Civil and Administrative Tribunal

New South Wales

Case Name:	Garofali v Moshkovich
Medium Neutral Citation:	[2021] NSWCATAP 242
Hearing Date(s):	21 June 2021
Date of Orders:	13 August 2021
Decision Date:	13 August 2021
Jurisdiction:	Appeal Panel
Before:	K Rosser Principal Member G Sarginson Senior Member
Decision:	(1) Leave to appeal is refused. (2) The appeal is dismissed.
Catchwords:	BUILDING AND CONSTRUCTION---Residential building work---Written contract---Whether payments made outside terms of written contract---Whether contract had been varied---No error established
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Clements v Independent Indigenous Advisory Committee [2003] FCAFC 143 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1 Drivas v Burrows [2014] NSWCATAP 87 Giovas v F.E.V. Mono Constructions Pty Ltd [2015] NSWCATCD 16 Italiano v Carbone [2005] NSWCA 177 Lake Macquarie City Council v McKellar [2002] NSWCA 90 Llamas v Rockwall Constructions Ltd; Rockwall Constructions Pty Ltd v Llamas [2019] NSWCATCD 75 Long & Fitzpatrick v Wollongong Homes Pty Ltd [2015]

NSWCATCD 141)
Lorbergs v State of New South Wales (1999) NSWCA 54
Lucantonio v Kleinert [2009] NSWSC 929
Pholi v Wearne [2014] NSWCATAP 78
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69,
Rice v JR & SD Farmer t/as Urban Bespoke Homes [2020] NSWCATAP 208
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Sabouni v Redevelop Building and Developments Pty Ltd [2021] NSWSC 31
Touma v Colantuono [2021] NSWCATAP 152,
Whyte v Broch (1998) 45 NSWLR 354
Woodward v Warwick Green Building Pty Ltd [2021] NSWCATAP 210

Texts Cited:	Not Applicable
Category:	Principal judgment
Parties:	Julius Garofali (Appellant) Rony Moshkovich (First Respondent) Beatris Moshkovich (Second Respondent)
Representation:	Solicitors: ITC Law (Appellant) First Respondent (Self Represented) R Moshkovich (Second Respondent)
File Number(s):	2021/00091257
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	4 March 2021
Before:	D Goldstein, Senior Member

File Number(s): HB 19/56420 and HB 20/02502

REASONS FOR DECISION

1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal involving proceedings under the *Home Building Act 1989* (NSW) (‘the HB Act’).

2 In this decision, the appellant is referred to as ‘the builder’ and the respondent is referred to as ‘the owner’.

BACKGROUND

3 The dispute involved the supply and installation of a swimming pool at residential premises. There was a written contract signed by the parties dated 18 July 2019. The contract price was $67,120.22, subject to variations.

4 The written contract clearly stated that the builder agreed to “supply and install” a fiberglass pool (p 2 of the contract) and was responsible for excavation and removal of soil and debris (p 6 of the contract).

5 Work was completed. The owners claimed that there were aspects of the work which were defective in breach of the statutory warranties under s 18B of the HB Act. The owners further claimed that they had “overpaid” monies to the builder and not been credited monies where they had paid for items that the builder should have paid for under the contract.

6 The builder, in its cross application, claimed unpaid amounts which were asserted to be variations under the contract.

7 The proceedings were heard over two days. Both the owner and the builder were self-represented.

8 On 4 March 2021 the Tribunal published reasons for decision.

9 The Tribunal found that the builder had performed defective work in respect of backfill material used around the pool.

10 In respect of this finding the Tribunal noted that at a joint expert conclave both parties experts (Mr Winton, building consultant for the owner and Mr Hall,

engineer, for the builder) had agreed there was a defect and prepared a joint report stating that there was agreement on this issue.

11 However, after the joint expert conclave, the builder had provided further photographs to and had a discussion with Mr Hall. This led to Mr Hall providing a supplementary report where he changed his opinion on whether the backfill material used by the builder was in breach of the statutory warranties under s 18B of the HB Act.

12 The Tribunal did not accept the change of position of Mr Hall, and stated (at para [19]):

> I do not accept the opinion advanced and the change of position by Kneebone Beretta & Hall Pty Ltd on 25 November 2020. I find that such a change of position was caused by discussion with the contractor after their 25 September 2020 letter. Except for one photograph, the photos to which they refer are not identified. I find that the provision of such a letter so close to the final day of the hearing which was listed to deal with the joint report is highly suggestive of an expert's attempt to assist its client rather than assist the Tribunal which directed a joint report to be produced stating the experts agreements and areas of difference. Kneebone Beretta & Hall Pty Ltd had been engaged by the contractor since 23 January 2020. They had ample time to acquaint themselves with all aspects of the engineering issues involved. A last minute appreciation of the details of construction is not persuasive.

