



## Civil and Administrative Tribunal New South Wales

Case Name: **Toms v Dev Constructions (NSW) Pty Ltd (No 3);  
Dev Constructions (NSW) Pty Ltd v Toms (No 3)**

Medium Neutral Citation: [2024] NSWCATCD

Hearing Date(s): 18 January 2024

Date of Orders: 29 January 2024

Date of Decision: 29 January 2024

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision:

1. The parties are to file and serve an agreed statement as to the amount owing by the owners to the builder (being the total amount owing under the contract and on a quantum meruit less damages for delay and calculated in accordance with my findings), and in the absence of agreement their separate statement which explains the reason for disagreement, by 5 February 2024.
2. If any party wishes to make an application for costs, the applicant (the costs applicant) is to file and serve a costs application, including submissions limited to three pages and any evidence in support, by 12 February 2024.
3. The respondent to the costs application is to file and serve any submissions limited to three pages and any evidence in reply by 26 February 2024.
4. The costs applicant is to file any submissions limited to two pages in reply by 4 March 2024.
5. 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. If a hearing is not dispensed with, the parties will be advised of a date for the hearing of the application.

Catchwords: BUILDING AND CONSTRUCTION – Residential building work – Whether the owners or the builder owe money to the other under the building contract - Damages for delay – Where liquidated damages clause provides for nominal amount – Whether provision relating to liquidated damages provides an exclusive remedy for delay and, if it does, whether it was rendered void by the *Home Building Act 1989* (NSW), s 18G

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 60  
Civil and Administrative Tribunal Rules 2014 (NSW), r 38  
Home Building Act 1989 (NSW), s 18G

Cases Cited: Cappello v Hammond & Simonds NSW Pty Ltd [2020] NSWSC 1021  
Cappello v Hammond & Simonds NSW Pty Ltd [2021] NSWCA 57

Texts Cited: None cited

Category: Principal judgment

Parties: 2023/00373706:  
Alexy Toms and Sheeja Abraham (Applicants)  
Dev Constructions (NSW) Pty Ltd (Respondent)

2023/00373378:  
Dev Constructions (NSW) Pty Ltd (Applicant)  
Alexy Toms and Sheeja Abraham (Respondents)

Representation: Counsel:  
A Lim (Dev Constructions (NSW) Pty Ltd)

Solicitors:  
Neil Lawyers (Alexy Toms and Sheeja Abraham)  
Birch Partners (Dev Constructions (NSW) Pty Ltd)

File Number(s): 2023/00373706 (formerly HB 23/44435);  
2023/00373378 (formerly HB 23/44431)

Publication Restriction: Nil

## **REASONS FOR DECISION**

### **Overview**

- 1 These two proceedings, which have been remitted for reconsideration by the Appeal Panel, involve disputes arising out of a building contract between Alexy Toms (Mr Toms) and Sheeja Abraham, the owners, and Dev Constructions (NSW) Pty Ltd, the builder.
- 2 The two substantial issues arising for determination are whether the owners or the builder owe money to the other under the building contract and if so the amount, and whether the builder is liable to the owners for damages for delay.
- 3 I have found the owners owe money to the builder under the building contract which is to be calculated in accordance with my findings, and the builder is liable to the owners for \$2,932.00 for general and liquidated damages for delay. I have made procedural orders for submissions by the parties as to the total amount owing by the owners to the builder and the costs of the two proceedings.

### **The factual background**

- 4 Since prior to 26 December 2019, Kamleshkumar Patel (Mr Patel) has been the director of the builder.
- 5 On 26 December 2019, the owners entered into a written contract with the builder whereby the builder agreed to carry out and complete the demolition of the existing dwelling and the construction of a two-storey dwelling with landscaping and driveway works (the works) at the owners' property at Old Toongabbie in New South Wales for a contract price of \$675,000.00 (the contract).
- 6 Disputes arose between the owners and the builder resulting in:

- (1) the following proceedings in the Tribunal under the *Home Building Act 1989* (NSW) (HB Act) between them in the Consumer and Commercial Division:
  - (a) proceedings HB 21/45601 (the HB 21/45601 proceedings);
  - (b) proceedings HB 21/48836 (the HB 21/48836 proceedings);
- (2) the subsequent appeal (the appeal).

