If there is any bona fide dispute in relation to the value or quality of work done, the dispute must be dealt with in accordance with the dispute resolution procedure set out in clause 27”.

10 Clause 12 also provided that, in those circumstances, the owner was entitled to withhold from the progress payment “an amount estimated by the owner, acting reasonably, equal to the owner’s estimate of the value of the disputed item” and that the builder must continue to carry out his obligations under the contract pending resolution of the dispute.

11 Clause 18 provided "in carrying out the work the contractor must comply with the codes, standards, specifications and conditions of consent as set out in Clause 3".

12 Clause 24 provided:

> "If the owner, without reasonable and substantial cause:
>
> …
>
> > fails to pay a progress payment or any other amount due to the contractor within time allowed, but only if the owner fails to pay the progress payment or other amount due after a written notice from the contractor requiring payment within a further period of 5 business days
>
> …
>
> > denies the contractor or the contractor's sub-contractors access to the site so as to prevent the work from proceeding, or otherwise prevents the contractor from carrying out the work …
>
> the contractor may, without prejudice to any other rights under the contract, suspend the work by giving written notice to the owner in accordance with clause 28 (Giving of Notices) specifying the reason."

13 Clause 27, headed "Disputes", provided:

> "If the owner or contractor considers that a dispute has arisen in relation to any matter covered by this contract, either during the progress of the work, after completion of the work or after the contract has been terminated, that person must promptly give to the other party written notice of the items of dispute."

14 The clause provided for the parties to confer with a mutually agreed third party to assist in the resolution of the dispute by mediation or expert appraisal and, if the parties did not agree to confer with a third party or a dispute is not resolved, the owner may notify and seek the assistance of Fair Trading to resolve the dispute.

15 Clause 27 concluded:

> "Even if a dispute has arisen the parties must, unless acting in accordance with an express provision in this contract, continue to perform their obligations under the contract so that the work is completed satisfactorily within the agreed time".

16 Clauses 25 and 26 dealt with termination of the contract by the owner and builder respectively. Relevantly, Clause 26 provided that, if the owner failed to make a progress payment or denied access to the site so as to prevent the work from proceeding, the builder could notify the owner in writing that "unless the default is remedied within 10 business days or such longer period as

specified" the builder will terminate the contract, and that, if the owner did not remedy the default within the time allowed, the builder could terminate the contract by giving written notice to that effect.

17 We note that the schedule, which formed part of the email dated 14 May 2019 referred to in Clause 1 and which was attached to the contract, referred, inter alia, to the following work:

> "Dig new footings
> Level out for new slab
> Dig trench for sewer and stormwater (plumber)
> Compact all ground ready for new slab
> Install orange builder's plastic film
> Install trench mesh
> Install mesh
> Install mesh chairs
> Termite protection (included in material cost)
> Install expansion joints between outer walls
> Pour concrete and pump"

18 The owner paid the deposit of $28,500 and work under the contract commenced with the demolition of the rear of the house in late May 2019.

19 On 3 July 2019, the builder issued a claim for payment of the first progress payment, Stage 1, that is demolition, being $28,500. At that time, the builder commenced preparatory work in relation to the construction of a concrete slab for the new building work.

20 It is not in dispute that the approved plans, the subject of development approval and the construction certificate, provided for the relevant part of the building to have timber framing rather than a concrete slab.

21 Commencing on the evening of 4 July 2019 there was an exchange of emails between the parties in relation to the acoustic aspects of the windows as designed. In an email sent at 6.20pm on 4 July 2019 the builder sought an urgent meeting with the owner, the architect, the structural engineer and the acoustic consultant and stated: "no further works can be completed until this matter is resolved".

22 In the course of emails exchanged over the following three days the parties expressed the intention to meet at the site on 8 July 2019 at 1 pm. In emails sent on 6 and 7 July 2019, the owner referred to the builder's "unapproved stop work" and suggested that if the builder did not recommence work he would be in "substantial breach" of the contract.