13 The Tribunal, however, accepted the opinion of Mr Hall over the opinion of Mr Winton on the appropriate method of rectification of the defective backfill. The Tribunal found that the builder rectifying the defective work was not the preferred outcome and set out reasons why a work order was not appropriate having considered s 48MA of the HB Act.

14 The Tribunal found that it was “not possible” to calculate damages because neither expert had expressed an opinion on the cost of performing the method of rectification identified by Mr Hall. The Tribunal made orders that allowed the parties to file and serve further evidence so that damages under s 48O of the HB Act could be calculated for the cost of rectification.

15 The Tribunal's orders do not clearly state whether the proceedings were adjourned, or how submissions and evidence on the issue of calculation of damages for defective work would be dealt with. However, this aspect of the

decision is not subject to any of the grounds of appeal, and it is unnecessary for us to make any comment about the orthodoxy of such an approach.

16 The Tribunal found that the owners had “overpaid” the contractor a net amount of $13,315.36 based upon the total amount of the invoices issued by the builder, plus items that the owner had paid for that were the builder’s responsibility under the contract, less a valid unpaid variation of $2,310 inclusive of GST.

17 The builder in its cross-application claimed $9,006.20 in addition to the valid contractual variation of $2,310. The Tribunal found that the builder had not issued any valid contractual variations other than in respect of the amount of $2,310 (which the Tribunal had taken into consideration and deducted from the owner’s claim for “overpayment”) and dismissed this aspect of the builder’s claim.

18 The Tribunal stated (at para [50]):

> I reject his claim for $9,006.20 because he has not asserted that the amounts claimed were for variations and because he has been paid the contract price which absent variations or other money the recovery of which is expressly allowed by the contract, is the upper limit of the owner’s payment obligations under the contract.

19 The reasons of the Tribunal do not indicate any claim was made by the builder for payment on a quantum meruit basis in the alternative to a contractual claim. Rather, the reasons indicate that the claim by the builder for unpaid variations was solely based on contract.

20 The builder lodged an appeal on 1 April 2021. The builder was legally represented at the time the appeal was lodged.

21 On 21 April 2021 the builder’s application for a stay on the order for damages in the amount of $13,315.36 was refused by the Appeal Panel.

GROUNDS OF APPEAL

22 The Notice of Appeal identified the grounds of appeal in respect of error of law as follows:

> (1) Failure to consider the contract price and varying costs [sic] at the direction of the applicant [sic] which were the subject of evidence.

(2) Failure to deal with the contract and the contract variations of value for work undertaken.

(3) Failure to properly consider the additional work undertaken by the contractor as variations.

(4) Failure to take into account the evidence of the contractor's expert.

23 It was also asserted that the Member had committed an error other than an error of law because the decision was not fair and equitable due to:

(1) Failure to "understand the additional works of the contract and the effect this work would have on the contract price".

(2) The Member "refused the position [sic] of the expert's evidence on 25 November 2020 and the photographs produced by the contractor.

24 The builder filed an Outline of Submissions on 12 April 2021. The Outline of Submissions did not clearly indicate or articulate the grounds of appeal. Rather, the Outline of Submissions contained a narrative of the builder's version of events and the evidence the builder relied upon, while repeating the Grounds of Appeal without elaboration as to why the Member had committed any errors of law or why leave to appeal should be granted.

25 However, the Outline of Submissions contained the following paragraphs after repeating the Grounds of Appeal filed on 1 April 2021:

> Further to the above, the Member failed to properly address all the parties involved with the project and was not aware of the facts regarding the retaining wall which were at the instruction of the applicant to engage a structural landscaper to do works which were designed and engineered independently to our client. The Member failed to recognise that our client was hired as the pool installer after the works of the landscaper.
>
> Lastly, the Member's failure to acknowledge the validity of our client's evidence makes it prejudicial for the current orders to stand given that our client has been [sic] reimbursed for expenses incurred and the long-term consequences this judgment debt will have on our client's only source of income.

26 The builder filed a bundle of documents which were the documentary evidence relied on by the builder in the proceedings before the Tribunal.