### **The history of the two proceedings**

- 7 On 5 October 2021, the owners (with Mr Toms incorrectly named as Alexy Thoms) as the applicants commenced the HB 21/45601 proceedings against the builder as the respondent in which they claimed a work order of \$35,000.00 and a money order of \$40,000.00, and accepted they still owed \$33,750.00 under the contract.
- 8 On 29 November 2021, the builder as the applicant commenced the HB 21/48836 proceedings against the owners (with Mr Toms incorrectly named as Alexy Thomas) as the respondents in which it claimed a money order of \$100,772.62.
- 9 On 30 November 2021, the Tribunal made procedural directions for the two proceedings including an order granting leave to both parties to be represented by an Australian legal practitioner.
- 10 On 15 December 2022, the hearing of the two proceedings took place.
- 11 On 29 June 2023, the Tribunal made the following orders (the 29 June 2023 orders) and published reasons for the decision:

“1. In matter HB 21/45601, the respondent is to pay the applicants \$20,000.00 on or before 27 July 2023.

2. Matter HB 21/48836 is dismissed.

3. On or before 6 July 2023 Dev Constructions (NSW) Pty Ltd must take such steps that are necessary to ensure that the Homeowners have access to and possession of their property.

4. On or before 6 July 2023 Dev Constructions (NSW) Pty Ltd must provide to the Homeowners whatever compliance certificates it is required to issue under the terms of the Contract or the HB Act.

5. In matters HB 21/45601 and HB 21/48836, the Tribunal proposes to order Dev Constructions (NSW) Pty Ltd to pay the costs of Alexy Thoms and Sheeja Abraham as agreed or as assessed.

6. If either party wishes to submit that some other costs order should be made, they must file submissions and evidence on or before 13 July 2023.

7. The other party may respond on or before 27 July 2023.

8. Submissions, not including evidence, are to be limited to five pages.”

12 On 8 August 2023, the Tribunal made the following orders and published reasons for the decision:

“In matters HB 21/45601 and HB 21/48836 Dev Constructions (NSW) Pty Ltd is to pay the costs of Alexy Thoms and Sheeja Abraham:

(a) on the ordinary basis up until 30 October 2022; and

(b) on the indemnity basis from 30 October 2022.”

### **The history of the appeal**

13 On 25 July 2023, the builder as the appellant commenced proceedings 2023/00236521 against the owners as the respondents by lodging a notice of appeal in which it relevantly sought orders that the 29 June 2023 orders be set aside and the two proceedings be remitted to the Consumer and Commercial Division for hearing, and an application for a stay of order 1 of the 29 June 2023 orders.

14 On 10 August 2023, the Appeal Panel made corrected procedural orders (which were originally made on 9 August 2023) for the hearing of the appeal including a consent order staying order 1 of the 29 June 2023 orders until further order of the Tribunal or finalisation of the appeal, whichever is the earlier in time.

15 On 25 September 2023, the builder filed its bundle of documents in six volumes comprising 2,482 pages.

16 On 27 September 2023, the Appeal Panel made the following orders (the 27 September 2023 orders):

“1 By Consent, the appeal is allowed.

2 Without admission, the eight orders made on 29 June 2023 and the costs order/s made on 8 August 2023 are set aside, pursuant to Reg 9 of the NCAT Regs on the Appeal Panel’s own motion and/or s 59 of the NCAT Act.

3 Remit for reconsideration:

(a) by a differently constituted Tribunal,

(b) on the basis of the written and oral evidence provided at first instance (being the documents contained behind tabs 6, 7 and 15 of the appellant’s documents received on 25 September 2023, namely pages 89 to 2042 and 2305 to 2482) and the affidavit of Alexy Toms dated 23 January 2023,

(c) with the hearing being confined to oral closing submissions, and

(d) an opportunity to provide an outline of written submissions before that hearing.

