



Précis Paper

Seeking Remedies for Breach of Statutory Warranties: Home Building

A discussion of the key case of *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84 and the remedies that can be sought in home building matters.

Discussion Includes

- Facts of *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84
- Facts and findings of *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248
- Developing case theory in building matters in NCAT
- Electing the appropriate remedy to seek
- Decision of Court of Appeal in *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84
- Options available if you have sought the wrong remedy

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Video Title

In this edition of BenchTV, Sydney Jacobs (Barrister – 13 Wentworth Selborne Chambers, Sydney) and Elie Nehmetallah (Principal – Manfred Legal, Sydney) discuss the case of *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84 and its implications in regards to the remedies that are available to parties in home building matters for breach of statutory warranties.

Facts of *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84

1. Many people believed the judgement of Ipp J in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 effectively barred remedies, both for damages and for specific performance, if the contract remained on foot. This meant that if the home owner could have cancelled a contract for the builder's wrongdoing or repudiated the contract, but had not elected to do so, then the home owner could not claim damages for defects, nor damages for incomplete work, and perhaps not even claim for the statutory version of specific performance under s 48O of the *Home Building Act 1989* (NSW). However the case of *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84 (*Little*) arguably dispelled this view.
2. In the *Little* case, the Little's (the Applicants) owned property in Northern NSW. In October 2013, they entered into a contract with the builder, J & K Homes (the Respondents), to build a home on that property for \$330,000 which was to be completed within 120 days. The work commenced in February 2014 and continued until 15 September, 2015. At that point in time, the builder left the site, leaving substantial work to be completed and a lot of defective work that had to be attended to and rectified. The Applicant's then approached the Department of Fair Trading, who issued a rectification order and an inspection report, both of which recorded that the works of the builder were not done, despite the builder agreeing to return to site to complete them.
3. An application to the NSW Civil and Administrative Tribunal (NCAT) was made in April 2016 by the Littles. The builder responded and admitted that the last time they had attended the site to complete works was in September 2015. The respondent builder then filed an amended and supplementary defence along the lines of the rule in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248, which will be discussed in detail below. The Respondents alleged the Applicants had no standing to commence proceedings while the contract was on foot. At first instance, proceedings were dismissed on the basis that the applicant lacked standing to commence proceedings as the contract had not been terminated.

4. There was little consideration given to the order that was sought on the filed application seeking the statutory version of specific performance that can be granted under s 48O of the *Home Building Act 1989* (NSW), which provides the Tribunal the power to make an order that the builder return to site and fix the works.
5. In this case, the Applicant's then filed an internal appeal in NCAT, which will be discussed below, and the judgement of the learned member below was reversed.

Facts and findings of *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248

6. The judgement handed down at first instance in *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84 which saw the proceedings dismissed relied heavily upon the decision in *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 (*Brewarrina*).
7. In *Brewarrina*, Brewarrina Shire Council entered into a contract with a builder known as Beckhaus to perform works on the terms of a standard form of contract. Within that contract it was stated that at a certain date, the works of the site are to be handed over to the builder and then the work is in the builder's hands until certain things occur, such as practical completion. Practical completion occurs when the works are then handed back into the hands of the owner or the developer.
8. It is important to note to look out for whatever form of contract is in your case to see what provisions are made for the work or the site being passed from the possession of the owner to that of the builder.
9. In this case, Beckhaus, the building contractor, wrote to the council advising that, in its view, practical completion had been reached, however the council refused to issue a certificate of practical completion. The council were of the view that practical completion had not been reached, and therefore believed Beckhaus was not entitled to any remuneration.
10. The Court held that while Beckhaus had not achieved practical completion, it nevertheless had achieved substantial compliance with the contract and the Court found in favour of Beckhaus. The Court of Appeal inferred Council's position in keeping the contract on foot, i.e. open, was so it could claim liquidated damages.
11. Essentially, the *Brewarrina* case held that whilst the contract is on foot and has not been terminated, and the builder is entitled to return to site and rectify any defects or complete work, there is no claim for damages on part of the owner for incomplete work or for rectification.

12. This decision led to a view by many that in home building matters, the judgement of Ipp J barred a claim on the part of the homeowner for damages for rectification or for incomplete work. At no point in the *Brewarrina* case was there a claim for rectification, and there was no claim under statutory warranties.

