Civil and Administrative Tribunal

New South Wales

Case Name:	Heys v Balmain Projects Pty Ltd
Medium Neutral Citation:	[2021] NSWCATAP 192
Hearing Date(s):	22 June 2021
Date of Orders:	29 June 2021
Decision Date:	29 June 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J McAteer, Senior Member
Decision:	1. Appeal upheld. 2. The Tribunal's orders of 18 March 2021 are set aside. 3. The Tribunal's decision in relation to the appellant's claim for major defects, and the costs associated with that claim, are confirmed. 4. The proceedings are remitted to the Tribunal as originally constituted for further hearing of the appellant's case in relation to minor defects and in accordance with these reasons. 5. If any party desires to make an application for costs of the appeal: a. that party is to so inform the other parties within 14 days of the date of these reasons; b. the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons; c. the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from

the date of these reasons;

d. any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

e. the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

Catchwords:	BUILDING AND CONSTRUCTION - Home Building Act 1989 - statutory warranty - proceedings for breach – time in which proceedings to be commenced – calculation of time – applicability of s 36 of the Interpretation Act 1987 ADMINISTRATIVE LAW - particular administrative bodies - NSW Civil and Administrative Tribunal – discretionary decision on practice and procedure – failure to take into account relevant matters
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 4, 25, 40 Home Building Act 1989 (NSW), s 18E Interpretation Act 1987 (NSW), s 5(1), 36 Civil and Administrative Tribunal Rules 2014 (NSW), rr 4(3), 6
Cases Cited:	Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305 [2020] NSWCA 327 Hollingsworth v Bushby [2015] NSWCA 251 House v The King (1936) 55 CLR 499; [1936] HCA 40 Moloney v Taylor [2016] NSWCA 199
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Timothy Martin Heys (Appellant) Balmain Projects Pty Ltd (Respondent)

Representation:	Counsel: L Cooper-Hackman (Respondent) Solicitors: John Byrnes & Associates (Appellant) Fortis Law (Respondent)
File Number(s):	2021/00104205
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	18 March 2021
Before:	S Thode, Senior Member
File Number(s):	HB 20/32870

REASONS FOR DECISION

1 This appeal concerns a claim made by the appellant against the respondent under the *Home Building Act 1989* (NSW) (the "HBA") for breach of statutory warranties in relation to the construction of the appellant's home at Five Dock, NSW.

2 This appeal concerns the calculation of time for the limitation period applying to part of the appellant's claim, and the rejection of expert evidence by the Tribunal tendered by the appellant because that evidence had been served only shortly prior to the hearing.

3 For the reasons that follow the appeal is upheld and the matter remitted to the Tribunal as originally constituted for further hearing in accordance with these reasons.

Background

The Legislation

4 In relation to claims brought in the Tribunal, the HBA divides defects into two categories: “major defects” and defects which are not major defects (often colloquially referred to as “minor defects”, an expression we shall adopt in these reasons for ease of expression although that terminology is not used in the HBA).

5 The HBA also provides for limitation periods in which proceedings may be commenced by parties in the Tribunal for breach of the HBA’s statutory warranties.

6 Section 18E of the HBA provides that proceedings for a breach of a statutory warranty must be commenced before the end of the warranty period for the breach. The section says that the warranty period is six years for a breach that results in a major defect in residential building work or two years in any other case (meaning for minor defects).

7 Section 18E also says that the warranty period starts on completion of the work to which it relates.

The Facts

8 The appellant commenced proceedings against the respondent on 3 August 2020 for both major and minor defects.

9 The appellant served an expert report by Mr Anthony Capaldi of Tyrrells Property Inspections Pty Ltd dated November 2020 in relation to both categories of defects. No expert report was served by the respondent in reply to Mr Capaldi’s report.

10 On 11 March 2021, seven days before the hearing before the Tribunal, the appellant served upon the respondent a supplementary report by Mr Capaldi dated 11 March 2021 (concerning an additional minor defect), and a quote dated 9 February 2021 and other documents from a plumber in relation to the installation of a gas boundary path valve. For ease of expression, we shall refer to all of these documents, collectively, as the supplementary reports.