23 At 5.52 pm on 7 July 2019 the builder emailed the owner "we are still working on your project trying to find solutions and will be on site tomorrow. See you at 1 pm tomorrow".

24 At 11.25pm on 7 July 2019 the owner emailed the builder: "I have been alerted to a possible contravention on my construction certificate and need to meet with council before you recommence work. As a result I ask you not to come on site before the 1pm meeting."

25 The parties exchanged further emails between 5am and 6am the following morning with the builder stating that he would be on site and the owner demanding that the builder not attend before the meeting at 1pm.

26 The builder attended the site early on the morning of 8 July 2019 with tradesmen. It is apparent that the owner was present and directed the builder and his workers to leave. At 11am the owner changed the code on the garage door.

27 The garage door was the means of access to the rear yard of the premises where the work was being carried out. The changing of the code effectively excluded the builder. The owner submitted that the builder could have entered through another door but the owner's intention to exclude the builder was clear.

28 On 8 July 2019 the builder forwarded to the owner a letter in which the builder stated:

> "I confirm that as of today 8/7/19 you have locked us out of the site at xxx Leichhardt.
>
> I have no alternative other than to suspend the works.
>
> I advise pursuant of clause 18 of the contract that there is a discrepancy in the documentation provided by you."

29 The builder referred to issues in relation to aircraft noise assessment in relation to acoustic requirements and continued:

> "Further to clause 18 of the contract, I formally advise you in writing that the construction of the ground floor has proceeded on the bases of being a concrete slab instead of timber framing as has been previously discussed with you. The construction from timber framing to concrete is required because the current design does not facilitate the required sub-floor ventilation. This alternation from a timber floor frame to concrete floor would not require a cost variation."

30 The builder concluded:

> "Under clause 24 of the contract, I provide formal notice that I am suspending the works until all the above issues are appropriately resolved.
>
> Pursuant of clause 27 I formally advise you that we are in dispute."

31 On 9 July 2019 the builder had a telephone conversation with the owner's husband, during which, according to the builder's handwritten note, the owner's husband informed the builder unequivocally that the owner would never work with the builder again and that he should take his equipment and leave.

32 On 12 July 2019 the builder forwarded a letter headed "Notice of Substantial Breach of Contract". The letter stated that the owner was in substantial breach of the contract by denying access to the property and by failing to pay the amount of $28,500 being the balance of the first progress payment. The letter stated that the works were suspended pursuant to clause 24 of the contract and that if the breaches were not remedied within 10 business days the builder would terminate the contract.

33 On 31 July 2019 the builder forwarded a letter to the owner noting that there had been no remedy of the contractual breaches and stating that the contract was terminated.

34 It does not appear there was any response by the owner to any of these letters.

35 The owner retained another builder to complete the work. The new builder commenced work in September 2019.

36 The owner commenced proceedings in the Tribunal seeking compensation for allegedly defective building work, reimbursement of the deposit, and damages for additional accommodation costs said to have been incurred by reason of delay in the completion of the work.

37 The builder also commenced proceedings in the Tribunal seeking payment of two invoices amounting to $47,129 in respect of work carried out, an order that

he was not obliged to repay the deposit, and compensation for breach of contract including loss of profit and "expenses associated with being locked off the site."

38 Each party asserted that the other was at fault in relation to the termination of the contract. The owner asserted that the builder was in breach of the contract and the statutory warranties by carrying out work for the construction of a concrete slab which was not in accordance with the plans and specifications or the development consent. The builder relied upon the notice of termination of 31 July 2019.

The Decision

39 By its Decision, delivered on 27 October 2020, the Tribunal determined that the contract required the construction of a concrete slab. The Tribunal held (at [78]):

> "While this may be contrary to the DA and the Construction Certificate, a consequence which the evidence suggests the parties could address by approaching the local Council if matters had proceeded, the fact remains that the DA and CC were obtained by the Homeowner prior to the written contract being executed and that when the parties subsequently came to execute the contract they signed up for a concrete slab. Indeed, it could be said that if the builder proceeded with a timber bearing floor support, he would have been in breach of the contract."

