Conducting hearings in the Consumer & Commercial Division of NCAT

Australian Construction Law Discussion Group

Sydney — 31 May 2016

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Thank you for your invitation to address you this evening regarding the work that you do in the Civil and Administrative Tribunal of New South Wales.

Before we immerse ourselves in the practical matters that you are involved in on a day to day basis, I thought it might be helpful to take a step back and give you an overview of the Tribunal.

As you may be aware the Tribunal is made up of a number of divisions. They are:

- Guardianship,
- Administrative and Equal Opportunity;
- Occupational; and
- Consumer and Commercial.

There is also an internal Appeal Panel, which hears appeals from each of the four divisions.

In 2014–15 NCAT received 71,449 applications, of which 58,360 or 81.7% were lodged in the Consumer and Commercial Division.

Of the 58,360 applications lodged in the Consumer and Commercial Division, 44,893 related to residential tenancy matters.

There were 3,105 applications lodged under the Home Building jurisdiction in 2014–15. In the previous year there were 3,543 applications filed.

It may be of interest to practitioners to learn that there were 5,255 applications lodged in the Division's General jurisdiction (Consumer Claims) and 1,352 applications in the Division's Strata Schemes jurisdiction.

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Tool Kit

There are a number of NCAT documents that practitioners in the Consumer and Commercial Division should be aware of and be familiar with. They are:

NCAT procedural directions:

1. Service and Giving Notice
2. Summonses
3. Expert Witnesses
4. Registrars' Power – Directions

Consumer and Commercial Division procedural directions:

- Adjournments
- Acceptance of Building claims
- Conciliation and Hearing by Same Member
- Home Building Disputes
- Online Lodgement
- Personal Identifiers
- Electronic Evidence

Consumer and Commercial Division guidelines:

- Representation of Parties

Guiding Principle

If only one thing is to be learned from the *Civil and Administrative Tribunal Act 2013* (NSW) it should be sections 36(1) and (2) which state:

> (1) The ***guiding principle*** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) The Tribunal must seek to give effect to the guiding principle when it:
>
> (a) exercises any power given to it by this Act or the procedural rules, or
> (b) interprets any provision of this Act or the procedural rules.'

Disposition of Proceedings

Again, before throwing ourselves into the detail, it is in my view useful to take a step back and resume our overview.

I think that we all know that Courts and Tribunals are driven by or assessed on the basis of various criteria. It's just that practitioners don't often know of the criteria, are not interested in the criteria or don't take the trouble to find out what the criteria are.

The NCAT Annual Report 2015 informs the reader that the Tribunal's efficiency and effectiveness is measured (in part) by applications lodged in the Tribunal in a year and the Tribunal's case clearance rate in that year which, taken together, indicate the capacity of the Tribunal to manage its workload.

The clearance ratios achieved indicate an expectation that the applications resolved will be equal to (or greater than) the applications lodged in any one year.

This material will indicate to you the overall desire of Tribunal Members to have matters resolved as expeditiously as possible. I think that it is now understood that there is no tolerance within the Consumer and Commercial Division to proceedings being left to languish in the lists, with numerous directions hearings being held without the matter progressing in an appropriate manner.

The approach which I have referred to does not contribute to the efficient disposition of proceedings, nor is it consistent with the guiding principle to which I have referred. It also does not assist in achieving an acceptable clearance ratio.

At the heart of the 'guiding principle' is the quick and cheap resolution of the real issues.

I would add here that building disputes are often beyond the capability of the litigant in person, who is the preferred litigant in the Tribunal having regard to section 45(1) of the NCAT Act. Nonetheless, where leave for legal representation is given, I appreciate that it can often be a difficult to contain legal costs.

A case management approach which allows matters to languish has the undesirable effect of increasing the costs of the proceedings which is inimical to their 'quick and cheap' disposition.

Delayed proceedings and numerous directions hearings may drive up legal costs, such that settlement of proceedings becomes that much more difficult. In extreme cases the prospect of the receipt of a costs order may be a factor in the running of a case.

To tie together information that we have already learned, if the Tribunal receives 3,105 applications in the Home Building jurisdiction in one year and its clearance ratio expects that the same number of applications will be resolved in the same year, that means about 259 home building cases must be resolved in every month. Slicing and dicing the figures further, that is 13 Home Building cases per day to be heard and resolved.

Against this background you can understand why those responsible for the overall management of the Home Building List are delighted when matters settle, and especially delighted when matters settle early.

To plead or not to plead

The Tribunal does not require cases to be pleaded in the traditional manner.

However, I would suggest that in the Home Building list practitioners should impose upon themselves the discipline of pleading out the case even if only in a simple and straightforward manner.

Issues such as the jurisdiction of the Tribunal might be considered in this process. For example:

The amount claimed does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations).