4 For the avoidance of doubt, the stay order made on 9 August 2023, as corrected on 10 August 2023, is lifted.

5 Each party is to bear their own costs of the appeal, for the reasons indicated orally at the conclusion of the hearing.”

### **The history of the two remitted proceedings**

17 On 28 September 2023, the Registry renumbered the HB 21/45601 proceedings as proceedings HB 23/44435 and proceedings HB 21/48836 as proceedings HB 23/44435.

18 On 20 October 2023, the Tribunal made procedural orders for the hearing of the two remitted proceedings.

### **The hearing of the two remitted proceedings**

19 On 19 January 2024, the hearing of the two remitted proceedings took place. Mr M Babu, a solicitor, appeared for the owners. Dr A Lim, a barrister, appeared for the builder.

20 At the commencement of the hearing, I made an order correcting the name of Mr Toms in each of the two proceedings.

21 The evidence for the hearing in accordance with order 3(b) of the 27 September 2023 orders comprised:

(1) the following evidence of the owners:

- (a) the affidavit of Mr Toms sworn on 6 May 2022;
- (b) the affidavit of Mr Toms sworn on 1 July 2022;
- (c) the affidavit of Mr Toms sworn on 22 August 2022;
- (d) the report of Paul O'Donnell dated 22 June 2022;
- (e) the affidavit of Mr Toms sworn on 23 January 2023;

(2) the following evidence of the builder:

- (a) the statement of Mr Patel dated 1 July 2022 (the 1 July 2022 Patel statement);
- (b) the statement of Mr Patel dated 12 August 2022;
- (c) the report of Neil Wallace dated 27 July 2022;

(3) the joint report of Messrs O'Donnell and Wallace dated 4 and 29 July 2022;

(4) the transcript of the hearing on 15 December 2022.

22 The owners relied on:

- (1) their outline of submissions dated 17 November 2023 (the owners' submissions);

(2) their submissions in reply dated 22 December 2023 (the owners' reply submissions).

23 The builder relied on:

(1) its outline of submissions dated 1 December 2023 (the builder's submissions);

(2) its submissions in reply dated 19 December 2023 (the builder's reply submissions).

24 Each of Mr Babu and Dr Lim made oral submissions.

25 At the conclusion of the hearing, I reserved my decision.

### **The issues**

26 The following issues arise for determination in the two remitted proceedings:

(1) issue 1: whether the owners or the builder owe money to the other under the contract, and if so what amount;

(2) issue 2: whether the builder is entitled to any, and if so what, amount on a quantum meruit;

(3) issue 3: whether the owners are entitled to damages for delay, and if so in what amount;

(4) issue 4: whether the owners are entitled to \$2,156.00 which they paid as compensation to Famous Kitchen;

(5) issue 5: the costs of the two proceedings.

27 Before considering these issues, it is necessary to set out the applicable provisions of the contract.



## The contract

28 The contract was in the form of the seventh edition issued in May 2015 of the HIA NSW Residential Building Contract for New Dwellings and:

- (1) comprises standard clauses 1 to 43, schedules 1 to 7, and special conditions;
- (2) incorporates various documents including the tender dated 2 December 2019 of the builder (the tender);

29 The contract relevantly includes the following standard clauses:

- (1) clause 17 which is entitled “Progress Payments” and when read with Schedule 2 provides for the payment by the owners of the following progress claims within 5 working days of the builder giving the owner a written claim for a progress payment for the completion of each stage:

<i>Revised Progress Payment Schedule</i>			
<i>Stage</i>	<i>Description of Works</i>	<i>Percentage</i>	<i>Amount</i>
1	Deposit	10%	\$67,500.00
2	Floor Slab poured	10%	\$67,500.00
3	Wall frame complete to braced, structural support Install	25%	\$168,750.00
4	Bricks install	25%	\$168,750.00
5	Roof install rough In down pipes & Windows Install	10%	\$67,500.00
6	Plasterboard sanded, insulation, rough in electric & plumbing	10%	\$67,500.00
7	In, doors rough in, Painting, kitchen cupboards, appliances	5%	\$33,750.00
8	Practical completion	5%	\$33,750.00
		100%	
Total Contract Price Incl GST			\$675,000.00