11 On 18 March 2021 the Tribunal heard the proceedings.

12 The Tribunal said that completion of the work occurred on 2 August 2018, being the date of issue of the Final Occupation Certificate.

13 The Tribunal said that the appellant's proceedings in relation to minor defects were commenced on 3 August 2020 and thus were not within the two-year period required for the commencement of such proceedings by s 18E of the HBA.

14 During the hearing the appellant sought to tender the supplementary reports.

15 The Tribunal rejected the tender of the supplementary reports because they had not been served on the date the Tribunal had directed for expert reports to have been served (being 13 November 2020) and the appellant had not (before the date for hearing) obtained an extension of time for the service of those reports.

16 The appellant's claim in relation to the major defects claimed was accepted by the Tribunal and the respondent was ordered to pay the appellant $27,252.44.

17 The Tribunal rejected the appellant's claim for minor defects on the basis that that claim was out of time.

18 The Tribunal awarded the appellant $5,063.11 for costs of the proceedings, being $278.11 for the filing fee and $4,785 for the "experts (sic) reports", presumably being a reference to Mr Capaldi's charges.

The Appeal

19 The appellant appealed on two grounds:

(1) The Tribunal erred in holding that his claim for minor defects was out of time.

(2) The Tribunal erred in rejecting the tender of the supplementary reports.

20 The appellant also made a number of other claims on the appeal (such as for "new (building) costs"), but these were, properly, not pressed on the appeal.

Ground 1

21 The Tribunal erred in holding the appellant's claim for minor defects was not commenced before the end of the warranty period for minor defects.

22 The Tribunal accepted that the completion of the work occurred on 2 August 2018, being the date of the Final Occupation Certificate – see s 3B of the HBA.

23 The *Interpretation Act 1987* (NSW) (the "IA") applies to the reckoning of time in this case by dint of s 5(1) which says that the IA applies to all Acts and instruments whether enacted or made before or after the commencement of the IA. It therefore applies to the HBA.

24 Section 36(1) and (2) of the IA says:

> **36 Reckoning of time**
>
> (1) If in any Act or instrument a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall be reckoned exclusive of that day or of the day of that act or event.
>
> (2) If the last day of a period of time prescribed or allowed by an Act or instrument for the doing of any thing falls—
>
> (a) on a Saturday or Sunday, or
>
> (b) on a day that is a public holiday or bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following that is not a Saturday or Sunday, or a public holiday or bank holiday in that place, as the case may be.

25 As s 18E of the HBA prescribes the period of time in which proceedings are to be commenced, dating from a given day (being the completion of the work to which the proceedings relate), the two years provided for is reckoned exclusive of that day (being 2 August 2018).

26 Therefore, the first day is 3 August 2018.

27 Section 18E says that proceedings for minor defects must be commenced before the end of the warranty period, which is two years. Hence the end of two years from 3 August 2018 is midnight on 2 August 2020.

28 2 August 2020 was a Sunday, and the Tribunal's Registry was physically closed on that day. Therefore, per s 36(2) of the IA, the last day for the appellant to have commenced his proceedings fell on a Sunday, he was permitted to have commenced his proceedings (by filing his application) on the first day following, being Monday 3 August 2020. That is what the appellant did. Accordingly, s 36 of the IA had the effect that the commencement of the appellant's proceedings for the minor defect claim was within time and the Tribunal erred in holding otherwise.

29 The Tribunal's erroneous application of the law relating to the time in which the appellant had to commence his claim for minor defects gave rise to a question of law. It follows the appellant had a right to appeal on that point without the need to seek leave to appeal.

30 On the appeal the respondent submitted that the IA did not apply in this case because of rr 4(3) and 6(5) of the Civil and Administrative Tribunal Rules 2014 (NSW).

31 Rule 4(3) says:

> These rules apply to proceedings in the Tribunal subject to any provisions of enabling legislation or a Division Schedule for a Division of the Tribunal that are applicable to the practice and procedure to be followed in proceedings of the kind concerned.

