

# Sham Building Contracts, Extra Warranty Periods & Quantum Meruit Claims

## NCAT PROVIDES CLARIFICATIONS ON BUILDING CONTRACT ISSUES

### HUTCHINGS v HOPE – NCAT APPEAL PANEL (20 MARCH 2019)

A recent decision by the Appeal Panel of the NSW Civil and Administrative Tribunal provided some interesting guidance on how residential building contracts should be construed, even where there is some suggestion that the contract, or some part thereof, is a “sham”. The Appeals Panel also touched in the effect of the distinction between statutory warranties and contract terms, in particular the limitation periods available, and whether failure to provide Home Owners Warranty Insurance was fatal to a builder’s right of recovery.

#### Facts

- Builder (Hope) carried out residential building work for Hutchings (Owner).
- At the initial hearing the Tribunal found the building contract was a sham, solely for the purpose of securing finance from the Commonwealth Bank.
- The Builder failed to provide Home Owners Warranty Insurance.
- At the initial hearing the Tribunal found that the Builder was entitled to be compensated for the work performed on a quantum meruit basis.
- The Owner was limited to the statutory time limitation periods of 2 years (minor defects) and 6 years (major defects).

The Appeal Panel found that the Tribunal at first instance did not provide adequate reasons as to:

- Why it considered the building contract to be a sham,
- Why, even if the building contract was sham, the Tribunal found there was no contract of some other kind having regard to the available documents, oral discussions and available inferences,
- Why allowing the Builder to recover on a quantum meruit basis was “just and equitable” when there was no Home Owners Warranty Insurance.

The Appeal panel set aside the orders of the initial Tribunal, and remitted the matter back for a new hearing before a differently constituted Tribunal. In giving its reasons for doing so the Appeal Panel offered the following clarifications:

- At law, there is a strong and natural presumption against holding that a provision or a document is a sham. This is because the law places a premium on commercial certainty. There is High Court authority defining a “sham” as “... a legally effective transaction but which the parties contend should not have the apparent, or any, legal consequences.” Making such a finding is one of the rare instances where it is necessary for a court to

consider evidence of the subjective intention of both parties, before the presumption that the parties intended the transaction to have its objective legal effect displaced.

- Even where some contract document is considered invalid, courts and tribunals need to consider whether there is some kind of agreement between the parties (even if not wholly in writing) and if they find so must construct the terms of that contract through the available evidence.
- Parties are entitled to enforce the terms of their contracts, provided this does not conflict with statutory provisions. The limitation period for breach of contract is 6 years from when the cause of action accrues. Interestingly, this means that where a contract expressly repeats the terms of the statutory warranties under the Home Building Act, “minor defects” have a six year limitation period between the Builder and the Owner (but not subsequent owners, who are not a party to the contract. This is provided the Owners sues on the basis of breach of contract, and not just breach of statutory warranty. Under the *Home Building Act 1989* “minor defects” only have a limitation period of 2 years from the date of completion.
- Although breach of contract has a limitation period of 6 years, NCAT only has jurisdiction with respect to “building claims” brought within 3 years of the last supply. Claims brought after that 3 year period will have to be pursued through the courts.
- The Appeals panel made no definitive finding as to whether the absence of Home Owners Warranty Insurance meant a quantum meruit claim was or was not “just and equitable”, and left this for the re-hearing.

**Prepared by Bannermans Lawyers**

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T: (02) 9929 0226      M: 0403 738 996      ABN: 61 649 876 437  
E: [dbannerman@bannermans.com.au](mailto:dbannerman@bannermans.com.au)      W: [www.bannermans.com.au](http://www.bannermans.com.au)  
P: PO Box 514      NORTH SYDNEY NSW 2059      AUSTRALIA