- (2) clause 20 which is entitled “Prime Cost and Provisional Sum Items”:
  - (a) relevantly includes the following terms:

“20.1 The *owner* must give the *builder* written notice of the *owner's* selection of a *prime cost item* within 5 working days after the *builder's* request to do so.

...

20.4 Each *prime cost item* must have an allowance stated next to it. The allowance is the estimated price to supply the Item and does not include an amount for the builder's margin.

20.5 Each *provisional sum item* must have an allowance stated next to it and does not include an amount for the builder's margin.

20.6 In relation to each *prime cost item* and *provisional sum item* is:

(a) less than the allowance, the difference is deducted from the contract price;

(b) more than the allowance, the total of the difference and the builder's margin applied to that difference is added to the contract price.

...”

- (b) and relevantly is to be read with the following items in Schedule 7 which in turn refers to the following sections 3 and 4 of the tender:

“3. Provisional Allowances (PC):

3.1	Provide a Total Provisional Allowances Supply, Install & Deliver Included <ul style="list-style-type: none"> <li>• Sanitary Fitout Supply &amp; Install Sanitary Fixtures including tap wares, vanities, toilet, L'dry, Mirrors, Bath tub, shower screen &amp; all accessories</li> <li>• Kitchen, Pantry, L'dry, BBQ including associated works</li> <li>• Bulit in W'robe to bedrooms &amp; other area</li> <li>• Appliances 90cm Cooktop, Own, Rangehood, Dishwasher, Hot water</li> <li>• All walking in robe (WIR) Joinery including associated works</li> <li>• Security Alarm &amp; Intercom</li> <li>• Staircase including hand rail \$10,000</li> </ul>	Included
	3.1 Provisional Allowances for Dwelling in total: \$45,000.00	\$45,000.00

	Note: Builder will give credit back to clients \$45,000 for above Items 3.1 if client will supply and install Items listed as per clause 3.1	
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“4. Prime Cost (PC) Items:

4.1	Supply of bricks \$800 Including GST per thousand	PC
4.2	Supply of common bricks \$400 including GST per thousand	PC
4.3	Supply of wall t \$20 perm2 and Floor tiles \$20 per m2	PC
4.4	Supply of timber floor \$30 per m2	PC
	Note: 20% Variation will apply if client select Items above PC rates.	

- (3) clause 21 which is entitled “Practical Completion” relevantly includes the following terms:

“21.1 The builder must give the owner a notice of practical completion at least 5 working days prior to practical completion being reached.

21.2 The notice of practical completion is to:

- (a) state the builder's assessment of the date of practical completion;
- (b) state the date and time for the owner to meet the builder on the site to carry out an Inspection of the building works; and
- (c) have attached the builder's final progress claim.

21.3 The owner must meet the builder on the site for the inspection at the date and time stated by the builder in the notice of practical completion or at a date and time otherwise agreed with the builder and either:

- (a) pay the amount of the final progress claim; or
- (b) if the owner believes that-the building works have not reached practical completion give the builder a. written notice detailing anything to be done to reach practical completion.

...

21.6 If the owner does not pay the amount of the final progress claim under subclause 21.3(a) or give the builder a notice under sub-clause 21.3(b):

- (a) the amount of the final progress claim is deemed to be a debt due and owing from the owner to the builder;

(b) the date of practical completion stated in the notice of practical completion is deemed to be the date of practical completion; and

(c) the owner acknowledges the building Works have reached practical completion.

...”