27 Additionally, the builder filed a further Outline of Submissions on 17 June 2021, where it was submitted as follows:

(1) The Member "failed to differentiate" the builder's claims for work under the contract and works "outside the contract".

(2) The builder had conducted “third party works” consented to by the owner.

(3) The Member “failed to acknowledge” that the amounts “above the initial contract” are “not an overpayment to the contract and are being claimed as variations and for third parties”.

28 The Outline of Submissions filed on 17 June 2021 referred to “transcript references” but did not provide any detail of the said transcript.

29 Despite clear directions of the Appeal Panel dated 21 April 2021, the builder failed to file any sound recording of the hearing or a transcript of evidence.

BUILDER’S APPLICATION FOR AN ADJOURNMENT

30 The builder’s solicitor emailed the Tribunal on 17 June 2021 seeking an adjournment of the hearing on the basis the owner’s documents and submissions had been filed and served on 16 June 2021, which the builder asserted was one week beyond the timetable obligation.

31 The parties were informed that any adjournment application would be dealt with at the appeal hearing on 21 June 2021.

32 At the commencement of the hearing, the builder submitted that the hearing of the appeal should be adjourned because the builder could not meet some of the documents of the owner. The builder submitted that it was also unable to file and serve written submissions in reply.

33 The builder also submitted that an unidentified staff member of the Appeal Panel Registry had told the legal representative of the builder that there was a high likelihood the adjournment would be granted. The builder’s legal representative also submitted that she was not the solicitor with carriage and conduct of the matter who had drafted the Grounds of Appeal and submissions. The legal representative stated that the solicitor with carriage and conduct of the matter could not appear as he was unwell.

34 Most of the documents filed and served by the owner were documents that had been previously filed and served in the owner’s Reply to Appeal dated 5 May 2021.

35 The only ‘new’ documents that were not contained in the owner’s Reply to Appeal or the documents filed by the builder were documents pertaining to a

claim brought by *“Garofali Group Pty Ltd t/as Nepean Pools”* against the owners for unpaid monies for work performed pursuant to an agreement dated 4 March 2019 in the Local Court of NSW. A Statement of Claim stated that the amount sought was $7,328.75. A Judgement/Order of the Local Court dated 17 April 2021 stated that the proceedings had been dismissed.

36 At the hearing on 21 June 2021, we pointed out to the owner that it did not appear the documents pertaining to the Local Court proceedings were relevant to the appeal. The owner stated that he was not relying on such documents at the hearing of the appeal. The owner did not consent to the adjournment application.

37 In *Touma v Colantuono* [2021] NSWCATAP 152, the Appeal Panel summarised the relevant principles pertaining to adjournment applications as follows at [56]-[58]:

> 56. When refusing the adjournment application, the Tribunal cited the Appeal Panel in *Hanson v Metricon Homes Pty Ltd* [2019] NSWCATAP 133 from [25] to [28] (*Hanson*). While the Supreme Court allowed an appeal from the Appeal Panel’s decision in *Hanson* (see *Hanson v Metricon Homes Pty Ltd* [2020] NSWSC 401), the Court’s judgment turned on the facts of the particular case rather than on the legal principles articulated in the Appeal Panel’s decision, which are uncontroversial.
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> 57. The Appeal Panel in *Hanson* cited another Appeal Panel decision, *Armee v Brealey* [2017] NSWCATAP 141 (*Armee*), on the issue of the circumstances in which a refusal to grant an adjournment may give rise to a denial of procedural fairness. In that matter, the Appeal Panel stated at [121]
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>> 121 The Tribunal has the power to adjourn proceedings under s 51 of the Act. The power to adjourn is to be exercised according to the principles set out by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303, French CJ, Kiefel, Bell, Gageler and Keane JJ at 321 [51] (see *O’Neill v T and I Engines Pty Ltd* [2015] NSWCATAP 77 at [21]). Procedural fairness may be denied if a decision maker fails to adjourn proceedings where such a failure has the effect of depriving a person of adequately presenting the person’s case: see *Grozdanov v N&T Buildings Pty Ltd* [2015] NSWCATAP 107 at [51]; *Tiwari v Champion Homes Sales Pty Ltd* [2016] NSWCATAP 73 at [21]-[22].
>
> …

58. The Appeal Panel in *Armee* cited another Appeal Panel decision which considered the issue of adjournment applications: *O'Neill v T and I Engines Pty Ltd* [2015] NSWCATAP 77. In that matter, the Appeal Panel stated at [20] to [23]:

> 20 In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46, a unanimous High Court said:
>
> "In Aon Risk Services Australia Ltd v Australian National University, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. The decision in Aon Risk Services Australia Ltd v Australian National University was concerned with the Court Procedures Rules 2006 (ACT) as they applied to amendments to pleadings. However, the decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice."
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> 21 That approach is applicable in this Tribunal. Section 36(1) of the Civil and Administrative Tribunal Act 2013 ('the Act') is in relevantly identical terms to s 56(1) of the Civil Procedure Act 2005, the provision considered in the Expense Reduction decision.
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> 22 It follows that a number of principles apply to applications for an adjournment:
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> (1) matters should almost always proceed on the date fixed for hearing, for the reasons enunciated above,
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> (2) an application for an adjournment should be seen as the exceptional rather than the ordinary course;
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> (3) where the adjournment is caused, at least in part, by the delay of the party seeking the adjournment, or non-compliance by that party with an extant order of the Tribunal, adequate explanation is called for, and its absence weighs heavily, and sometimes decisively against the grant of an adjournment
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> 23 Further, there is the effect on the opposing party to consider. In *Sayhoun v Owners Corporation Strata Plan 75123* [2014] NSWCATAP 112, an Appeal panel of this Tribunal said at [17], in terms we would adopt:

> “We are satisfied that the respondent would be prejudiced if an extension of time were granted. That prejudice may be addressed by an award of costs, although we note the remarks of the plurality in *Aon Risk Services Aust Pty Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [100] that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants; and their approval (also at [100]) of Bowen LJ's statement in *Cropper v Smith* [1884] 26 Ch D 700 that: Non-compensable inconvenience and stress on individuals are significant elements of modern litigation. Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary.”

38 The application for an adjournment was refused.

39 The builder was legally represented and the owner was not legally represented. Whether or not the solicitor with carriage and conduct of the matter for the builder could appear at the hearing of the appeal was immaterial in circumstances where the builder could rely upon its written submissions and had adequate time to prepare.

40 Any alleged comments by a staff member of the Appeal Registry over the telephone to the builder’s solicitors were irrelevant, in circumstances where it is the decision of the Appeal Panel whether or not to grant any adjournment application, and it was made clear in directions issued prior to the hearing that the adjournment application would be dealt with at the hearing. All legal practitioners are aware, or should be aware, that oral comments of a Registry staff member do not bind the Appeal Panel, and any lack of preparation on the basis of confidence that an adjournment application will be granted is misconceived.

41 In circumstances where the owner was not relying upon the Local Court documents, there was no reason why the builder could not ventilate its arguments on appeal and make oral submissions in reply to any submissions of the owner. There was no prejudice or procedural unfairness to the builder by reason of refusing the adjournment, and no satisfactory reason why the Appeal Panel should adopt the “exceptional” course of adjourning the hearing of the appeal.

SCOPE AND NATURE OF APPEAL-APPLICABLE PRINCIPLES

42 Section 80 of the *Civil and Administrative Tribunal Act 2013 (NSW)* ('the NCAT Act') sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

Question of Law

43 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right.

44 In *Prendergast* the Appeal Panel also stated at [12] that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to approach the issue by looking at the grounds of appeal generally, and to determine whether a question of law has in fact been raised (subject to any considerations of procedural fairness to the respondent that might arise).

45 A denial of procedural fairness is an error of law: *Prendergast* at [13] (4); *Italiano v Carbone* [2005] NSWCA 177; *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143 at [8]: NCAT Act, ss s 38(2), (5) and (6).

46 Applying an incorrect legal principle is also an error of law: *Prendergast* at [13] (3).

Leave to appeal

47 Clause 12 of Sch 4 of the NCAT Act provides that, in an appeal from a decision of the Consumer and Commercial Division of the Tribunal, an Appeal Panel may grant leave to appeal only if 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

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

(3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

48 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In *Collins v Urban* [2014] NSWCATAP 17 (‘*Collins v Urban’*) the Appeal Panel conducted a review of the relevant cases at [65]-[79] and concluded at [84](2) that:

> Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) Issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
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> (c) 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;
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> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
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> (e) 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.

49 Even if an appellant establishes that it may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the Act. The appellant must demonstrate something more than that the Tribunal was arguably wrong: *Pholi v Wearne* [2014] NSWCATAP 78 at [32]. An appeal hearing is not merely an opportunity for a dissatisfied litigant to “run their case again” (*Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]).