The claim is a 'building claim' as defined in section 48A of the Act as follows:

> building claim means a claim for:
>
> (a) the payment of a specified sum of money, or
> (b) the supply of specified services, or
> (c) relief from payment of a specified sum of money, or

(d) the delivery, return or replacement of specified goods or goods of a specified description, or
(e) a combination of two or more of the remedies referred to in paragraphs (a)–(d) of section 48A

And the building claim arises from a supply of *building goods or services* whether under a contract or not, and is to not include a claim that the regulations declare not to be a building claim.

Building goods or services are defined in section 48A of the Act to mean:

> goods or services supplied for or in connection with the carrying out of *residential building work* or specialist work, being goods or services:
>
> (a) supplied by the person who contracts to do, or otherwise does, that work, or
> (b) supplied in any circumstances prescribed by the regulations to the person who contracts to do that work.

Residential building work is defined by the Act in section 3 to mean:

> any work involved in, or involved in co-ordinating or supervising any work involved in:
>
> (a) the construction of a dwelling, or
> (b) the making of alterations or additions to a dwelling, or
> (c) the repairing, renovation, decoration or protective treatment of a dwelling.

Finally pursuant to section 48A(2) of the Act 'a building claim includes the following':

> (a) an appeal against a decision of an insurer under a contract of insurance required to be entered into under this Act,
>
> (b) a claim for compensation for loss arising from a breach of a statutory warranty implied under Part 2C.

As part of the simple task of pleading their case, practitioners should also have regard to a few shoals and reefs their clients may be washed up on.

There are limitation issues for owners claiming damages for breach of statutory warranties in the form of section 18E of the *Home Building Act*. It should not be forgotten that section 18E has been amended a number of times, so care should be taken to see whether one's client has a 7 year warranty period, or if the position which applies is a 6 year structural warranty and a 2 year non-structural warranty.

If the client is a builder seeking to recover money for carrying out building work, it is necessary for the pleader to consider whether there has been compliance with sections 4 and 7 of the Act. If the builder has not complied it will be necessary to frame the application in quantum meruit/restitution.

It will also be necessary for the pleader to consider whether a builder client was required to obtain Home Owners Warranty Insurance and, if so, was the insurance obtained.

If the insurance was required but not obtained then it will be necessary to frame the application in quantum meruit/restitution and to persuade the Tribunal that it is just and equitable for the builder to recover on that basis.

The first directions hearing

As you all know, at the first directions hearing orders will be made for the filing of evidence in order to prepare the case for hearing.

The Tribunal currently runs a program on Fridays when experienced Members will be available to assist parties achieve a settlement on the first occasion a matter is listed for a directions hearing.

This program is quite effective in assisting parties to achieve settlement of their claims.

For ADR practitioners, it is an interesting way to help parties achieve early settlement, before proceedings become complicated and costly. It is worthwhile noting that this type of an early intervention method can only be successful through an intensive deployment of appropriate resources.

To return to a subject discussed earlier, early settlement of cases can only assist one's clearance ratio.

Where the parties are represented, the Tribunal will expect the first directions hearing to put in place the orders necessary for the exchange of evidence required to place the proceedings in a position of preparedness for a hearing or for a further directions hearing to consider what more needs to be done before setting the matter down for hearing.

In most cases the 'what more needs to be done' before a hearing is ordered will be a consideration of whether there should be a:

- Conclave;
- Joint experts report; or
- Mediation.

Conclaves etc.

I am sure that practitioners are aware of the conclave process and the benefits of having a conclave.

A conclave is a Tribunal sponsored process in that appropriately experienced Tribunal Members conduct the conclave and prepare minutes of what was agreed at the conclave, which are to be formalised and signed by the parties' experts.

It won't be possible in all cases for a Tribunal Member to be available to conduct a conclave. In those cases the parties will be ordered to ensure that their experts meet to establish what issues they are able to agree and then to prepare a joint report which sets out the agreed issues and also lists the matters which remain in dispute and the experts' position in relation to the disputed matter and his or her reasons for holding that position appropriately cross referenced to earlier reports.

A conclave or a joint experts' report should save the parties large amounts of fees, both legal and expert, in that the hearing of a dispute should be considerably reduced if the conclave or meeting process is effective.

Some dos and don'ts regarding conclaves

Consider whether the owner's expert (usually) needs to put on a reply report before the conclave. There is no point for the expert at the conclave to be

expressing his reply opinions for the first time to the other expert at the conclave, who might complain that he has been taken by surprise.

Once the reply report is on the conclave should take place.

If a reply report is required but not served before the conclave, the conclave may well be a waste of time and resources.

Resist the temptation to seek an order for further expert's reports after the conclave. Experienced Tribunal Members will ordinarily refuse to allow any such reports.

There may be an occasion for further expert reports, hopefully rare, perhaps on discrete issues arising out of the conclave. However, the orders for that material should be made or recommended by the conclave Member.

Do not expect that an expert will be permitted to resile from agreements made at a conclave. To put it another way, if an expert does seek to resile from conclave agreements, that may affect his credibility.

Don't allow the conclave to be inconclusive or fail to address the real issues. This is more a comment addressed to experts. I appreciate that this is beyond the reach of lawyers who do not attend the conclave.