40 At [91] the Tribunal held:

> "I therefore find that the Homeowner should be bound by the contract she signed and having contracted with the builder for a concrete slab, she was not entitled to lock him out of the site because he was attempting to build that structure."

41 The Tribunal found that the builder was entitled to terminate and did terminate the contract in accordance with the provisions of the contract. The Tribunal awarded the builder the unpaid invoice for the balance of the demolition, the value of the work completed in relation to the concrete slab on a quantum meruit basis and compensation for the loss of profit on the balance of the contract, calculated at 10% of the cost of the remaining stages.

42 By the Costs Decision the Tribunal determined that the builder had succeeded in the proceedings and had achieved a better outcome than an offer of settlement made by the builder on 16 April 2020. As the amount in issue in the proceedings exceeded $30,000, the Tribunal did not need to find special

circumstances before making an award of costs. The Tribunal awarded the builder the costs of the proceedings and ordered that those costs should be paid on the indemnity basis from 17 April 2020, the day after the builder made his offer of settlement.

The scope and nature of internal appeals

43 By virtue of s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act), internal appeals from decisions of the Tribunal may be made as of right on a question of law, and otherwise with leave of the Appeal Panel.

44 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

> 1. Whether there has been a failure to provide proper reasons;
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> 2. Whether the Tribunal identified the wrong issue or asked the wrong question;
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> 3. Whether a wrong principle of law had been applied;
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> 4. Whether there was a failure to afford procedural fairness;
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> 5. Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;
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> 6. Whether the Tribunal took into account an irrelevant consideration;
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> 7. Whether there was no evidence to support a finding of fact; and
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> 8. Whether the decision is so unreasonable that no reasonable decision-maker would make it.

45 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice because:

> 1. The decision of the Tribunal under appeal was not fair and equitable; or
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> 2. The decision of the Tribunal under appeal was against the weight of evidence; or
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> 3. Significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

46 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

47 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

48 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> 1. issues of principle;
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> 2. questions of public importance or matters of administration or policy which might have general application; or
>
> 3. an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> 4. a factual error that was unreasonably arrived at and clearly mistaken; or
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> 5. the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of appeal

49 The owner set out her grounds of appeal in a document attached to the Further Amended Notice of Appeal. Although the attachment to the Further Amended Notice of Appeal stated four grounds of appeal, there was considerable overlap between and repetition within the various grounds. The fundamental proposition raised by the grounds of appeal was that, because the development consent and construction certificate required a timber framed floor, by proceeding with the construction of a concrete slab, the builder was in breach of the implied warranties in s 18B(1)(a) and (c) of the HBA.

50 The attachment to the Further Amended Notice of Appeal asserted that the Tribunal should have found:

(1) That the contract was ineffective and of no effect by reason of s 18G of the HBA, which provides: “a provision of an agreement or other instrument that purports to restrict or remove the rights of a person in respect of any statutory warranty is void”.

(2) That; because the work carried out by the builder in relation to the construction of a concrete slab was carried out in breach of statutory warranties; because the work relating to the construction of the slab was required to be demolished and therefore demolition was not complete; and because, by failing to demolish the work that had been carried out in relation to the construction of the concrete slab or carry out the contract in accordance with the plans, the respondent had evinced an intention not to be bound by the contract, the builder was:

(a) Not entitled to charge for demolition while the work "remained in breach of the statutory warranties"; and

(b) Not entitled to issue a Notice of Breach or terminate the contract.

(3) That the builder was not entitled to his loss of profit or the cost of the work carried out in relation to the construction of the concrete slab.

