

# Unravelling the NCAT's Landmark Decision: Design and Building Practitioners Act

As the legal representative for the appellants in both the original proceedings and the appeal, our firm has witnessed the significant challenges faced by the Owners in their pursuit of justice. The costs, time, and stress associated with litigation can often render justice inaccessible for numerous homeowners. This favourable outcome serves as a validation of our clients' tenacity and dedication to seeking justice in their case.

## Deaves v Sigma Group and Cazo Constructions

The New South Wales Civil and Administrative Tribunal (NCAT) plays a crucial role in resolving construction disputes in the state. One recent case involving the Design and Building Practitioners Act 2020 (NSW) (DBPA) and the Home Building Act 1989 (NSW) (HBA) has sparked significant interest in the legal community, as well as among property developers, builders, and homeowners. This case has raised essential questions about the extent of NCAT's jurisdiction and its ability to handle claims under the DBPA and the HBA. It also highlights the critical interplay between conveyance contracts, statutory warranties, and duty of care in the construction industry.

In this article, we will delve into the facts and background of this case, explore the crux of the issues and legal findings, and discuss the implications of the decision on NCAT's jurisdiction in handling similar cases in the future. By examining this case in detail, we aim to provide a comprehensive understanding of the complex legal landscape surrounding construction disputes and the role of NCAT in resolving these issues.

## Deaves v Sigma Group NSW Pty Limited [2023] NSWCATAP 94 Background

The case, *Deaves v Sigma Group NSW Pty Limited [2023] NSWCATAP 94*, revolves around a townhouse in a strata scheme property in Emu Plains, Sydney, purchased by the appellants. The development consent for the strata development was granted in January 2017, and a construction certificate was required before commencing any building works. The appellants entered into a contract with the developer in June 2017 for the purchase of a townhouse on Lot 2 of the proposed strata plan.

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The conveyance contract included standard terms and additional clauses, such as the developer's obligation to complete works required by the Townhouse Application and registering the Strata Plan. The appellants acknowledged that the developer could make alterations to the Strata Plan to obtain approval from proper authorities. They contended they were entitled to the benefit of statutory warranties against the developer under the HBA.

The construction took place under a written contract between the Sigma Group and the Cazo Constructions, with statutory warranties implied under the HBA. The Tribunal made no findings regarding any differences between the registered Strata Plan and the plans subject to the Development Consent, the Construction Certificate, and the unregistered Strata Plan. The appellants and the developer settled on the conveyance contract in May 2019.

The appellants alleged deficiencies in the construction, amounting to breaches of the HBA warranties. They claimed that both the developer and builder carried out construction work within the meaning of s 37(1) of the DBPA and that they owed a duty of care to the appellants. The appellants alleged that both parties breached this duty of care, causing them economic loss. The case raised questions about the extent of the Tribunal's jurisdiction to hear and determine claims under the DBPA and HBA, the interpretation of various contracts, and the appellants' entitlement to statutory warranties and damages.

## Legal Issues in the Case

The main legal issues in this case revolve around the appellants' entitlement to statutory warranties under the HBA and their claim for economic loss under the DBPA. The case also touches upon the jurisdiction of the Tribunal in hearing and determining claims under these acts.

### Statutory Warranties under the HBA

The appellants alleged that the builder, Cazo Constructions, and developer, Sigma Group NSW, breached warranties in s 18B(1)(a) and (c) of the HBA, which state that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract, and that the work will comply with the law. They contended that they were entitled to the benefit of these statutory warranties against the developer by reason of the operation of s 18C of the HBA, and that they had the right to enforce these warranties against the builder under s 18D of the HBA.

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## Duty of Care and Economic Loss under the DBPA

The appellants claimed that both the developer and builder owed them a duty of care to avoid economic loss caused by defects related to the building, as per s 37 of the DBPA. They alleged that both parties breached this duty of care, causing them economic loss, and sought the same amount of damages as in their breach of statutory warranties claim.

## Tribunal's Jurisdiction

The case raised questions about the jurisdiction of the Tribunal to hear and determine claims under the DBPA and HBA. Section 48K of the HBA grants the Tribunal jurisdiction to hear and determine any building claim brought before it, provided the amount claimed does not exceed \$500,000. In this case, the appellants' claim was within this threshold. However, the Tribunal's jurisdiction to determine claims under the DBPA was disputed.