Developing case theory in building matters in NCAT

13. In light of the decision in *Brewarrina*, the applicant must make a tactical decision as to whether or not they serve notices in accordance with the contract to effect termination or whether or not to keep the contract on foot, while they are seeking a remedy.
14. The decision in *Brewarrina* may lead one to believe that in those circumstances it would be suitable to terminate the contract with the builder, but that may not be the most tactful decision. This is because in order to develop your case theory one must have regard to s 18E and s 48O of the *Home Building Act 1989* (NSW). Section 18E of the *Home Building Act 1989* (NSW) provides a framework and a time limitation for commencement of proceedings for breach of statutory warranties.
15. Statutory warranties are found in s 18B of the *Home Building Act 1989* (NSW). Some examples of statutory warranties include: the builder must build progressive works with due diligence, the builder must build in accordance with the plans and specifications and all relevant law, the builder must hand over a home that is habitable and fit for purpose, etc.
16. Section 18E of the *Home Building Act 1989* (NSW) provides that proceedings for breach of statutory warranties must be commenced before the end of the warranty period for the breach. The warranty period is 6 years for a breach that results in a major defect in residential building work, or 2 years in any other case. The warranty period starts on completion of the work to which it relates.
17. Section 18E(d) of the *Home Building Act 1989* (NSW) provides that if work is not completed, the warranty period starts on the day the contract is terminated. If the contract is not terminated, the warranty period starts on the date on which the work is ceased, and if the contract has not been terminated and work has not been started, the warranty period begins on the date of the contract. It is possible to argue that the decision in *Brewarrina* is wholly inconsistent with the legislation as it applies to home owner's claims.
18. In *Mohammed Affan v Fabiani Constructions Pty Ltd; Fabiani Constructions Pty Ltd v Mohammed Affan* [2014] NSWCATCD 192, the home owner took the position that it did not have to pay the builder the last bit of money because the work was incomplete. The homeowner alleged he had an action for damages, despite *Brewarrina*, for breach of

statutory warranty for incomplete or defective work. The builder asserted that it did not have to finish off the last bit of work the home owner alleged was incomplete or defective, and argued the *Brewarrina* point, stating there could be no action for damages whilst the contract was still on foot. In this case the judge found in favour of both the builder and the homeowner. The judge found for the builder in that it was owed money on a quantum meruit, but found also for the homeowner, despite *Brewarrina*, that he could claim damages for defectively incomplete work.

19. Therefore it is possible to argue that principles espoused by the Honourable Justice Ipp in his judgement in *Brewarrina* do not apply to claims for damages for breach of statutory warranty.

Electing the appropriate remedy to seek

20. It now appears that an applicant can bring proceedings for breach of statutory warranties while the contract is on foot, the applicant must also elect the appropriate remedy to seek.
21. There is a credible argument that can be made that damages can still be awarded in circumstances where the contract is still on foot and work is technically still in the hands of the builder. In certain situations, the facts may warrant awarding damages. Those facts may be:
 - Abandonment – where the builder refuses to come back to site to rectify defective or incomplete works,
 - Where the builder is unlicensed and cannot legally come back to site and complete or rectify those works,
 - In all other circumstances, one should refer to s 48O of the *Home Building Act 1989* (NSW).
22. Section 48O(1)(a) of the *Home Building Act 1989* (NSW) provides that an order can be made that one party to the proceedings pay money to another party, or to a person specified in the order by way of debt, damages, restitution, or refund any money paid by a specific person.
23. Section 48O(1)(b) of the *Home Building Act 1989* (NSW) provides that an order can be made that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to proceedings is not entitled to a refund of any money paid to another party in the proceedings.
24. Section 48O(1)(c) of the *Home Building Act 1989* (NSW) provides that an order can be made that a party to the proceedings do any specified work, or perform any specified service or

obligation arising under this Act, or the terms of any agreement, or do or perform, or refrain from doing or performing any specified act, matter or thing.

25. There is an argument that can be made that one forensic approach to be made would be for the homeowner, in home building matters, to claim for damages for breach of statutory warranty whilst maintaining the contract on foot. Namely, you can accumulate liquidated damages if the contract provides for some and recover them in due time, because you can only seek liquidated damages while the contract is on foot, and liquidated damages continue to run until you choose to terminate. You can also then claim damages at the hearing for incomplete or defective work for breach of statutory warranty. The question then becomes when must you elect what remedy you are seeking, i.e. do you have to make that election before you file your claim? It is important to have regard to when you need to make the election by, and the answer to this may depend upon the individual circumstances of each case.