32 Rule 6 says:

> **6 Reckoning of time**
>
> (1) Any period of time fixed by these rules, or by any order or other decision of the Tribunal or a registrar or by any document in any proceedings, is to be reckoned in accordance with this rule.
>
> (2) If a time of one day or longer is to be reckoned by reference to a given day or event, the given day or the day of the given event is not to be counted.
>
> (3) If, apart from this rule, the period in question, being a period of 5 days or less, would include a day or part of a day on which the Registry is closed, that day is to be excluded.
>
> (4) If the last day for doing a thing is, or a thing is to be done on, a day on which the Registry is closed, the thing may be done on the next day on which the Registry is open.
>
> (5) Section 36 of the Interpretation Act 1987 (which relates to the reckoning of time) does not apply to these rules.

33 The respondents submits that the effect of those rules is that the IA does not apply to the appellants minor defects claim under the IA, and that the Tribunal's Registry was not "closed" per r 6(4) because the Tribunal had allowed parties to file documents electronically for a period which included Sunday, 2 August 2020 due to the COVID-19 pandemic.

34 We do not accept that submissions for the following reasons.

35 The term "enabling legislation" used in r 4(3) is defined in the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act") in s 4 to mean:

> … legislation (other than this Act or any statutory rules made under this Act) that—
>
> > (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
> >
> > (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.

36 The HBA is "enabling legislation" because Part 3A of the HBA, headed "Resolving building disputes and building claims" contains ss 48K and 48L which confer jurisdiction on the Tribunal to hear and determine any building claim brought before it in accordance with Part 3A and that the Tribunal is to be chiefly responsible for resolving building claims.

37 Section 25 of the NCAT Act says that the Rule Committee may make rules not inconsistent with enabling legislation, and thus the Rules may not be inconsistent with the HBA. This, of course, is consistent with the general proposition that it is not permissible for legislation to be made by a body other than the parliament without the authority of the parliament, and thus the Rules may not (without the express authority of parliament) alter the provisions of the HBA.

38 Section 40 of the NCAT says that an application to the Tribunal is to be made in the time and manner prescribed by enabling legislation or the procedural rules. Thus, the time for HBA claims to be commenced is to be within that prescribed by the HBA (there is no time prescribed by the procedural rules).

39 Rule 6(1), quoted above, in terms, does not apply to the HBA. In terms, it applies to periods of time fixed by the Rules, or an order or decision of the Tribunal or Registrar, or by any document in any proceeding. The HBA is none of those things.

40 Rule 6(5), in terms, says that s 36 of the IA does not apply to the Rules, and does not say (and could not validly say) that s 36 of the IA does not apply to the HBA.

41 That is sufficient to reject the respondent's submission and is dispositive of the submission, but we would add that in our opinion the word "closed" in r 6(4) means physically closed. The Registry does many more things than just accept documents for filing, and so the mere acceptance of documents electronically

does not amount to the Registry being open. In addition, there is a difference between a registry being “open” and a registry being “closed” but allowing certain documents to be filed electronically. To accept the respondent’s submission would be, with respect, an idiosyncratic interpretation of the word “closed” in r 6(4).

42 We also note that the respondent wished to argue in this appeal that the Tribunal should have held that the date the works was completed was the date of an Interim Occupation Certificate dated 23 July 2018, with the result that the appellant’s minor defects proceedings were out of time.

43 However, the respondent had not appealed from the decision of the Tribunal, and although the Interim Occupation Certificate was mentioned in the hearing the actual certificate was never tendered.

44 We did not entertain this argument because the respondent had not challenged the Tribunal’s decision as to when the work was completed by filing a Notice of Appeal. Without doing so, the appellant was not provided with formal notice that the respondent was seeking to overturn that finding and it would be unjust to allow that to happen at this late stage.

45 Further, in essence the respondent wished to raise this question for the first time on appeal (because the Interim Occupation Certificate was not tendered to the Tribunal). As such Certificates may be open to challenge – see *Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305* [2020] NSWCA 327 for example – and such challenges may give rise to factual questions (such as whether preconditions to the issue of a certificate specified in the development consent were complied with) the argument should not now be allowed to be raised. A party seeking to advance for the first time on appeal a new ground not taken at trial will be precluded from doing so if the new ground could possibly have been met by calling evidence at the hearing - *Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33.