(4) clause 32 which is entitled “Liquidated Damages”:

(a) provides:

“32.1 If the building works do not reach practical completion by the end of the building period the owner is entitled to liquidated damages in the sum specified in Item 11 of Schedule 1 for each working day after the end of the building period to and including the earlier of:

(a) the date of practical completion;

(b) the date this contract is ended; or

(c) the date the owner takes possession of the site or any part of the site,

(b) and relevantly is to be read with item 11 in Schedule 1:

“11. Liquidated damages (Clause 32)

\$1.0 per working' day calculated on a daily basis (if nothing stated, than \$1)”

(5) clause 33 which is entitled "Interest on Late Payments":

(a) provides:

“33.1 The builder may charge the owner interest at the rate stated in Item 12 of Schedule 1 from the day on which an amount falls due to be paid to the builder up to and including the day that amount is paid.”

(b) and relevantly is to be read with item 12 in Schedule 1:

“12. Interest (Clause 33)

Interest on late payments is 12% (If nothing stated then the post judgement interest rate applicable to judgements In the NSW Supreme Court from time to time)

**Issue 1: whether the owners or the builder owe money to the other under the contract, and if so what amount**

*Introduction*

30 In the owners' submissions, the owners submitted that they made total payments of \$702,945.00 to the builder (comprising progress claims for stages 1 to 7, a payment of \$38,000.00 claimed by the builder and \$23,695.00 for variations), they received a refund of \$2,145.00 for a variation, and thereby made an overpayment of \$4,250.00 in respect of the adjusted contract price of \$696,550.00 (being the total of the contract price of \$675,000.00 and variations totalling \$21,550.00).

31 In the builder's submissions, the builder the owners submitted that it received total payments of \$702,945.00 from the owners (comprising progress claims for stages 1 to 7, a payment of \$38,000.00 and \$23,695.00 for variations). It submitted that when prime cost adjustments and provisional sum adjustments and a quantum meruit claim were taken into account, the owners owed it \$70,028.13 (being the total of the contract price of \$675,000.00 less the provisional sum allowance of \$45,000.00 plus the total of \$43,219.51 for agreed variations of \$23,695.99, the prime cost adjustments of \$17,918.51 and a quantum meruit claim of \$1,606.00 plus provisional sum adjustments of \$99,753.62 less payments received of \$702,945.00) plus an amount for interest. In oral submissions, the builder conceded that this amount should be amended to claim provisional sum adjustments of \$106,749.62 less amounts claimed for labour for three items, to claim \$21,550.00 for variations, to remove quantum meruit claim of \$1,606.00 and to take into account the refund of \$2,145.00 to the owners.

32 In oral submissions, the builder amended its claim for provisional sum adjustments to \$106,749.62.

33 The builder made the following concessions during the hearing:

- (1) there should be a deduction of \$2,250.00 for labour including the builder's margin of 20% for the installations of mirrors, the in-wall cisterns and the bulkhead for the built-in wardrobes in its claim for provisional sum adjustments;
- (2) the quantum meruit claim of \$1,606.00 should be removed as part of the adjusted contract price;
- (3) its claim for variations should be reduced to \$21,550.00 to take into account its refund of \$2,145.00 to the owners.

34 The owners made the following concessions during the hearing:

- (1) the total of the prime cost adjustments including the builder's margin of 20% was \$17,918.51 as claimed by the builder;
- (2) if they were liable, then the total of the provisional sum adjustments was \$104,499.62 (being the \$106,749.62 the deduction of \$2,250.00 for labour conceded by the builder) was owing subject to the qualification that there should be a further deduction of \$1,800.00 for labour including the builder's margin of 20% for further work on the staircase.

35 In the light of these concessions, the following issues remained in dispute:

- (1) whether on the proper construction of the contract the liability of the owners for provisional sums was limited to a total of \$45,000.00 where they did not make a selection of the provisional sum items;
- (2) whether the owners instructed the builder not to carry out further work on the staircase;
- (3) the calculation of the amount owing by the owners to the builder under the contract including interest.