CONSIDERATION

50 The grounds of appeal and the submissions of the builder did not clearly identify errors of law; or clearly articulate errors other than errors of law that would justify leave to appeal being granted.

51 Parties and practitioners have a duty to assist the Tribunal to achieve the just, quick and cheap resolution of the real issues in dispute (Section 36 (3) of the NCAT Act. Some latitude is appropriate to self-represented parties who often struggle to clearly identify what their grounds of appeal are and relate their submissions to each identified ground (*Prendergast* at [12]),

52 However, it is of no assistance to the Appeal Panel when a legally represented party cannot clearly identify and articulate what errors of law have purportedly occurred; nor clearly identify and articulate the distinction between purported errors of law (which do not require leave of the Tribunal) and errors other than errors of law to which leave to appeal is required.

53 This is not a new issue. The NSW Court of Appeal has been critical of practitioners who do not file and serve clearly articulated grounds of appeal and timely written submissions that engage with the grounds of appeal in *Whyte v Broch* (1998) 45 NSWLR 354 ('*Whyte*'); *Lorbergs v State of New South Wales* (1999) NSWCA 54 and *Lake Macquarie City Council v McKellar* [2002] NSWCA 90 at [88]-[94]. In *Whyte*, Spigelman CJ referred to a pervasive "climate of complacency" regarding the failure of practitioners to file and serve timely outlines of submissions that engage with clearly articulated grounds of appeal.

54 Our comments in the above paragraphs are not meant as a personal criticism of the legal practitioner who presented the appeal for the builder. The practitioner did her best in the circumstances. We accept she was not the solicitor with carriage and conduct of the matter.

55 However, all legally represented parties who appear in the Appeal Panel should, as a minimum standard, be able to clearly identify and articulate what are the purported errors of law or errors that require leave to appeal rather than merely provide a narrative as to why their client disagrees with the decision.

56 From the Grounds of Appeal and submissions of the builder, we understand the purported errors of law to be:

(1) The Member did not consider a quantum meruit claim by the builder for the value of work performed and payments made by the builder to sub-contractors.

(2) The Member did not consider whether payments made by the owners were made "outside the contract" to the builder and/or third parties.

(3) The Member erred by finding that certain monies paid by the owner to the builder were paid for valid variations under the contract.

(4) The Member erred by rejecting the supplementary report by Mr Hall dated 25 November 2020 and the further photograph evidence that

formed the basis of his change of position after the joint expert conclave.

Payments Made and Work Done 'Outside the Contract'

57 The builder submits that he performed design and "project management" work outside the scope of the written contract dated 18 July 2019.

58 That work appears to have occurred in the period between when a quote was given by the builder in the name of "Nepean Pools" in June 2018; and the execution of the written contract on 18 July 2019. During that period, the builder was purportedly performing design works and organising footings for a retaining wall as a "designer and pool building consultant" under the business name "Pool+Garden+Design".

59 It was also submitted the builder was the "agent" of the owner in respect of work that fell outside the written contract.

60 On this basis, the builder asserts that the Member erred by finding that the owner had "overpaid" under the written contract for the work performed; and erred by not finding that unpaid works the subject of invoices were payable to the builder.

61 For the builder to establish any entitlement payment for such work "outside the (written) contract" , the onus was upon the builder to prove:

(1) There was a separate contract between the parties distinct from the written contract dated 18 July 2019:

(2) The terms of the contract and the form of the contract (e.g. was it a written contract; an oral contract; or a partly written and oral contract);

(3) That such a contract fell within the jurisdiction of the Tribunal as a "building claim" involving "building goods and services" by reason of the operation of ss 48K and 48A of the HB Act, and that the proceedings fell within the relevant limitation period under s 48K (8) of the HB Act;

(4) That the contract complied with relevant stipulated conditions under the HB Act (e.g. ss 7; 7E and 92 of the HB Act);

(5) That the owner had breached the terms of the contract; and the loss to the builder;

(6) If there was a contract but the contract was unenforceable in whole or part by the builder because the builder had failed to provide a contract to the owner that complied with the stipulated conditions under the HB Act (and accordingly was unenforceable by reason of s 10 of the HB

> Act) or was otherwise unenforceable; the builder was entitled to be paid for the reasonable value of the work and services that were provided by the owner and accepted by the consumer. Principles applicable to quantum meruit claims by a builder have been the subject of many authorities (e.g. *Rice v JR & SD Farmer t/as Urban Bespoke Homes* [2020] NSWCATAP 208; *Woodward v Warwick Green Building Pty Ltd* [2021] NSWCATAP 210) and it unnecessary to repeat the applicable principles in the circumstances of this appeal.

