Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Unique Commercial Group Pty Ltd v Cusumano [2024] NSWCATAP 141**
Hearing dates:	18 July 2024
Date of orders:	23 July 2024
Decision date:	23 July 2024
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member
Decision:	(1) The application for summary dismissal of the appeal is refused. (2) The costs of the application are to be the Appellant's costs in the appeal.
Catchwords:	APPEALS — summary dismissal — questions of law available where no evidence led by Appellant at first instance
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Home Building Act 1999 (NSW)
Cases Cited:	BDK v Department of Education and Communities [2015] NSWCATAP 129 Bellgrove v Eldridge (1954) 90 CLR 613 Commissioner of Police, NSW Police Force v Hogan [2024] NSWCATAP 77 Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 Crystele Designer Homes Pty Ltd v Wood [2023] NSWCATAP 242 Davis v NSW Minister for Health [2023] NSWCATAP 211 General Steel Industries Inc v Commissioner for Railways (1964) 112 CLR 125 Henderson v Henderson [1843] EngR 917; (1843) 3 Hare 100 Hermes Nominees Pty Ltd v Shepherd [2024] NSWCATAP 36 Jain v Dr N Kalokerinos Pty Ltd [2023] NSWCATAP 141 McCann v Parsons (1954) 93 CLR 418; [1954] HCA 70

	Medical Council of New South Wales v Lee [2017] NSWCA 282 Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45 S & G Homes Pty Ltd t/as Pavilion Homes v Owen [2015] NSWCATAP 190 Samchris Pty Ltd v Keogh [2024] NSWCATAP 125 Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd [2017] NSWCA 223 Simmons v New South Wales Trustee and Guardian [2014] NSWCA 405 Soulis v R & A Henry Auto Repairs Pty Ltd [2021] NSWCATAP 338 Spencer v Commonwealth (2010) 241 CLR 118 University of Wollongong v Metwally (1984) 158 CLR 447; [1984] HCA 74 Wollondilly Shire Council v Styles [2024] NSWCATAP 104 Zeitoune v Commissioner of Police, NSW Police Force [2024] NSWCATOD 59
Category:	Procedural rulings
Parties:	Unique Commercial Group Pty Ltd (Appellant) Richard Cusumano (Respondent)
Representation:	Counsel: J Martin (Respondent) Solicitors: Birch Partners (Appellant) Cornerstone Lawyers (Respondent)
File Number(s):	2024/00216473
Publication restriction:	Nil
Decision under appeal	
Court or tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	24 May 2024
Before:	H Woods, Senior Member
File Number(s):	2022/00395939

REASONS FOR DECISION

Summary

1 This matter was before me on 18 July 2024 to consider an application for summary dismissal of an appeal lodged by an appellant builder (tiler) from a decision of the Consumer and Commercial Division made on 24 May 2024 which, in summary, ordered it to pay the cost of removal and replacement of almost all the internal and external tiles laid by it in the respondent home owner's property. The award was approximately $200,000. The respondent had lodged his claim in the Division in December 2022.

2 Importantly, the appellant made a forensic decision not to participate in the first instance proceedings: Reasons for Decision at first instance (RFD) at [13]. On that basis, the respondent's evidence and submissions went unchallenged and was accepted by the Tribunal.

3 Notwithstanding that, the appellant has lodged its notice of appeal within time. By subsequent amendment, it relies upon four grounds of appeal, said to be questions of law, and otherwise seeks leave to appeal.

4 The respondent's primary basis for the application for summary dismissal is that the appellant is now effectively estopped from challenging the Tribunal's acceptance of the evidence and arguments raised by him, because the appellant had the opportunity to do so at first instance but elected not to: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45 (*Anshun*). The respondent places particular emphasis on the comments made in *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100, at pp 114-115 (67 ER 313, at p 319) per Sir James Wigram V.C., referred to in *Anshun*, that:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (at p 598)

5 I do not doubt that principle is applicable to proceedings in this Tribunal. However, because there are aspects of the appellant's case on appeal which do not fall within that principle, and which I am satisfied are reasonably arguable, I will not summarily dismiss the appeal.

Relevant considerations on a summary dismissal application

6 Other principles also apply in respect of summary dismissal where the appeal is said to be frivolous, vexatious or otherwise misconceived or lacking in substance.

7 The parties agreed as to the relevant principles for summary dismissal under s 55 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act), set out in the respondent's submissions on the application at [5] to [10]:

“5. Section 55(1)(b) of the Act relevantly provides that:

> 55 Dismissal of proceedings
>
> The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances —
>
> …
>
> (b) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance.