Ground 2

46 In our opinion the Tribunal erred in the exercise of its discretion in rejecting the tender of the supplementary reports for the reasons it gave.

47 The rejection of the supplementary reports was a discretionary decision relating to practice and procedure, the reasoning being non-compliance with the Tribunal's directions for expert evidence to be served by 13 November 2020 and the failure to obtain an extension of time for the service of those reports.

48 In our opinion the Tribunal erred in failing to have regard to the near impossibility of the appellant being able to bring and have heard an application for an extension of time between 11 March 2021 (the date of Mr Capaldi's supplementary report) and the date of hearing and failed to take into account whether any prejudice would be occasioned to the respondent if the reports were allowed to be tendered.

49 As to the latter we have significant doubts there would have been any such prejudice because the respondent did not serve any expert report in reply to Mr Capaldi's first report, instead relying upon his cross-examination of Mr Capaldi (which the Tribunal found of no assistance) and the evidence of its director, Mr Kazzi.

50 Those two matters were, in our opinion, important matters for the Tribunal to have considered, especially since the Tribunal is required to conduct itself with minimum formality and to reach decisions according to the substantive merits of the case, and not by reference to legal form or technicalities - *Moloney v Taylor* [2016] NSWCA 199 per McColl JA, with whom Simpson JA and Ball J agreed, at [30].

51 Therefore, the Tribunal fell into one of the errors identified in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 and amounts to an error of law.

52 In *Hollingsworth v Bushby* [2015] NSWCA 251 Macfarlan JA, with whom Basten JA agreed, held that procedural unfairness had occurred in circumstances where a party was not allowed to give evidence for the sole reason of non-compliance with procedural directions. We prefer to limit ourselves to *House v The King* error in this appeal but, had we been called upon to decide it, would have held that procedural unfairness was occasioned to the appellant on analogous reasoning to that set out in *Hollingsworth* on that point.

53 Of course, there may be other reasons for the rejection of the reports which the Tribunal did not need to consider but which will now need to be considered, but as the matter will return to the Tribunal as originally constituted those matters (if any) may be addressed at that time.

Orders

54 As we indicated that if the appeal was upheld the matter would be remitted to the Tribunal for further hearing, the respondent asked for leave to file and serve an expert's report in reply to both Mr Capaldi's first report (which was received in evidence by the Tribunal) and the supplementary reports (both in relation to the minor defects).

55 As the matter is to be remitted to the Tribunal, the respondent may make that application to the Tribunal, keeping in mind that the Tribunal will, if it grants leave, probably make directions similar to Order 6 made on 25 September 2020 to the effect that the parties' experts will be required to meet and produce a joint report and which contains the material referred to in Order 6.

56 We shall set aside the Tribunal's orders so that, if the Tribunal does find the appellant is entitled to further monies in relation to minor defects, and perhaps further costs, then adjustments can be made to the amounts the Tribunal originally ordered and new orders made reflecting the new amounts (if any) the respondent is pay the appellant for his claims and costs.

57 Having said that, we shall make an order confirming the Tribunal's decision (as distinct from the orders) to make clear that the Tribunal's decision in favour of the appellant on the major defects claim remains binding on the parties (including rejection of the respondent's submission that rectification should be ordered rather than a monetary award made).

58 We make the following orders:

(1) Appeal upheld.

(2) The Tribunal's orders of 18 March 2021 are set aside.

(3) The Tribunal's decision in relation to the appellant's claim for major defects, and the costs associated with that claim, are confirmed.

(4) The proceedings are remitted to the Tribunal as originally constituted for further hearing of the appellant's case in relation to minor defects and in accordance with these reasons.

(5) If any party desires to make an application for costs of the appeal:

(a) that party is to so inform the other parties within 14 days of the date of these reasons;

(b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons;

(c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;

(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

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

Registrar

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

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