62 There is nothing in the material before us to indicate that the builder made any claim under a separate contract (including any collateral contract) other than the written contract dated 18 July 2019. No separate contract was identified nor the terms established. The written reasons of the Member make no reference to such a claim or issue being raised in the Tribunal proceedings. The builder failed to provide a transcript of evidence or a sound recording to demonstrate that such a claim had been made and the Member had failed to consider it.

63 Further, there is nothing in the material before use to indicate that the builder raised the issue of quantum meruit, or clearly formulated such a claim before the Member. If a quantum meruit claim was being made, the onus was on the builder to clearly identify and prove such a claim in the proceedings (*Sabouni v Redevelop Building and Developments Pty Ltd* [2021] NSWSC 31 at [34]),

64 Parties are bound by the conduct of their case at first instance, and other than in the most exceptional case a party cannot raise a new argument on appeal which, deliberately or inadvertently, was not put at the hearing when there was an opportunity to do so (*Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at [10]; *Drivas v Burrows* [2014] NSWCATAP 87 at [32]).

65 We are not satisfied that the builder raised any claim or issue in the proceedings before the Tribunal that there was a separate or collateral contract distinct from the written contract dated 18 July 2019. Nor are we satisfied that the builder raised a quantum meruit claim.

66 Accordingly, there is no error of law in the finding of the Tribunal that the owners had paid more monies than they were contractually obliged to pay on the basis that the builder has issued invoices which the builder had no contractual right to issue.

67 No ground of appeal or argument on appeal was raised that a payment made by an owner to a builder not in accordance with the contract should not be recoverable or credited back to the owner (see *Llamas v Rockwall Constructions Ltd; Rockwall Constructions Pty Ltd v Llamas* [2019] NSWCATCD 75 at [60]-[67]) so it is unnecessary to further consider this issue.

68 In respect of monies that the builder claimed, it is clear that the only basis for such a claim identified by the builder was that they were valid variations under the written contract dated 18 July 2019 (para [50] of the decision of the Tribunal). No submission or evidence before the Tribunal was referred to in the appeal that demonstrate that the builder complied with the provisions of the written contract for the contract to be varied. No error of law has been established in respect of the Tribunal's findings that the builder had not issued variations in accordance with the contract.

Rejection of the Report of the Supplementary Report of Mr Hall Dated 25 November 2020

69 The Member did not accept the supplementary report of Mr Hall completed after the joint expert conclave; which was based on further assumptions provided by the builder to his expert and further photographs.

70 It is well established that a Court or Tribunal may reject evidence of an expert witness who has resiled or changed his or her opinion from what was agreed at a joint expert witness conclave and may reject any additional expert evidence adduced after the conclave (*Lucantonio v Kleinert* [2009] NSWSC 929; *Giovas v F.E.V. Mono Constructions Pty Ltd* [2015] NSWCATCD 16; *Long & Fitzpatrick v Wollongong Homes Pty Ltd* [2015] NSWCATCD 141).

71 It fundamentally undermines the principles underlying joint conclaves (where experts are, after they have prepared their respective reports, required to confer and attempt to narrow disagreements and clearly articulate what they agree upon and disagree upon); the duties of experts under the NCAT Expert Witness Code of Conduct; the principles of the Tribunal under s 36 of the NCAT Act; and the credibility of an expert witness; if an expert witness resiles from an agreed opinion expressed in the joint conclave report unless there are compelling reasons to explain the change of opinion. The Tribunal is entitled to

disregard or give no weight to the purported change of opinion and the further evidence it is based upon.

72 No error of law has been established in respect of the Tribunal's rejection of Mr Hall's supplementary report of 25 November 2020.

Leave to Appeal

73 The builder submits that the decision of the Tribunal was not fair and equitable; or against the weight of evidence; and leave to appeal should be granted. Other than disagreeing with the outcome, the builder did not clearly articulate why leave to appeal should be granted.

74 There is nothing in the decision of the Tribunal nor the material before us in the appeal that had been relied on as evidence of the parties before the Tribunal that establishes the decision was not fair and equitable; or against the weight of evidence to satisfy us in accordance with the principles in *Collins v Urban* that leave to appeal should be granted.

ORDERS

(1) Leave to appeal is refused.

(2) The appeal is dismissed.

****

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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