6. The Tribunal's power to dismiss proceedings at any stage under the Act is discretionary: *Zeitoune v Commissioner of Police, NSW Police Force* [2024] NSWCATOD 59, [18]. The principles pertaining to s.55(1)(b) were set out at length *in BDK v Department of Education and Communities* [2015] NSWCATAP 129 at [57]-[75], and have since been cited with approval: see e.g. *Davis v NSW Minister for Health* [2023] NSWCATAP 211; *Zeitoune v Commissioner of Police, NSW Police Force* [2024] NSWCATOD 59, [20].

7. Unlike, for example, the Uniform Civil Procedure Rules 2005 (NSW), s 55(1)(b) of the Act does not have a generic catch-all category of ‘abuse of process’ to pick up conduct in relation to the issuance and pursuit of proceedings that might, arguably, fall outside the four specific categories set out there: *BDK* at [62].

7. Notwithstanding this, as the Appeal Panel in BDK held at [66] that:

> “In our view a reasonably broad connotation should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While 'misconceived' and 'lacking in substance' may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are frivolous' or 'vexatious', conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings.”

9. This broad interpretation was followed by the Appeal Panel in *Davis* where it was held at [53] that:

> “We agree with the view expressed by the Appeal Panel in BDK that a “reasonably broad connotation” should be given to the meaning of each of the four categories of proceedings listed in s 55(1)(b) of the NCAT Act. Ms Davis is correct that the phrase “lacking in substance” can mean proceedings where it is found that the initiating claim or application is based on an “untenable proposition of fact or law” or “is not reasonably arguable”. However, there is nothing in the text, context or purpose of s 55(1)(b) of the NCAT Act to suggest that these are the only findings which might justify the conclusion that the proceedings are lacking in substance. A range of findings could potentially justify a conclusion that proceedings are “lacking in substance”, including that the proceedings “would be of no practical effect”, or that the initiating application was based on an “untenable proposition of fact or law” or was “not reasonably arguable”. Equally, a range of findings could potentially justify a conclusion that proceedings are “vexatious”, “frivolous” or “misconceived” (see, e.g., the analysis of Roden J about the term vexatious in *Attorney General v Wentworth* at 491).”

10. Section 55(1)(b) of the Act empowers the Tribunal to govern its own processes, to ensure that its processes are not abused and to ensure that its resources are applied to resolving real, not confected, amorphous or nebulous disputes. *BDK* at [62].”

8 To those principles, though, I would add what was said in *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 by Barwick CJ at p 129 where his Honour said:

> “It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that is to be the ground on which the Court is invited, as it is in this case, to exercise its powers of summary dismissal, is clearly demonstrated. The test to be applied has been variously expressed as so obviously untenable that it cannot possibly succeed, manifestly groundless, so manifestly faulty that it does not admit of argument, discloses a case of

which the Court is satisfied cannot succeed, under no possibility can there be a good cause of action, be manifest for that to allow the pleadings to stand would involve useless expense."

9 In accordance with the High Court's decision in *Spencer v Commonwealth* (2010) 241 CLR 118 (*Spencer*), it is clear (despite the fact that was a decision referring to s 31(a)(2) of the Federal Court Act) that analogous considerations apply here; which are that on a summary judgment application the real issue is whether there is an underlying cause of action or defence, not simply whether one is pleaded, and the critical question can be expressed as whether there is more than a fanciful prospect of success or whether the outcome is so certain that it would be an abuse of the process of the Court to allow the action to go forward. Demonstration of the outcome of litigation is required, not an assessment of the prospects of success: *Simmons v New South Wales Trustee and Guardian* [2014] NSWCA 405 at [192], citing *Spencer*.

10 The Court also noted that the power to terminate proceedings summarily must be exercised with exceptional caution.

Background

11 The background to the dispute is as set out in RFD [32]-[58] and does not need to be repeated here.

12 In essence, the Tribunal found that there were several contracts made between the parties leading to the appellant conducting tiling works. Those contracts were made in:

(1) 2012: RFD [32];

(2) September 2016: RFD [38], leading to works being undertaken in late 2016/early 2017; and

(3) September 2020: RFD [49], leading to further works being undertaken in 2022.

13 The Tribunal found, correctly in my preliminary view and as I understand it on an unchallenged basis, that the warranties implied under section 18B of the *Home Building Act 1999* (NSW) (HBA) were not actionable by the respondent in respect of the works completed in 2012 when the respondent brought his claims to the Consumer and Commercial Division in 2022. That is because, on any view, the time limit for bringing the claims had expired and cannot be extended: *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190.