## *Consideration*

### **Whether on the proper construction of the contract the liability of the owners for provisional sums was limited to a total of \$45,000.00 where they did not make a selection of the provisional sum items**

- 36 The owners submitted that if the owners did not make a selection of the provisional sum items, then on the proper construction of cl 20 of the contract when read with Schedule 7 and cl 3.1 of the tender, the owners' liability for provisional sums was limited to \$45,000.00.
- 37 There is no warrant for the construction of cl 20 of the contract as submitted by the owners. Firstly, cl 20 does not provide for a selection of the provisional sum items, but only the prime cost items in accordance with a request by the builder under cl 20.1. Secondly, cl 20 of the contract contains no such express or implicit limitation on the liability of the owners for the provisional sum items. On the contrary, cl 20.6 provides for an adjustment of the contract price depending on whether the amount expended on the prime cost items and the provisional sum items exceeds the specified allowance.

### **Whether the owners instructed the builder not to carry out further work on the staircase**

- 38 The owners' claim that they instructed the builder not to carry out further work on the staircase rested on the following two communications:

- (1) paragraph [186] of the 1 July 2022 Patel statement:

"Home owners also requested to flight changed towards to Master bed & Changed Garage door opening towards Stair Case ileu (sic) of Hallway. I organised sum timber, Additional beam, Plasterboard, Paint and Labour to modify this change from Original drawing. It cost us \$1500.00"

- (2) the following text messages on 13 June 2020:

- (a) from Mr Patel at an unspecified time:

“Hi Carpenter is asking \$500 to change staircase & garage door direction and I will supply timber..let me know so I can booked him”

(b) from Mr Toms at 13.04:

“I told u before. If you can do it then do it otherwise it fone”

(c) from Mr Toms at 13.05:

“Fine”

(d) from Mr Toms at 13.08:

“@work”

39 I am not satisfied that the owners instructed the builder to change the staircase direction if it could be done. I am not satisfied that the owners instructed the builder to change the staircase direction only if it was done at no extra cost for them. Accordingly, I am satisfied that the builder is entitled to charge an additional \$1,800.00 (being the total of \$1,800.00 increased by a builder’s margin of 20%) as an adjustment to the provisional sum of \$10,000 for the staircase pursuant to cl 20.6 of the contract.

**The calculation of the amount owing by the owners to the builder under the contract including interest**

40 I am satisfied that the adjusted contract price is \$773,968.13 being the total of the following amounts:

- (1) contract price of \$675,000.00;
- (2) prime cost adjustments of \$17,918.51;
- (3) provisional sum adjustments of \$59,499.62 (being the total of \$106,749.62 claimed by the builder less \$2,250.00 for labour and margin of 20% less \$45,000.00);



(4) agreed variations of \$21,550.00.

41 I am satisfied that the owners owe the builder the amount of \$73,168.13 (the total of \$773,968.13 less payments received of \$700,800.00 when the refund of \$2,145.00 is taken into account) under the contract.

42 I am satisfied that the owners are liable to the builder for interest on the outstanding balance of the adjusted contract price pursuant to cl 33 of the contract. I have made procedural orders for the provision of submissions by the parties as to as to the total amount owing by the owners to the builder which is to take into account of the calculation of interest pursuant to cl 33 of the contract.

**Issue 2: whether the builder is entitled to any, and if so what, amount on a quantum meruit**

43 During the hearing the owners conceded that they are liable for \$1,606.00 for electrical work on a quantum meruit as claimed by the builder.

**Issue 3: whether the owners are entitled to damages for delay, and if so in what amount**

*Introduction*

44 In the owners' submissions, the owners submitted that they are entitled to general damages for delay as follows:

(1) \$93,045.72 for loss of future rent;

(2) or alternatively, \$50,302.95 for mortgage interest;

(3) or alternatively, \$33,909.81 for rent;

(4) \$13,400 for storage.

45 During the hearing the owners conceded that they were not pressing any claim for general damages for delay except for \$33,909.81 for rent.