Decision of Court of Appeal in *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84

26. In the Court of Appeal's decision in *Little*, the submissions of the Applicants were upheld by the Court of Appeal in saying that even if the contract was still on foot, this did not prevent the Tribunal from making an order for the builder to return to site. There is nothing that prevents the Tribunal from making an order that defective work be fixed, and there is nothing that prevents the Tribunal from making an order that the builder, if he, for example, has lost his license, to order the builder to cause another licensed builder to complete the work.
27. The Court of Appeal in *Little* held that the Tribunal had the power under s 480 of the *Home Building Act 1989* (NSW) to order the recalcitrant builder to complete the work and rectify any defects.
28. On the *Brewarrina* point, the Court of Appeal said at [24], that if a builder wrongfully refuses to complete building work governed by the *Home Building Act 1989* (NSW), the Tribunal has jurisdiction pursuant to s 480(1)(c) of the *Home Building Act 1989* (NSW) to direct the builder to complete the work.
29. Given that the builder was unlicensed, the builder could not, consistent with the *Home Building Act 1986* (NSW) carry out such work. However, the obligation could be fulfilled by the respondent retaining a licensed builder to carry out the works. Therefore, even if the builder is unlicensed by the time of the final hearing because it voluntarily refused to renew its license, or its license was lost on a basis that was less than voluntary, the Tribunal can make order under s 480 of the *Home Building Act 1989* (NSW) to cause the work that is defective or incomplete by finding a licensed builder to complete the works. There has been one other case, to the knowledge of Jacobs and Misra, where a similar order was made, i.e.

saying the builder was ordered to cause work to be done and that was the case of *Sudarma v Mifsud & Sons Builders Pty Ltd & BIGC (Home Building)* [2008] NSWCTTT 1074.

Options available if you have sought the wrong remedy

30. If you have begun your case and sought the wrong remedy, there are other options available. For home building matters specifically, this is entrenched in s 48O(2) of the *Home Building Act 1989* (NSW). This section provides that the Tribunal can make an order, even if it is not the order the applicant asked for. This is further entrenched in s 38 of the *Civil and Administrative Tribunal Act 2013* (NSW) which states that the Tribunal is to act with as little formality as the circumstances of the case permit according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
31. In the case of *Gee v Burger* [2009] NSWSC 149 at [31], it was held that prayers of relief do not form part of the pleading, and a Court of Equity is always entitled to mould the relief which it will grant in such a way as to recognise and enforce the rights which the plaintiff is able to establish. In this case certain remedies were sought including remedies for breach of privacy. The law of privacy is fairly complex and there have only been one or two cases in Australian jurisprudence that have held that there is a remedy in relation to a breach of privacy in circumstances where there is photography, as there was in this case. The application was dismissed in this case and it was held that prayers of relief do not form part of the course of action.
32. Therefore in sum, if you are able to give notice to the Court and to your opponent that you propose to put your case on a remedial basis wider than damages, i.e. the statutory incarnation of specific performance under s 48O of the *Home Building Act 1989* (NSW), you should have a strong basis for argument.

BIOGRAPHY

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Sydney completed undergraduate studies and his LLB in Cape Town, South Africa and has an LLM from the University of Cambridge. Prior to being called to the NSW Bar in 1997, Sydney worked as a solicitor at Minter Ellison in Australia and lectured at the University of Technology Sydney. His practice focuses on property and large scale building and construction matters in the Supreme Court of NSW.

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Elie Nehmetallah was admitted as a solicitor in NSW in 2002. He is the Principal of Manfred Legal, specialising in property development.

BIBLIOGRAPHY

Focus Case

Little v J & K Homes Pty Ltd [2017] NSWCATAP 84

Judgment Link

[*Little v J & K Homes Pty Ltd* \[2017\] NSWCATAP 84](#)

Cases

Brewarrina Shire Council v Beckhaus Civil Pty Ltd [2005] NSWCA 248

Mohammed Affan v Fabiani Constructions Pty Ltd; Fabiani Constructions Pty Ltd v Mohammed Affan [2014] NSWCATCD 192

Sargent v ASL Developments Ltd (1974) HCA 40; 131 CLR 634

Sudarma v Mifsud & Sons Builders Pty Ltd & BIGC (Home Building) [2008] NSWCTTT 1074

Gee v Burger [2009] NSWSC 149

Legislation

Home Building Act 1989 (NSW)

Civil and Administrative Tribunal Act 2013 (NSW)