51 The owner also sought leave to appeal on the basis that:

(1) "It is contrary to principle and the intent of the [Home Building] Act that a Builder should be permitted to construct residential work that does not comply with the law without undertaking at the minimum, the requirements of s 18F. The findings of fact of Senior Member Paull to the contrary failed to satisfy or address the requirements of the Act";

(2) "The entry into a contract which to the knowledge of the builder has as its object construction which is not permitted by the development approval and the construction certificate is contrary to the requirements of [the statutory warranties]; and any finding that permits such conduct on the basis of evidence other than compliance with s 18F, is inconsistent with the Act and the dictates of justice"; and

(3) The findings of the Tribunal that the appellant had knowledge of the construction of the concrete slab and consented to it were against the weight of the evidence.

52 The findings the subject of the third ground for seeking leave to appeal appear to be paragraphs [85] and [86] of the Decision, which were as follows:

> 85. What is more, the emails between the parties in early June 2019 at the very least show an earnest attempt by the Builder to keep the Homeowner informed and abreast of things. These communications make it difficult to accept that the Builder would unilaterally proceed to change from a wooden to a concrete flooring structure unless the matter had been agreed upon by the Homeowner and as recorded in his quote and the written contract.
>
> 86. In contrast, the Homeowner's communications do not support her claims that she did not agree to a concrete slab footing. When she appears to raise this matter in her 5/7/19 email to the Builder, she makes an oblique reference to "a possible contravention on my construction certificate" with no specific mention of what was apparently her great concern about the concrete slab flooring support. Curiously, prior to this there is the Homeowner's email of 28/6/19 where she states: "I thought you were concreting (my emphasis) this week?"

53 The owner sought that the Decision be set aside and that the proceedings be remitted to the Consumer and Commercial Division, differently constituted, for re-determination of the owner's claim for damages. The owner also sought that the Costs Decision be set aside. The challenge to the Costs Decision was entirely contingent upon the owner succeeding in the appeal at least to some degree, thereby removing the basis upon which the costs issues had been determined.

The owner's submissions

54 In support of the submission that the work carried out by the builder in relation to the construction of a concrete slab had been carried out in breach of the statutory warranties, the owner referred to the Court of Appeal decision in *The Owners-Strata Plan No 66375 v King* [2018] NSWCA 170, in which Ward and White JJA held that the implied warranty in s 18B(1)(c) (that the work would comply with the law) was independent of the warranty in s 18B(1)(a) (that the work will be done in accordance with the plans and specifications set out in the contract).

55 The primary judge in that case had held that the "work" referred to in s 18B(1)(c) is the work done under the contract into which the s 18B warranties are implied and that, because the builder's obligation "was to construct the development in accordance with the plans and specifications that formed part of the contract", there was no breach of the warranty in s 18B(1)(c) even where the work required by the plans and specifications did not comply with the law.

56 White JA held at [402] to [408]:

> 402. I do not agree. The expression "the work" is first used in s 18B(a) which stated (at that time) that "the work" will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract. That is a reference to "residential building work" referred to in the chapeau to s 18B. The reference to "the work" in s 18B(c) is again a reference to residential building work. As Ward JA observes (at [271] above) in s 18C references to "the work" are to the "residential building work" which has been "done" by the developer. "Residential building work" means, relevantly, "any work involved in ... the construction of a dwelling" (definitions, s 3). It was the work involved in the construction of the dwelling that was required to comply with any law.
>
> 403. This conclusion follows from the text of the legislation. It is confirmed by the purpose of the provision explained in the Minister's Second Reading Speech quoted by Ward JA at [289] that emphasises the then government's

intention to "tighten up" the content of home building contracts to redress what was considered to be a process that hitherto had been heavily skewed in favour of the builder. There is nothing in the Second Reading Speech that suggests that any of the statutory warranties could be modified by the contractual terms. To the contrary, the Minister said that "these statutory warranties will not be able to be excluded by any provision of the contract ...".