## Grounds of Appeal

The appellants raised several grounds of appeal, claiming that the Tribunal erred in various aspects of the case, including its conclusions regarding the statutory warranties and its lack of jurisdiction to determine the appellants' claim with respect to the DBPA.

## Tribunal Decision

The Tribunal's decision centred on two main aspects: the statutory warranties under the HBA and the appellants' claim under the Design and Building Practitioners Act.

## Statutory Warranties under the HBA

The Tribunal focused on determining whether the issues concerning internal floor space, the attic, the water tank, and the rear courtyard deck fell within the ambit of the statutory warranties in s 18B, rather than establishing if a breach of the statutory warranties occurred. Ultimately, the Tribunal found that the appellants failed to show that these issues were within the scope of the HBA's statutory warranties.

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The reasoning behind this decision was based on the conveyance contract provisions, the appellants' assumed knowledge of the issues before settlement, and the fact that they chose not to avail themselves of contractual redress.

#### Claim under the DBPA

Regarding the appellants' claim under s 37 of the DBPA, the Tribunal asserted that it could only operate within the powers specifically extended to it under statute. The appellants failed to establish any specific jurisdiction bestowed upon the Tribunal under the DBPA.

The Tribunal's decision was subject to appeal on any question of law under s 80 of the Civil and Administrative Tribunal Act 2013 (NSW), NCAT Act. For other grounds, the appellant had to satisfy the Appeal Panel that leave to appeal should be granted.

## Grounds of Appeal

The appellants raised several grounds of appeal, claiming that the Tribunal erred in various aspects of the case. Key grounds of appeal included the Tribunal's conclusions regarding the statutory warranties and the Tribunal's lack of jurisdiction to determine the appellants' claim with respect to the DBPA.

#### Conclusions on Statutory Warranties

The appellants submitted that the Tribunal asked itself the wrong question and examined irrelevant considerations. They argued that the Tribunal wrongly relied on the conveyance contract to restrict or remove the appellants' rights in respect of the statutory warranties. Furthermore, the appellants contended that the Allianz decision did not apply in the current case.

#### Jurisdiction and the Design and Building Practitioners Act

Regarding the second ground of appeal, the appellants submitted that a claim for economic loss under s 37 of the DBPA falls within the definition of a building claim under s 48K of the HBA. The respondents, on the other hand, argued that the Tribunal's decision was a correct application of the orthodox principle set out in Allianz. They emphasised that the appellants knew the condition of the property prior to purchase and did not argue a case of latent defects at the hearing.

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They also pointed out that the contract for the sale of land provided a contractual remedy for any claimed misdescriptions or defects, which the appellants chose not to avail themselves of.

In oral submissions, the respondents highlighted that the Tribunal found that the appellants had actual knowledge of the deficiencies before settlement and, therefore, the practical outcome was that they could not proceed with their claim.

## Legal Findings and Outcome

The Appeal Panel addressed the main legal issues in the case, including the jurisdiction to determine claims under the Design and Building Practitioners Act, the remittance of the case for redetermination by a differently constituted Tribunal, and costs orders for the appeal and first-instance proceedings.

### Jurisdiction under the DBPA

The Appeal Panel concluded that the Tribunal has jurisdiction to determine claims under the DBPA, as the claims fall within the provisions of "building claim" in s 48A(1) of the HBA.

### Remittance for Redetermination

Due to the important disputed questions of fact in which the Tribunal made no findings, the case must be remitted to the Tribunal for redetermination. The appellants accepted this outcome.

### Differently Constituted Tribunal

The case will be remitted to a differently constituted Tribunal, as it is in the interests of justice.

### Costs Orders

The respondents are ordered to pay the appellants' costs of the appeal, and the costs order made on 15 September 2022 is set aside. The question of costs at first instance is to be remitted to the Tribunal for redetermination, and the parties have 14 days to apply for any order varying the costs orders.

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Overall, the Appeal Panel determined that the Tribunal's original decision contained errors in its approach to the statutory warranties and jurisdiction under the DBPA. As a result, the case will be sent back to a differently constituted Tribunal for redetermination, with the possibility of a different outcome for the appellants.