46 The parties were in agreement as to the following facts:

- (1) the builder commenced the works under the contract on 27 January 2020;
- (2) the date of completion the works under the contract calculated in accordance with cl 12 when read with item 6 of Schedule 1 was 6 October 2020;
- (3) the builder did not make any claim for an extension of time under cl 19 of the contract;
- (4) the builder issued a notice of practical completion dated 1 December 2021 which specified 11 December 2021 as the date of practical completion;
- (5) the owners did not challenge the date of practical completion pursuant to cl 21.3 of the contract;
- (6) if liquated damages were payable for the period from 6 October 2020 to 11 December 2021, then the amount of liquated damages payable pursuant to cl 32 when read with item 11 of Schedule 1 is \$307.00;
- (7) if general damages for delay were payable for the period from 6 October 2020 to 11 December 2021, then the amount of general damages is \$2,625.00.

47 In the light of these concessions and this agreement, the following issues remained in dispute:

- (1) whether on the proper construction of the contract, the builder was liable for general damages for delay in addition to liquated damages pursuant to cl 32 when read with item 11 of Schedule 1;

- (2) whether the builder is liable for general damages for delay and if so in what amount.

*Consideration*

**Whether on the proper construction of the contract, the builder was liable for general damages for delay in addition to liquidated damages pursuant to cl 32 when read with item 11 of Schedule 1**

- 48 In the owners' submissions, the owners submitted that on the proper construction of the contract they are entitled to general damages in addition to liquidated damages and relied on *Cappello v Hammond & Simonds NSW Pty Ltd* [2020] NSWSC 1021 (*Cappello SC*) and *Cappello v Hammond & Simonds NSW Pty Ltd* [2021] NSWCA 57 (*Cappello CA*).
- 49 In the builder's reply submissions, the builder did not challenge this construction of the contract.
- 50 In *Cappello SC*, the proceedings concerned a building contract entered into on 1 September 2017 by which the first defendant builder agreed on a costs plus basis to undertake renovation work to the ground floor of the plaintiffs' two storey residence in Haberfield in New South Wales in accordance with drawings that had received development approval from the local council. Clause 28 of the building contract dealt with liquidated damages, and provided for "\$1.00 per working day calculated on a daily basis" after the end of the building period, being the earlier of the date of three specified events including the date of practical completion.
- 51 The owners claimed damages for delay by reason of the work under the contract having been approximately seven months late which consisted of two components. First, they claimed the sum of \$370,000, which was said to be the diminution in the value of the property between the time it ought to have been completed and the time it was in fact completed. Second, they claimed general damages of \$30,000 for delay. In response to both claims, the builder contended that the owners were only entitled to recover \$1 per day, in accordance with the contractual provisions relating to liquidated damages. It

submitted that by making provision for liquidated damages the parties were to be taken to have intended to exclude a right to general damages, contending that that, generally, where parties choose to make provision for the payment of liquidated damages they are to be taken as excluding a right to claim general damages. The owners make two responses to the builder's reliance on the liquidated damages clause. First, they submitted that, on the proper construction of the contract, the liquidated damages clause does not provide an exclusive remedy. Second, they submitted that if it did, then it was rendered void by s 18G of the HB Act.

52 Ball J at [30]-[32] made the following findings:

[30] The two questions are tied together. If two interpretations of the liquidated damages clause are available and on one the clause is rendered void by s 18G of the HBA, that is a reason for preferring the alternative interpretation. That principle has particular application in the present case. The Contract is based on a standard form that has been specifically drafted for use in relation to residential building work in New South Wales and with the HBA and s 18B, in particular, in mind. The standard form contract itself provides that, if the parties do not insert an amount for liquidated damages, then they are to be taken to have inserted the figure of \$1 per day. It should not readily be inferred that the drafters of the standard form contract intended to adopt a default position that rendered the provision relating to liquidated damages void. And it should not readily be inferred that the parties to the Contract by making the default position express in their contract intended to achieve a different result from the default position.