404. If the construction of s 18B(c) adopted by the primary judge were correct then it would follow that not only the warranty provided in that paragraph, but also the warranty provided in s 18B(b) could be excluded by a builder's including in the building contract plans for the construction of the building and specifications for the materials to be used in that construction that did not comply with the requirements of the Building Code of Australia, notwithstanding that the Building Code had the force of law. That construction should not be accepted.

405. The Kings did not seek to support the construction adopted by the primary judge by reference to the reasons in Mr Grubits' report quoted at [397] above that:

> "- The builder is unlikely to possess the specialist BCA expertise required to determine compliance with the BCA, particularly for a complex building with a number of *Alternative Solutions.*
>
> - The builder does not have design responsibility and therefore has to accept design advice, and
>
> - The hierarchy of the clauses in the HBA can be considered to infer a priority order."

406. The factual premises of that contention should be accepted in the absence of any contradictory material. But the question is not whether it is fair to impose upon the builder responsibility for the failure of the building work to comply with the BCA, but whether s 18B(c) imposes that responsibility. Where the BCA has the force of law, that responsibility is imposed. If the builder has to rely upon the expertise of another, such as an architect or a fire safety consultant, to satisfy the builder's statutory warranty, then the builder might be well advised to negotiate contractual protection for the builder's potential statutory liability. That is not such an extreme outcome that would displace what is otherwise the natural construction of s 18B(c).

407. The order of provisions is sometimes relevant in the construction of deeds or contracts. Where a contract or deed contains conflicting provisions such that a later provision "destroys altogether the obligation created by the earlier clause" (*Forbes v Git* [1922] 1 AC 256 at 259) the later provision will be rejected as repugnant to the former. This is a principle of last resort to which recourse may be had only when every other avenue of resolving inconsistencies has been exhausted (*Hume Steel Ltd v Attorney-General (Vic)* (1927) 39 CLR 455 at 465; *Durbin v Perpetual Trustee Co Ltd* (1995) NSW ConvR 55-725 at 55,603-4). Generally, inconsistencies in a contract can be resolved by ascertaining the parties' intentions from the language they have used, considering the document as a whole, and endeavouring to harmonise the conflicting parts so as to give effect to each of them. If the later clause can be read as qualifying rather than destroying the effect of the earlier clause, the two will be read together (*Australian Guarantee Corporation Ltd v Balding* (1930) 43 CLR 140 at 151; *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corp Pty Ltd (No 1)* (1993) 178 CLR 379 at 386-7; Lewison and

> Hughes, *The Interpretation of Contracts in Australia* (2012, Law Book Co) [9.08], [9.13]).
>
> 408. The statutory warranties can be read together. The builder warrants both that the work will be carried out in accordance with the plans and specifications and that it will comply with the law. Impliedly the builder warrants that the construction of the work in accordance with the plans and specifications will comply with the law. The order of precedence does not mean that s 18B(c) has no application if the non-compliance with the law is the result of design defects in the plans and specifications.

57 Ward JA, at [325], agreed with those reasons, stating:

> "the statutory warranties can be read together so that impliedly, the developer warrants under the notional contract that the work done in accordance with the plans and specifications will comply with the law, and therefore that s 18B(c) continues to apply even where the non-compliance with the law is the result of design defects in the plans and specifications".

58 The owner submitted that, in carrying out construction which was contrary to or inconsistent with the development approval or construction certificate, the builder was acting in breach of the implied warranty in s 18B(1)(c).

59 The owner further submitted that that breach was sufficient justification for the owner to terminate the contract. The owner submitted that the builder had been given an explicit direction to comply with the construction certificate by the correspondence from the owner commencing on 4 July 2019 and had refused to do so.

60 The owner submitted, in the alternative, that the builder was not entitled to compensation for breach of contract as he was not ready, willing, and able to perform the contract because he was refusing to build in accordance with the development approval and construction certificate.