## Implications of the Decision

The Appeal Panel's decision in this case carries several important implications for the construction industry, property owners, and legal practitioners.

### Clarification on the Tribunal's Jurisdiction

The decision clarifies that the Tribunal has jurisdiction to determine claims under the DBPA, as they fall within the provisions of "building claim" in s 48A(1) of the HBA. This clarification provides guidance to parties involved in similar disputes in the future and reinforces the Tribunal's role in resolving building-related disputes.

### Impact on Statutory Warranties

The Appeal Panel's decision highlights the importance of a proper understanding and application of statutory warranties under the HBA. The original Tribunal's decision appeared to have applied a limitation to the scope of statutory warranty provisions that was not founded on legislative provisions or case authority. By remitting the case for redetermination, the Appeal Panel has emphasised that the scope and effect of statutory warranties should not be limited by other contractual considerations, such as the conveyance contract.

### Influence on Future Cases

The decision may have a significant influence on future cases involving disputes between property owners, developers, and builders. By addressing the errors in the Tribunal's decision, the Appeal Panel has provided valuable guidance on the proper interpretation and application of statutory warranties and jurisdictional issues under the DBPA. This guidance is likely to impact how parties approach similar disputes in the future and may lead to more consistent outcomes in building-related disputes.

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## Consumer Protection Implications

The decision reinforces the importance of consumer protection in the context of building disputes. By clarifying that statutory warranties should not be limited by conveyance contract provisions, the Appeal Panel's decision supports the policy objective of consumer protection in the building industry. This decision may encourage property owners to pursue claims for defects more confidently, knowing that their rights under statutory warranties are protected.

## Contracts Specialist Construction Lawyers

Our firm specialises in advising homeowners on their contracts and construction disputes. We represent homeowners in the NCAT and court. If you are a homeowner with a construction law issue, feel free to reach out to us for a free 15 minute consultation.

## Key Takeaways

The Appeal Panel's decision in this case offers several key takeaways for those involved in the construction industry, property transactions, and legal disputes related to building defects.

### Understanding Statutory Warranties

It is crucial for property owners, developers, and builders to understand the scope and effect of statutory warranties under the HBA. These warranties should not be limited by other contractual provisions, such as those found in conveyance contracts.

### Jurisdiction of the Tribunal

The Tribunal's jurisdiction to determine claims under the DBPA has been clarified. Parties involved in building disputes should be aware that claims related to the DBPA can be brought before the Tribunal, as they fall within the definition of a "building claim" under the HBA.

### Importance of Consumer Protection

Consumer protection remains a vital aspect of the construction industry. The Appeal Panel's decision reinforces the policy objective of consumer protection in the context of building disputes, encouraging property owners to pursue claims for defects with confidence.

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## Impact on Future Cases

The guidance provided by the Appeal Panel in this case is likely to influence how parties approach similar disputes in the future. It offers valuable insights into the proper interpretation and application of statutory warranties and jurisdictional issues under the DBPA, contributing to more consistent outcomes in building-related disputes.

## Conclusion

The Appeal Panel's decision in this landmark case sheds light on the interplay between statutory warranties under the HBA and the DBPA, as well as the jurisdiction of the Tribunal in determining claims related to these acts. By clarifying key legal issues and offering guidance on the interpretation of relevant provisions, this decision serves as a valuable resource for those involved in the construction industry, property transactions, and legal disputes surrounding building defects.

The case also underscores the importance of consumer protection in the context of building disputes and highlights the need for parties to understand the extent of their rights and obligations under relevant legislation. As the construction industry continues to evolve and new legal challenges arise, the lessons drawn from this case will undoubtedly contribute to a more transparent and equitable landscape for all stakeholders.

This firm would like to extend heartfelt gratitude to Mr. and Mrs. Deaves for their unwavering perseverance throughout this challenging process. We also want to express our appreciation to both counsel, Mr. Michael Hazan and Mr. Peter Newton SC, of the esteemed 11th Floor St. James Hall Chambers in Sydney, for their exceptional guidance and legal expertise. Together, we have navigated a complex case, striving to uphold justice and fairness for all parties involved.

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