14 The appellant now wishes to challenge the Tribunal's findings that the 2016 and 2020 oral contracts were in fact formed. I accept, on the principles outlined in *Henderson v Henderson*, above, and the usual application of the principles relating to the admission of new evidence on appeal (see for example *McCann v Parsons* (1954) 93 CLR 418; [1954] HCA 70 per Dixon C.J., Fullagar, Kitto and Taylor JJ at [14], referred to with approval in the Appeal Panel in *Wollondilly Shire Council v Styles* [2024] NSWCATAP 104 at [61]) or raising new issues in an appeal (see, for example *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74; *Coulton v Holcombe* (1986) 162 CLR 1 at [9]; [1986] HCA 33) that the chances of the appellant being given the opportunity to do so by leading evidence in this appeal that could have been

produced at first instance may be limited. That may well prove fatal to the appellant's application for leave to appeal, given the effect of cl 12(1), Sch 4 of the Act, but that will be a matter for the Appeal Panel determining the substantive appeal.

15 However, those principles will not necessarily prevent the appellant proceeding as of right on a question of law, particularly if there is no suggestion that the respondent might have adduced evidence to meet the relevant argument in the Tribunal. Any prejudice to the respondent in allowing the argument to be put for the first time on appeal could, for example, potentially be remedied by an order that the appellant pay the respondent's costs of the appeal proceedings in any event: s 80(2)(b) of the Act; *Medical Council of New South Wales v Lee* [2017] NSWCA 282 per Basten JA at [77].

16 In that regard, the appellant seeks to challenge the Tribunal's decision on “no evidence” grounds which, properly framed, may be questions of law: see appellant's submissions on the substantive appeal lodged 12 July 2024, p ABD271 at [34] and [42]. The effect of those challenges, the appellant says, is that the Tribunal found, without evidence, that the relevant defects constituted a “major defect” attracting a six year limitation period in respect of the 2016 works: HBA, s 18E(1). The appellant alleges that the claim for both the 2012 and 2016 defects was lodged out of time, and therefore beyond the Tribunal's jurisdiction.

17 Moving from that assertion, the appellant submits that the Tribunal's decision to make an order for the almost complete removal and replacement of the tiling works was wrong, because there was an insufficient basis for it to do so without regard to how much of the defective work was related to the 2020 contract (which it denies) only.

18 Of course, even if it were to succeed in that argument, the appellant would still need to overcome the Tribunal's finding at RFD [83(1)] that the tiles cannot be matched, leaving open the possibility that the order could be justified, in any event, having regard to defective works in 2022 on the principles set out in *Bellgrove v Eldridge* (1954) 90 CLR 613.

19 In a related manner, the appellant also makes a challenge on the basis that the Tribunal’s reasons are inadequate: Amended grounds of appeal, ground 2(c). Again, properly framed, that may raise an arguable error on a question of law.

20 A challenge that I faced in determining the application is that the appellant's amended grounds of appeal do not squarely and clearly raise the arguments I have reflected at [16] and [17] above. I had to extract an understanding of the argument in an exchange with the appellant's solicitor.

21 Nor have the amended grounds of appeal apparently been drafted with a proper eye to identifying questions of law as that is now to be understood in this Appeal Panel: see *Soulis v R & A Henry Auto Repairs Pty Ltd* [2021] NSWCATAP 338; *Jain v Dr N Kalokerinos Pty Ltd* [2023] NSWCATAP 141; *Crystele Designer Homes Pty Ltd v Wood* [2023] NSWCATAP 242; *Hermes Nominees Pty Ltd v Shepherd* [2024] NSWCATAP 36*;*

Commissioner of Police, NSW Police Force v Hogan [2024] NSWCATAP 77, *Wollondilly Shire Council v Styles* [2024] NSWCATAP 104 and *Samchris Pty Ltd v Keogh* [2024] NSWCATAP 125.

22 Any diminished tolerance by the Appeal Panel for legally represented appellants failing to identify questions of law clearly and succinctly should be understood in the context of those decisions.

23 Here, the purported questions of law largely allege that the Tribunal “erred at law” in making various findings, which is wrong: *Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd* [2017] NSWCA 223 at [13].

24 However, as I consider there to be arguable errors on questions of law underpinning the appeal, I will not summarily dismiss it even though they are not, in my preliminary view, currently clearly identified in the grounds of appeal.

Costs

25 In the event summary dismissal of the appeal was refused, the appellant sought its costs of the application on an ordinary basis. There is no doubt that rr 38 & 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) apply here, so that the usual considerations as to costs usually applied in the courts, unconstrained by s 60 of the Act, are relevant.

26 Whilst the respondent has failed in its application for summary dismissal, and will not be awarded his costs on that basis, the appellant has to an extent invited the application by failing to clearly draft its purported questions of law.

27 I will order that the costs of the application are the appellant’s costs in the appeal, which in this case means the appellant could only recover the costs if successful in the appeal.

Orders

28 My orders are as follows:

(1) The application for summary dismissal of the appeal is refused.

(2) The costs of the application are to be the Appellant’s costs in the appeal.

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

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Decision last updated: 23 July 2024