[31] Section 18B(1)(d) implies into the Contract a warranty that the work will be completed within the time stipulated in the Contract. In my opinion, a provision of a contract which limits a party to claiming nominal damages for a breach of that warranty has the effect of restricting the rights of that person in respect of such a warranty since it substitutes for a substantial right for its breach a nominal one. It is therefore void under s 18G.

[32] It follows from what I have said that the better interpretation of the liquidated damages clause is the one that avoids that consequence. On that interpretation, the liquidated damages clause in this case should not be interpreted as providing an exclusive remedy for delay. Rather, by specifying the amount of liquidated damages at \$1 per working day, the parties intended not to provide for a substantive right to claim liquidated damages and intended instead to leave the plaintiffs a right to claim damages they could prove they had actually suffered. The position, of course, may well be different if the clause had provided for the payment of a substantial amount by way of liquidated damages." (citations omitted)

53 His Honour found that the owners did not establish either of their claims for damages for delay: [33]-[40]. He found the owners were only entitled to claim \$1 per day as damages for delay in completion of the building work, which amounted to \$152: [41].

54 In *Cappello CA*, the New South Wales Court of Appeal in allowing the appeal of the owners in part rejected their challenge to the rejection of their claims for damages for delay. There was no challenge by the builder to the construction of the contract that the liquidated damages clause should not be interpreted as providing an exclusive remedy for delay.

55 I am satisfied that there is no relevant distinction between the construction of the contract found in *Cappello SC*, and the construction of cl 32 of the contract when read with item 11 of Schedule 1 in these proceedings. It follows that the owners are entitled to recover general damages in addition to liquidated damages.

**Whether the builder is liable for general damages for delay and if so in what amount**

56 I am satisfied that the date of practical completion is 11 December 2021 pursuant to cl 21.6(b) of the contract.

57 in view of the concessions of the owners and the agreement of the parties, I am satisfied that the builder is liable to the owners in the amount of \$2,625.00 for general damages for delay. When its liability of \$307.00 for liquidated damages is added to this amount, the total liability of the builder to the owners is \$2,932.00.

**Issue 4: whether the owners are entitled to \$2,156.00 which they paid as compensation to Famous Kitchen**

58 In the owners' submissions, the owners submitted that they are entitled to 2,156.00 which they paid as compensation to Famous Kitchen.

59 During the hearing the owners conceded that they were not pressing this claim. It follows that this issue does not arise for consideration.

### **Issue 5: the costs of the two proceedings**

60 Rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) (NCAT Rules) deals with costs in costs in Consumer and Commercial Division of the Tribunal, and relevantly provides:

#### **38 Costs in Consumer and Commercial Division of the Tribunal**

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

...

(b) the amount claimed or in dispute in the proceedings is more than \$30,000.

61 I am satisfied that r 38(2)(b) of the NCAT Rules is applicable to the two proceedings because the amount claimed by each of the owners and the builder is more than \$30,000. It follows that the position of each party paying their own costs specified in s 60(1) of the *Civil and Administrative Tribunal Act* 2013 (NSW) does not apply to the two proceedings.

62 As the parties indicated that they wished to make submissions on costs, I have made procedural orders for the making of submissions on the costs of the two proceedings.

### **Orders**

63 I make the following orders:

- (1) the parties are to file and serve an agreed statement as to the amount owing by the owners to the builder (being the total amount owing under the contract and on a quantum meruit less damages for delay and calculated in accordance with my findings), and in the absence of

agreement their separate statement which explains the reason for disagreement, by 5 February 2024;

- (2) if any party wishes to make an application for costs, the applicant (the costs applicant) is to file and serve a costs application, including submissions limited to three pages and any evidence in support, by 12 February 2024;
- (3) the respondent to the costs application is to file and serve any submissions limited to three pages and any evidence in reply by 26 February 2024;
- (4) the costs applicant is to file any submissions limited to two pages in reply by 4 March 2024;
- (5) 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. If a hearing is not dispensed with, the parties will be advised of a date for the hearing of the application.

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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

The image shows a handwritten signature in black ink to the left of a circular official seal. The seal features the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem depicting a coat of arms.