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RELIANCE ON OCCUPATION CERTIFICATE FOR HBA WARRANTY ACTIONS UNCERTAIN – NCAT APPEAL PROVISIONS CONSIDERED

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RELIANCE ON OCCUPATION CERTIFICATE FOR HBA WARRANTY ACTIONS
UNCERTAIN – APPEAL PROVISIONS CONSIDERED

In *Owners – SP76269 v Draybi Bros Pty Ltd* the NCAT Appeal Panel considered the owners corporation's rights to appeal from a decision that proceedings for damages for breach of the *Home Building Act* warranties against the builder of the strata scheme, Draybi Bros Pty Ltd were out of time.

Proceedings were brought in the CTTT on 14 November 2012. The final occupation certificate for the strata scheme was issued on 15 November 2005. In the hearing before Principal Member Harrowell it was the evidence of the builder that the builder last attended the site to carry out work on 10 November 2005.

In determining whether the application had been brought within 7 years of the date of completion of the building work as required by s18E and s48K of the *Home Building Act*, the Tribunal considered the definition of the date of completion in s3B of that Act. It was agreed between the parties that the building contract did not provide for when work was complete and accordingly the completion of the residential building work occurred on practical completion of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.

Section 3B(3) goes on to say that it is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of the following relevant dates:

- The date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion);
- The date of issue of an occupation certificate under the *Environmental Planning and Assessment Act 1979* that authorises commencement of the use or occupation of the work.

Member Harrowell accepted the evidence of the builder that he last attended the site to carry out work on 10 November 2005. Accordingly, as that was the earliest date provided for in s3B(3), it could be presumed to be the date of practical completion. It was more than 7 years before the claim was brought and Member Harrowell dismissed the claim.

The owners corporation appealed and the Appeal Board turned its mind to the basis upon which decisions in relation to building matters brought in the CTTT may be appealed to the Appeal Panel.

Section 80 of the *Civil and Administrative Tribunal Act* provides:

- 1) *An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.*
Note : *Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27 (1).*
- 2) *Any internal appeal may be made:*
 - a. *in the case of an interlocutory decision of the Tribunal at first instance-with the leave of the Appeal Panel, and*
 - b. *in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance-as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.*
- 3) *The Appeal Panel may:*
 - a. *decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and*
 - b. *permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.*

The decision at first instance was a decision of the Consumer and Commercial Division and clause 12(1) of Schedule 4 of the Act applies. Clause 12(1) provides:

12 Limitations on internal appeals against Division decisions

- 1) *An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:*
 - a. *the decision of the Tribunal under appeal was not fair and equitable, or*
 - b. *the decision of the Tribunal under appeal was against the weight of evidence, or*
 - c. *significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).*

Note : *Under section 80 of this Act, a party to proceedings in which a Division decision that is an internally appealable decision is made may appeal against the decision on a question of law as of right. The leave of the Appeal Panel is required for an internal appeal on any other grounds.*

The owners corporation argued that the evidence upon which Senior Member Harrowell relied to conclude that work was not undertaken after 10 November 2005 was unreliable and false. The owners corporation also argued that newly available evidence from the Council indicated that work was performed in relation to the kerb after that date.

The Appeal Panel rejected the owners corporation's submissions saying that the reliance of Senior Member Harrowell on the evidence which was originally before him was reasonable and that no substantial miscarriage of justice had occurred. The Appeal Panel found that the evidence from Auburn Council did not lead to a conclusion that the contractor attended the site to carry out work after 10 November and that the owners corporation did not address the issue of whether, in the event that that work was carried out after that date, it was work to remedy a defect that did not affect practical completion.

Leave to appeal was not granted and the order of Senior Member Harrowell was upheld.

This case highlights the uncertainty of relying on the date of issue of an occupation certificate for determining the time for bringing action and some of the appeal limitations under the *Civil and Administrative Tribunal Act 2013*.

The *Home Building Amendment Act 2014* will, when proclaimed, make the date of issue of the occupation certificate the sole determiner of the date of completion for owners corporations.

The appeal provisions of the *Civil and Administrative Tribunal Act 2013* will be with us for some time to come.

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JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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