The builder's submissions

61 The builder submitted that, at the time the owner changed the code on the door of the garage on 8 July 2019, nothing permanent had been constructed and it remained open to the builder to rectify any defective work, including removing the formwork which he had constructed, and constructing a timber floor, if the owner preferred that course, rather than seeking amendments to the development approval and construction certificate to enable the construction of the concrete slab which the builder asserted was required by the contract.

62 The builder disputed that the directions given by the owner requiring the builder to comply with the construction certificate were referable to the conduct of the builder in proceeding with the construction of a concrete slab rather than a timber floor. The builder submitted that those communications only referred to the issues with the acoustic capacity of the windows.

Consideration

63 The Court of Appeal decision in *The Owners - Strata Plan No 66375 v King* clearly indicates that, regardless of whether the contract, properly construed, required the construction of a concrete slab or timber frame, the building of a concrete slab in contravention of the development approval and construction certificate was a breach of the statutory warranty in s 18B(1)(c) of the HBA.

64 We do not consider it necessary to determine whether the contract, properly construed, required the construction of a concrete slab or a timber frame.

65 The contract documents listed in clause 1 of the contract included the email job proposal dated 14 May 2019 (the schedule to which was attached to the contract and included explicit references to the installation of a concrete slab), as well as the development approval, the construction certificate, and the architectural plans (which required the construction of a timber frame).

66 Below the list of documents incorporated into the contract, Clause 1 of the contract provided: “in the event of any difference or inconsistency between the above documents, the contractor must discuss the matter with the owner and attempt to seek agreement on the work to be performed or the materials to be used.” Clause 1 also referred to the dispute resolution procedures in Clause 27.

67 There was a conflict between the documents incorporated by reference within the contract, in that the progress payments schedule and the schedule attached to the contract clearly contemplated the construction of a concrete slab, while the development approval, the construction certificate and the plans and specifications referred to in the contract required the construction of a timber frame.

68 However, we do not accept that that made the contract illegal or contrary to s 18G of the HBA. Rather, Clause 1 of the contract imposed an obligation on the parties to resolve the conflict.

69 It is clear that the construction of a concrete slab was or would have been a breach of the statutory warranty in s 18B(1)(c), unless and until the development approval and construction certificate were amended. The fact that the experts suggested that a variation, to substitute a concrete slab for the timber frame, could have been approved, did not make the builder's construction of a concrete slab lawful.

70 However, the fact that the builder had commenced construction of the slab, including setting up formwork and placing steel reinforcement, did not entitle the owner to terminate the contract. In our view the builder had clearly not repudiated the contract by doing so.

71 The builder relied upon the High Court decision in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423. In that decision, at 431 to 432, Stephen, Mason and Jacobs JJ held:

> The relevant question therefore is whether the events which we have recounted evidence an intention on the part of the appellant to repudiate or renounce the contract or more precisely whether such an intention is to be inferred from those events.
>
> For the respondents it was submitted that such an intention should be inferred from the appellant's continued adherence to an incorrect interpretation of the contract. It was urged that the appellant, because it was acting on an erroneous view, was not willing to perform the contract according to its terms. No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 at 734 ; [1964] 3 All ER 30 at 43 :
>
> > "In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments …".
>
> In this case the appellant acted on its view of the contract without realizing that the respondents were insisting upon a different view until such time as they

> purported to rescind. It was not a case in which any attempt was made to persuade the appellant of the error of its ways or indeed to give it any opportunity to reconsider its position in the light of an assertion of the correct interpretation. There is therefore no basis on which one can infer that the appellant was persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement.

72 We accept the submission of the builder that the correspondence leading up to the owner's changing of the code on the garage on 8 July 2019 (with the possible exception of the email sent by the owner at 11.25pm on 7 July 2019) did not relate to the fact that the builder was preparing to lay a concrete slab rather than constructing a timber frame. Rather, that correspondence was directed to the acoustic issues related to the windows. In the language used in *DTR Nominees*, in this case the builder acted on his understanding of the contract without any indication from the owner that she had a different view of the contract. Even the email sent by the owner at 11.25pm on 7 July 2019 only referred to "a possible contravention on my construction certificate" and said nothing to alert the builder that the owner considered him to be in breach of contract by proceeding with the construction of a concrete slab.