I recall one case where it became apparent during the hot tubbing of the experts that the conclave was the dress rehearsal, and the hearing was the opening night. While this was of benefit, the downside was that it is just not cost efficient from a time management perspective, both for the parties and the Tribunal.

Expert Reports

I do not intend to discuss directly the requirements for an expert report as discussed in cases such as *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 or in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21.

Practitioners are no doubt aware that most cases in the Home Building lists of the Consumer and Commercial Division require the tendering of experts reports.

The expert plays an important role in the Home Building cases that come before the Tribunal.

I sometimes gain the impression that solicitors, once they have received an expert's report, put a tick in some sort of a case preparation box, either mental or on paper, and then move on to the next task to be tackled.

This impression may be gained because the expert has failed to refer to the Expert Witness Code of Conduct. This does occur and more so in cases where the parties are not represented.

Secondly, I also form a view that solicitors have not spent that much time reading the report because of a lack of apparent reasoning path.

I understand that practitioners may be loath to suggest to experts how to express their opinions because:

1. The expert may take offence;
2. Communications of this nature will be amenable to a summons to produce; and
3. Submissions may be made that such a solicitor is seeking to dictate the expert's position such that the opinion expressed is not his own and therefore of no value.

However, merely to point out that a reasoning process is necessary to support a conclusion will not, in my view, expose a solicitor or an expert to the criticism that the opinion or conclusion is not the expert's.

After all, the reasoning process will be the expert's work, not the solicitor's.

I make this comment because I regret to say that quite often an expert's report will not contain a reasoning process to support the conclusion.

Often one comes across comments such as the work is defective because it is in breach of section 18B of the *Home Building Act*.

In *MacFayden v Tadrosse* [2014] NSWCATCD 194, I stated that an expert dealing with a case for a breach of a statutory warranty

> 'should provide evidence that would allow such a conclusion [of breach of warranty] to be drawn by the Tribunal. For example, evidence that

> work does not comply with the Building Code of Australia would establish a basis for a finding that sub section 18B(c) of the Act has been breached. Evidence of the details in which work does not comply with the contractual plans and specifications would form the basis for a finding that sub section 18B(a) of the Act has been breached. Evidence of work not being carried out in a proper and workmanlike manner would in my view involve identification of the work in question, a statement of how the expert would expect it to be carried out in a proper and workmanlike manner and then identification of the factors which establish that the way in which the work has been carried out falls short of it being carried out in a proper and workmanlike manner. Evidence of this nature, if accepted, would form the basis for a finding that sub section 18B(a) of the Act has been breached.'

Often it is stated that the work does not conform to the drawings or specifications, but in any event the expert cannot see any apparent damage or lack of functionality.

While this type of expert evidence may contain an admission of a breach by a builder to comply with one of the statutory warranties in section 18B of the Act, the additional comment by an expert of no apparent damage or no loss of functionality, indicates a possible straying into the role of an advocate by the expert.

The question of whether an admitted failure to comply with a statutory warranty coupled with an observation of no apparent damage or no loss of functionality may lead to a potential legal issue relating to the damage sustained by an owner. That clearly is not the province of the expert.

However if such a submission is to be made by a builder, one must concede that the evidence of those issues must be given by the expert.

In other cases the expert may say that the owner's claim has been caused by a lack of maintenance. For my part, such an observation, on its own, is not particularly helpful.

The issue to be determined is whether there has been a breach of one or other of the warranties. Once an expert has given an opinion about whether there

has or has not been a breach of a statutory warranty, it may in that context be helpful to provide an opinion about whether the matters that the owner complains of are caused by a failure to maintain some specific system or item.

Settlement or 'How time flies!'

I think that we can all agree that settlements are welcomed by the parties, the Tribunal and the lawyers and experts involved. The Tribunal will always grant indulgences in the form of adjournments to allow the documentation of a settlement. However, there is an issue of how long the Tribunal's indulgence should be granted.

The usual situation is that parties appear before a Member and recite the incantation that 'The matter has been settled and we need some more time to document the Deed of Settlement.'

To a Member in a busy list this is often a welcomed state of affairs and the adjournment is granted, as it facilitates the settlement and eases the pressure of the list.

On one occasion when that occurred I took a few moments to review the file, only to discover that the 'usual incantation' had been made on a number of occasions and in fact the parties were celebrating the first anniversary of those words first being uttered.

The proceedings were then set down for hearing in the hope that a forthcoming hearing might, to misquote Doctor Johnson, 'concentrate the mind wonderfully' as regards settlement of the matter.

Unfortunately that was not, in years past, an uncommon state of affairs.

When practitioners are unable to have their settlement papers signed within a reasonable time, the Tribunal may conclude that there is in fact no concluded settlement in place. Programming orders may be made to progress the case for hearing.

Practitioners may consider this an unreasonable attitude. However, as stated, applications cannot be left to languish in the list for long periods of time while parties seem to move on to other matters in the expectation that, at some time in the future, the settlement can or will be finalised.