73 By locking out the builder, failing to pay the progress payment due upon completion of demolition and failing to engage with the builder to resolve the discrepancy between the contract documents, the owner was in breach of the contract.

74 Upon the owner failing to respond to the breach notice from the builder, the builder was entitled to terminate the contract. We reject the owner's submission that the builder was not ready, willing, and able to perform the contract.

75 Upon termination, the builder was entitled to payment for the demolition work carried out up to the date of termination, either under the contract or on a quantum meruit basis.

76 The Tribunal determined that the builder was entitled to the progress payment due on completion of demolition, that is $28,500. The owner, by the Further Amended Notice of Appeal, challenged this finding, insofar as she asserted that "the work was unauthorised and therefore was itself required to be demolished and therefore the demolition required to carry out the contract was not complete". However, the Statement of Agreed Facts before the Tribunal at

first instance [Tender Bundle 650] included the fact that, in the time between commencing in May 2019 and 8 July 2019 “Stage 1 (‘Demolition’) was completed”. The owner is bound by her agreement to that fact and cannot be heard to submit that Stage 1 was not completed so as to entitle the builder to the first progress payment.

77 The owner has made no challenge to the Tribunal’s assessment of the amount due in respect of demolition. We find no error in the Tribunal’s conclusion that the builder was entitled to $28,500 in respect of demolition.

78 As the builder terminated the contract for breach by the owner, it follows that the builder was also entitled to his loss of profit in respect of the balance of the contract. The owner did not by the Further Amended Notice of Appeal challenge the Tribunal’s quantification of the loss of profit at $20,040, being 10% of the payments due upon completion of the remaining stages 3 to 10 of the contract.

79 The owner did not challenge the allowance in respect of the reimbursement of expenses in the amount of $1,996.06, as addressed in paragraphs [122] to [123] of the Decision.

80 Accordingly, we find no error in the Tribunal’s award in respect of demolition, loss of profit, and reimbursement of expenses, in a total amount of $50,536.06.

81 However, we consider that the builder was not entitled to payment for the work carried out in relation to the laying of a concrete slab, as that work was carried out in breach of the implied warranty arising pursuant to s 18B(1)(c) of the HBA that the work would comply with the development approval. We consider that the Tribunal erred in awarding a quantum meruit for work carried out in relation to the construction of the concrete slab.

82 It is not relevant in this context whether or not the owner was aware of the construction of the slab and we do not find it necessary to consider whether the Tribunal’s findings in this respect were incorrect or against the weight of evidence.

83 The builder did not suggest that he was entitled to rely upon s 18F of the HBA. That section provides a defence to an action for breach of statutory warranty

where the builder acted on instructions from the owner contrary to written advice from the builder or where the builder relied upon written instructions from an architect, design professional, engineer, or surveyor independent of the builder. There was no suggestion that s 18F was engaged in this case.

84 It follows from the finding that the work in relation to the installation of a concrete slab was carried out in contravention of the statutory warranty in s 18B(1)(c) that the builder is liable to compensate the owner for the costs of removal of the formwork and reinforcing which were constructed in breach of the statutory warranty.

85 At the conclusion of the hearing the parties were directed to advise the Appeal Panel whether the parties were able to come to an agreement as to the cost of rectification and, if so, the agreed amount.

86 The formal order made by the Appeal Panel was: “The parties have leave to file by 19 March 2021 a note concerning the cost to remove the work associated with the slab”.

87 The parties were not able to agree an amount for the cost of removing the work associated with the slab. In an email to the Tribunal communicating the parties’ failure to agree, the builder’s solicitors submitted that the Appeal Panel is in a position to assess the appropriate amount on the basis of the evidence adduced at the first instance hearing, and set out in their email references to the paragraphs of their submissions to the Tribunal at first instance which the builder submitted were relevant to that task.

88 In response to that email the appellant opposed the Appeal Panel receiving any further submissions concerning the cost of removal of the slab, but sought the opportunity to make such submissions in the event the Appeal Panel was minded to receive the submissions of the builder.

89 We do not consider it appropriate that the Appeal Panel assess the cost of the removal of the slab. Although s 80 of the NCAT Act permits the Appeal Panel to deal with an internal appeal by way of a new hearing, we do not consider that that is appropriate in this case.

90 The builder's expert's calculation of the costs of removal of the work associated with the concrete slab was $18,704.65 [TB 260]. The owner's expert's calculation set out in his report was $34,400.12 [TB 571].

91 In the builder's submissions to the Tribunal at first instance, he asserted that, by reason of concessions made by the owner's expert in cross examination, the true figure estimated by the owner's expert was $17,251.64, that is less than the amount estimated by the builder's expert.

92 However, we have not heard detailed submissions in relation to the questions whether the concessions, which the builder submits the owner's expert made, were in fact made, and whether the builder's calculations founded upon those asserted concessions are accurate.

93 We will remit to the Consumer and Commercial Division the question of the cost of removal of the work associated with the construction of the slab. We consider it appropriate to leave to the Tribunal hearing the proceedings on remittal the question whether further evidence should be permitted.

The Costs Appeal

94 As the appeal has been upheld in part, the Costs Decision of 19 February 2021 must be set aside.

95 The outcome of the appeal will result in a reduction of the amount payable to the builder by the amount of the $17,426 allowed by the Tribunal in respect of the work carried out by the builder in relation to the construction of the concrete slab, plus the costs of the removal of the work relating to the concrete slab. The costs order made by the Tribunal on 19 February 2021 provided for the owner to pay the builder's costs on the indemnity basis from 17 April 2020, on the basis that the builder had obtained a result more favourable to the builder than an offer made on 16 April 2020, that is two days before the first hearing date in the proceedings at first instance.

96 It is apparent from the Costs Decision that the owner made a counter-offer at that time. Although it would seem unlikely that the builder will not ultimately obtain an award in his favour, it is impossible at this stage to determine the amount the builder will ultimately receive or how the ultimate outcome of the

proceedings compares to the amounts the subject of the two competing offers made in the days leading up to the hearing.

97 Accordingly, it is appropriate to remit the question of the costs of the first instance proceedings, including both the initial hearing and the remittal hearing, to the Tribunal hearing the remitted proceedings.

Costs of the Appeal

98 The parties sought an opportunity to make submissions in relation to the costs of the appeal.

99 The parties were agreed that any application with respect to the costs of the appeal should be determined on the basis of further submissions once the outcome of the appeal is known. We note that the parties have agreed that the question of costs of the appeal can be determined on the papers and without a further hearing. We will make orders permitting the parties to file submissions concerning the costs of the appeal.

100 Our orders are:

(1) The appeal is allowed in part.

(2) The Tribunal's orders dated 27 October 2020 are set aside.

(3) The proceedings are remitted to the Consumer and Commercial Division of the Tribunal for determination consistent with these reasons, including determination of the cost of rectification of the work associated with the construction of the concrete slab.

(4) The orders of the Tribunal dated 19 February 2021 relating to the costs of the proceedings are set aside.

(5) The issue of the appropriate orders relating to the costs of the proceedings at first instance, including both the initial hearing and the remittal hearing, is remitted for determination by the Tribunal hearing the remitted proceedings.

(6) Any application in respect of the costs of the appeal is to be made by written submissions filed and served within 14 days of the date of publication of this decision.

(7) If either party files submissions in accordance with order (6) above the other party may file and serve submissions in response within a further 14 days.

(8) Submissions strictly in reply to any submissions filed in accordance with order (7) above may be filed and served within a further 7 days.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar