Supreme Court

New South Wales

Case Name:	The Owners Strata Plan 83405 v Ralan (Culworth) Pty Limited
Medium Neutral Citation:	[2019] NSWSC 578
Hearing Date(s):	16 August 2018
Date of Orders:	20 May 2019
Decision Date:	20 May 2019
Jurisdiction:	Common Law - Administrative Law
Before:	Harrison AsJ
Decision:	The Court orders that: (1) The plaintiff's application for leave to appeal the decision of the Appeal Panel of the Civil and Administrative Tribunal dated 6 December 2017 in proceedings numbered AP 17/40943 pursuant to s 83 of the Civil and Administrative Tribunal Act 2013 (NSW) is refused. (2) The plaintiff's application for judicial review pursuant to s 69 of the Supreme Court Act 1970 (NSW) is refused. (3) The plaintiff's amended summons filed 23 February 2018 is dismissed. (4) The plaintiff is to pay the defendant's costs on an ordinary basis.
Catchwords:	ADMINISTRATIVE LAW – Judicial review – Construction of Home Building Act 1989 (NSW), s 48K – Jurisdiction of Civil and Administrative Tribunal of NSW – Whether the Tribunal had jurisdiction to deal

with claim for an amount exceeding $500,000 – Whether the Appeal Panel fell into error in refusing the plaintiff's application to transfer proceedings to the Supreme Court – Refusal to conduct judicial review under s 34 of the Civil and Administrative Tribunal Act 2013 (NSW)

PRACTICE AND PROCEDURE – Civil procedure – Application for leave to appeal from a decision of the Appeal Panel of the New South Wales Civil and Administrative Tribunal – Civil and Administrative Tribunal Act 2013 (NSW), s 83 – Appeal on a question of law – Test to be applied by the Tribunal when considering a transfer application based on jurisdiction – Test to be applied by the Tribunal when granting leave – Considerations relevant to an application for adjournment – Whether the Tribunal failed to properly consider cl 6(1) Sch 4 of the Act

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW) , ss 34, 36, 38, 80, 81, 82, 83
Civil Procedure Act 2005 (NSW), ss 58, 140
Home Building Act 1989 (NSW), s 48K
Supreme Court Act 1970 (NSW), s 69

Cases Cited:

Amalgamated Society of Engineers v Adelaide Steamship (1920) 28 CLR 129
Aon Risk Services Limited v Australian National University [2009] HCA 27; (2009) 239 CLR 175
Australian Securities & Investments Commission v Saxby Bridge Financial Planning Pty Ltd (2003) 133 FCR 290; (2003) 202 ALR 450
Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164
Collins v Urban [2014] NSWCATAP 17
Coulter v R [1988] HCA 3; 164 CLR 350
Davis v NSW Land and Housing Corporation [2016] NSWCA 325
He v Yeung [2015] NSWCA 392
House v The King (1936) 55 CLR 499
Jaycar Pty Ltd v Lombardo [2011] NSWCA 284
Lee v New South Wales Crime Commission (2012) 224 A Crim R 94; [2012] NSWCA 262
Osland v Secretary to the Department of Justice (No 2)

	(2010) 241 CLR 320; [2010] HCA 24 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 State of Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146; (1997) 141 ALR 353 The Owners – Strata Plan 70030 v Decon Australia PL [2014] NSWSC 347 The Owners – Strata Plan 73943 v Gazebo Penthouse Pty Ltd [2014] NSWSC 1536
Texts Cited:	Mark Aronson, Matthew Groves and Greg Weeks, Judicial Review of Administrative Action and Government Liability (6th ed, 2017, Lawbook Co) at [17.90].
Category:	Principal judgment
Parties:	The Owners Strata Plan 83405 (Plaintiff) Ralan (Culworth) Pty Limited (First Defendant) NSW Civil and Administrative Tribunal (Second Defendant)
Representation:	Counsel: S Foda (Plaintiff) M Sheldon (First Defendant) Solicitors: Strata Title Lawyers (Plaintiff Storey & Gough (First Defendant) Submitting Appearance, Crown Solicitor (Second Defendant)
File Number(s):	2017/383476
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR:** This is an application for leave to appeal a decision of an Appeal Panel of the Civil and Administrative Tribunal of NSW ("NCAT") pursuant to s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the *CAT Act*"). Alternatively, it is an application for judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW).

2 By amended summons filed 23 February 2018, the plaintiff seeks firstly, that the decision of Senior Members Burton and Currie dated 6 December 2017 in proceedings numbered AP 17/40943 ("the Appeal Panel's decision") be set aside; secondly, that the decision and orders of Principal Member Rosser dated 18 September 2017 in proceedings numbered HB 16/55982 ("the Principal Member's decision") to transfer the proceedings to the Supreme Court be restored; and thirdly, in the alternative, that the proceedings be remitted to Principal Member Rosser to determine the application for transfer applying the test for an adjournment, after each party is afforded the opportunity to file and serve an evidence in support of this application.

3 The plaintiff is the Owners Corporation Strata Plan 83405 ("Owners Corporation"). The first defendant is Ralan (Culworth) Pty Limited ("Ralan"). The second defendant is NCAT, who has filed a submitting appearance. The Owners Corporation relied upon the affidavit of Thomas Courtenay Bacon dated 12 April 2018. Both the Owners Corporation and Ralan relied upon their joint court book.

Background

4 On 21 December 2016, the Owners Corporation commenced proceedings for breach of statutory warranties under the *Home Building Act 1989* (NSW) in the Home Building Division of NCAT, concerning building work that was completed on 22 December 2009. This was one day before the expiry of the seven year limitation period.

5 The substantive proceedings involve a claim for alleged defective works on a strata development at Killara, New South Wales by a builder engaged by Ralan, a developer. The builder was insolvent at the time of the commencement of the proceedings.

The legislation

6 It is convenient that I briefly refer to some relevant provisions of the *CAT Act* and the *Home Building Act*, including the provisions concerning the transfer of proceedings and the jurisdiction of the Tribunal.

7 Clause 6 of Sch 4 of the *CAT Act* relevantly reads:

"**6 Transfer of proceedings to courts or to other tribunals**

(1) If the parties in any proceedings for the exercise of a Division function so agree, or if the Tribunal of its own motion or on the application of a party so directs, the proceedings are:

(a) to be transferred to a court (in accordance with the rules of that court) that has jurisdiction in the matter, and

(b) to continue before that court as if the proceedings had been instituted there.

(2) If the parties in any proceedings that have been instituted in a court so agree, or if the court of its own motion or on the application of a party so directs, the proceedings are, if the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise a Division function:

(a) to be transferred to the Tribunal in accordance with the procedural rules (if any), and

(b) to continue before the Tribunal as if the proceedings had been instituted in the Tribunal."

8 Section 36(1) of the *CAT Act* reads:

"**36 Guiding principle to be applied to practice and procedure**

(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."

9 Section 38 relevantly reads:

"**38 Procedure of Tribunal generally**

(1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.

(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

(3) Despite subsection (2):

(a) the Tribunal must observe the rules of evidence in:

(i) proceedings in exercise of its enforcement jurisdiction, and

(ii) proceedings for the imposition by the Tribunal of a civil penalty in exercise of its general jurisdiction, and

…

(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(5) The Tribunal is to take such measures as are reasonably practicable:

(a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and

(b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

(6) The Tribunal:

(a) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and

(b) may require evidence or argument to be presented orally or in writing, and

(c) in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases."

10 Section 48K of the *Home Building Act* reads:

"**48K Jurisdiction of Tribunal in relation to building claims**

(1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations).

…"

The Principal Member's decision

11 On 18 September 2017, the Principal Member gave reasons for her decision and made an order transferring the proceedings to the Supreme Court as the quantum in the matter exceeded the limit of NCAT's jurisdiction.

12 At the commencement of the hearing, the Principal Member stated:

"PRINCIPAL MEMBER: So just to summarise then, your client is now claiming over $800,000 or at least over $500,000 and the order that you're asking for is an order for the transfer to the Supreme Court.

MR BACON: Yes. We seek leave to amend a claim and to - - -

PRINCIPAL MEMBER: I can't amend a claim to over $500,000.

MR BACON: Yes., Yes,

Principal member: So what you will be claiming exceeds the Tribunal's jurisdiction limit. All right."

13 There was no application by either party for an adjournment.

14 The Principal Member, in the reasons for her decision, stated at [20]-[30]:

“20 The respondent opposed the application. In essence, Mr Sheldon submitted that the Tribunal should deal with the application as an application to adjourn the hearing on 20 September 2017. The respondent submitted that the hearing should not be adjourned and that it should proceed on the basis of the quantum evidence filed by the respondent in June 2017.

21 In the alternative, Mr Sheldon submitted that if the hearing were adjourned, the applicant should be ordered to pay the respondent’s costs thrown away, that the respondent should be given an opportunity to consider the applicant’s quantum evidence and that the transfer application should be considered at a later date.

Transfer application

22. I do not accept the respondent’s submission that the Tribunal is first obliged to consider whether to adjourn the hearing on 20 September. While at the time the matter was listed for directions on 15 September 2017, the applicant primarily sought an adjournment of the hearing on 20 September, that situation changed once the quantum evidence was filed on 14 September. On the basis of that evidence, the applicant unequivocally applied for an order transferring the proceedings to the Supreme Court. The issue for the Tribunal to decide is whether such an order should be made. If the proceedings are transferred, then it follows that the hearing on 20 September will be vacated.

23. On the basis of Mr Lemon’s report, the applicant now seeks more than $800,000. This exceeds the Tribunal’s jurisdictional limit, which is $500,000: s 48K(1) HB Act.

24. Mr Lemon is a chartered quantity surveyor whose report appears to be in the form of expert evidence prepared in compliance with Procedural Direction 3 for Expert Witnesses. It provides a basis for the applicant’s claim that the cost of rectification of claimed defects exceeds $500,000. It therefore provides a basis for the transfer application.

25. In my view, the applicant has not conducted the proceedings before the Tribunal in a satisfactory manner. Having waited until the last day of the statutory warranty period before commencing proceedings, it commenced proceedings without first obtaining all necessary expert reports, which is contrary to the Consumer and Commercial Division Procedural Direction 4 (now revoked, but in force at the time the proceedings were commenced).

26. While Mr Bacon submitted that quantum wasn’t an issue until the respondent filed a report on quantum on 16 June 2017, quantum was always an issue in the proceedings. Establishing the quantum of the claim was essential and should have been done before proceedings were commenced.

27. In any event, after the proceedings were commenced, the applicant had three opportunities to provide quantum evidence. When the applicant was directed to provide the evidence in support of its claim, there was no suggestion that this was limited to liability evidence. The applicant finally provided its quantum evidence on 14 September 2017, more than six weeks after the last date for compliance of 27 July 2017. The applicant has not provided any satisfactory explanation for its failure to comply with the Tribunal’s orders and put on its quantum evidence in a timely manner. The fact that the quantum claimed might exceed the jurisdiction was not raised with the Tribunal and the respondent until three weeks after the applicant's quantum evidence was due to be filed and served.

28. However, although the applicant has without satisfactory explanation failed to comply with orders made by the Tribunal, its delinquency in this regard is not a sufficient reason to refuse to transfer the proceedings. Expert evidence is now available which supports a claim exceeding the Tribunal's jurisdictional limit. I do not have to be satisfied that the applicant will be awarded the sum specified in Mr Lemon's report in order to be satisfied that this is the case. In my view, Mr Lemon's report provides a sufficient basis for an order transferring the proceedings.

29. As noted above, the applicant commenced proceedings on the last day of the statutory warranty period. This means that it cannot withdraw the proceedings in the Tribunal and commence fresh proceedings in the Supreme Court. While I accept that there is prejudice to the respondent, which has complied with Tribunal orders, in now being faced with proceedings in the Supreme Court, I consider that the any prejudice to the respondent arising from the transfer of the proceedings does not exceed the prejudice that the applicant would suffer if it were unable to pursue a claim for damages in the sum estimated by its expert witness.

30. The application has not been formally amended. I am satisfied that any amendment of the application is best dealt with by the Supreme Court, which has jurisdiction to hear and determine the applicant's claim."

15 On 18 September 2017, the Principal Member made an order that the proceedings be transferred to the Supreme Court of New South Wales and continue before that Court as if the proceedings had been instituted there. The Principal Member made two costs orders: first, that the Owners Corporation pay Ralan's costs thrown away of the transfer, as agreed or assessed, on the ordinary basis; and second, that the Owners Corporation pay Ralan's costs thrown away of the vacated hearing on 20 September 2017, as agreed or assessed, on an indemnity basis.

Leave to appeal to the NCAT Appeal Panel

16 Section 80 of the *CAT Act* reads:

"**80 Making of internal appeals**

(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.

17 Section 82 of the *CAT Act* reads:

"**82 Interpretation**

(1) Each of the following kinds of decisions of the Tribunal is an *appealable decision* of the Tribunal for the purposes of this Division:

(a) any decision made by an Appeal Panel in an internal appeal,

(b) any decision made by the Tribunal in an external appeal,

…"

18 As the appeal concerned whether leave should be granted to the Owners Corporation to rely upon an expert's report (the "Lemon report"), which is an interlocutory decision, leave to appeal was required in accordance with s 80(1) of the *CAT Act.*

19 Two cases which deal with the principles governing leave to appeal are *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 ("*Das*") and *Lee v New South Wales Crime Commission* (2012) 224 A Crim R 94; [2012] NSWCA 262 ("*Lee*").

20 In *Das*, the Court of Appeal set out the principles to be considered in deciding whether leave to appeal should be granted. At [32], [33] and [35], Basten JA stated:

"[32] The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:

'It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Limited* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute.'

[33] In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of *Carolan*, noting that Kirby P had recognised 'that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle,

> questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable': at [46].
>
> …
>
> [35] In *Coulter v The Queen* [1988] HCA 3; 164 CLR 350, dealing with a challenge to a refusal of the South Australian Full Court to grant leave to appeal in a criminal matter, the majority noted that a leave requirement was a preliminary procedure 'recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention': at 356 (Mason CJ, Wilson and Brennan JJ). That statement is clearly applicable to civil, as well as criminal, appellate jurisdiction."

21 Similarly, in *Lee*, Bathurst CJ at [12] outlined the principles relevant to the granting of leave as follows:

> "12 The principles upon which leave to appeal is granted are well established. Ordinarily it is only appropriate to grant leave concerning matters that involve issues of principle, questions of general public importance or where it is reasonably clear there has been an injustice in the sense of going beyond it being reasonably arguable that the primary judge was in error: *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69; *Zelden v Sewell* [2011] NSWCA 56 at [22]; *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *GKD v Director of Department of Family & Community Service* [2012] NSWCA 219 at [10]; *Be Financial Pty Ltd v Das* [2012] NSWCA 164 at [32]-[34]."

22 In *Coulter v R* [1988] HCA 3; 164 CLR 350 at 359, Deane and Gaudron JJ noted the requirement for leave:

> "... represents a constraint upon the overall cost of litigation by protecting parties, particularly respondents, from the costs of a full hearing of appeals, which should not properly be entertained by the relevant court either because they are hopeless or, in the case of a civil appeal to the second appellate court, because they do not possess special features which outweigh the prima facie validity of the ordinary perception that the availability of cumulative appellate processes can, of itself, constitute a source of injustice."

23 I might add that this Court must also consider whether it should grant leave to appeal, and the authorities referred to above are equally applicable in these proceedings.

The Appeal Panel's determination – leave to appeal

24 In its decision dated 6 December 2017, the Appeal Panel firstly determined the appeal and then addressed the issue of leave to appeal at [45]-[47]. They read:

> "45 Leave is required to raise a question of law in relation to an appeal from a primary procedural decision: *CATA* s 80(2)(a). We consider that the errors of law, which involve important principles and their application in this context of home building disputes, clearly warrant such a grant of leave, all the more so when (as we have found) there is a clear error of law which works injustice to the developer and contains a mistaken basis for exercise of discretion leading

> to an unreasonable factual conclusion: *Collins v Urban* [2014] NSWCATAP 17 at [84].
>
> 46 It was said by the OC in effect that, even if the above error was corrected, the same conclusion would have been reached because the balance given effect to in relation to the grossly-late report that resulted in the transfer order was the correct balance. In effect, this meant that what the primary member said was the likely opposite outcome on an adjournment application was wrong.
>
> 47 This is more relevant to an issue of grant of leave to deal with the exercise of discretion as an error of (ultimate) fact, where the discretion to grant leave is available only if we are satisfied that the appellant may have suffered a substantial miscarriage of justice because the finding of fact was, relevantly to the present case, against the weight of evidence: CATA s 80(2)(b), Sch 4 para 12(1)(b); *Collins v Urban* at [65]-[79]. Having come to the conclusion we have that there were errors of law justifying the allowing of the appeal, it is unnecessary to determine this question."

25 The principles according to which this court is to decide whether the Appeal Panel's discretionary decision to allow a party to reply upon an experts report constitutes an error of law, are stated definitively in a short passage in the joint judgment of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505. It is, I think, useful to re-state them as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

The Appeal Panel's decision

26 On 22 September 2017, Ralan filed a notice of appeal with NCAT challenging the procedural orders made by the Principal Member on 18 September 2017. Ralan's grounds of appeal were as follows:

> "1. The Tribunal made an error at law at [J22] in not treating the Respondent's application as an application to adjourn the hearing on 20 September 2017. Had the application been considered as an adjournment application the

hearing should not have been adjourned. By reason of that the appellant suffered a substantial miscarriage of justice.

2. By reasons of the Respondent's repeated breaches of the Tribunal orders and order 4 of the Tribunal on 16 June 2017, the decision to grant an adjournment and/or transfer was an error of law and/or a failure to properly exercise its discretion and was not fair and equitable. By reason of that, the Appellant suffered a substantial miscarriage of justice.

3. The decision to grant an adjournment and/or transfer without satisfactory explanation for the applicant's failure to comply with the orders made by the tribunal [J28], [J38] was an error of law and/or failure to properly exercise its discretion and a decision against the weight of evidence and/or contrary to the Guideline on Adjournments published 1 August 2017. By reason of that the Appellant suffered a substantial miscarriage of justice.

4. By granting a transfer on the basis of an expert report served two days earlier and which the appellant states that it had not yet considered but sought additional time to consider, the Tribunal denied the appellant procedural fairness."

27 Ralan sought orders that:

"1. The Quantum Expert Report of Roderick Leigh Lemon and dated 13 September 2017 is rejected and cannot be relied upon by the Applicant at the hearing.

2. The parties are to jointly rely upon the quantum evidence contained in the Triaxial Consulting report dated 6 June 2017.

…"

28 Section 81 of the *CAT Act* reads:

"**81 Determination of internal appeals**

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

(a) the appeal to be allowed or dismissed,

(b) the decision under appeal to be confirmed, affirmed or varied,

(c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance."

The decision of the Appeal Panel dated 6 December 2017

29 On 21 November 2017, the application was heard by an Appeal Panel comprised of Senior Members G K Burton SC and J S Currie ("the Appeal Panel"). There is no dispute that the claim brought by the Owners Corporation was a building claim.

30 The Appeal Panel at [3]-[6], [11], [14]-[15], [17], [20], [24]-[43], [49], [52]-[53] stated:

> "3. The substantive proceedings are a claim for alleged defective works on a strata development at Killara New South Wales by a builder engaged by the appellant developer (the respondent in the proceedings below) (the developer). The builder was insolvent at the time the proceedings were brought.
>
> 4. It was common ground that the proceedings were brought on 21 December 2016, one day before the limitation period expired. The respondent to this appeal was the applicant owners' corporation (OC) in the proceedings below.
>
> 5. The proceedings were brought in the Tribunal, which has jurisdiction to a limit of $500,000 under s 48K(1) of the *Home Building Act 1989* (NSW) (*HBA*). Contrary to the then procedural requirements of the Tribunal in the Consumer and Commercial Division Procedural Direction 4 para 2, the application commencing these proceedings was not accompanied by an expert report that denominated the defects and quantified the claim. The Procedural Direction said:
>
> "Applicants should only make an application when they are ready to proceed with their case, having obtained all necessary expert reports and other relevant documents."
>
> 6. In those circumstances, the developer respondent was reasonably entitled to assume that the alleged defects were in claimed quantum under the Tribunal jurisdictional limit and to prepare its response and conduct the preparation and cost management of its case accordingly.
>
> …
>
> 11. The OC did not comply with any of the directions or extensions of time in those directions in respect of expert evidence as to quantum that it wished to rely upon at hearing, including the last to file that evidence by 27 July 2017. The 20 April extension of time was by consent, the last one on 16 June 2017 to 27 July 2017 was not. The OC filed, 6 days late, a defects report after its expert had missed two joint site meetings. The developer filed its defects report on time on 6 June 2017.
>
> …
>
> 14. On about 11 July 2017 the parties were notified that the matter had been set down for hearing on 20 September 2017. That notification was 16 days before the directed extended date for the OC's expert report. There was nearly 2 months between the extended compliance date for the OC's expert report and the hearing date.

15. There was evidence that the OC was still seeking from owners a specification of any alleged defects on 1 August 2017 and that a new expert had been engaged for inspection of some of the strata scheme units in the first part of August 2017, when the latest time for the delayed quantum report had already passed and the matter was set down for hearing in about 6 weeks' time. On becoming aware on 3 August 2017 of that activity, the developer's solicitor notified the OC's solicitor that the developer would oppose filing and service of any further evidence. That position was repeated on 17 August 2017.

…

17. There was no explanation before the primary member of the reasons for the OC's non-compliance from the outset with the Tribunal's procedural requirements and directions concerning its expert report on quantum, except for a limited explanation in relation to how the report emerged when it did, which is discussed below. There was no improvement on that position, to the extent it would be admissible, before us.

…

20. On 14 September 2017 the OC served an expert report dated 13 September 2017. The content of that report was not previously disclosed even in outline, nor was there any explanation of the gross delay in obtaining the report (that is, why it was not obtained at the proper time), including after the last compliance date of 27 July 2017 and after it was foreshadowed over 3 weeks earlier on 21 August 2017 (itself nearly a month after the last compliance date).

…

24. In those circumstances it is not surprising that the primary member found at [25] and [38] the following:

> [25] In my view, the applicant has not conducted the proceedings before the Tribunal in a satisfactory manner.
>
> [38] The failure to obtain the quantum evidence in accordance with the Tribunal orders remains unsatisfactorily explained. In the absence of both the quantum evidence and a satisfactory explanation for its failure to be provided by 27 July, I consider it unlikely that the Tribunal would have adjourned the hearing, even if such an order had been requested by consent.

25. This conclusion about adjournment was supported by authority: see, eg, *O'Neill v T&I Engines PL* [2015] NSWCATAP 77 at [20]-[23].

26. Nevertheless, the primary member at [28]-[29] came to the following conclusion:

> [28] However, although the applicant has without satisfactory explanation failed to comply with orders made by the Tribunal, its delinquency in this regard is not a sufficient reason to refuse to transfer the proceedings. Expert evidence is now available which supports a claim exceeding the Tribunal's jurisdictional limit. I do not have to be satisfied that the applicant will be awarded the sum specified in [the late expert] report in order to be satisfied that this is the case. In my view, [the late expert] report provides a sufficient basis for an order transferring the proceedings.

> [29] As noted above, the applicant commenced proceedings on the last day of the statutory warranty period. This means that it cannot withdraw the proceedings in the Tribunal and commence fresh proceedings in the Supreme Court. While I accept that there is prejudice to the respondent, which has complied with Tribunal orders, in now being faced with proceedings in the Supreme Court, I consider that the any [sic] prejudice to the respondent arising from the transfer of the proceedings does not exceed the prejudice that the applicant would suffer if it were unable to pursue a claim for damages in the sum estimated by its expert witness.

27. With great respect we consider that the primary member's exercise of discretion miscarried in this instance so as to constitute an error of law.

28. It is clear from the views expressed at [38] and [28] quoted above that the primary member would have come to a different view if the matter had been treated as an adjournment application for a report served this late that particularised the amount of the claim as under $500,000. That conclusion was strongly supported by the primary member's sensible findings at [25]-[27] about the conduct by the OC of the proceedings and the interlocutory application which are paraphrased in the description already given in these reasons. None of those findings was challenged on appeal by the OC.

29. We respectfully agree with the primary member's views that an adjournment application would have failed for a grossly-late and central expert report within jurisdictional limit, leaving the OC, as the primary member noted in her orders, with the option of no expert evidence or reliance upon the existing expert evidence filed by the developer.

30. The fact that the late report took the amount of the claim over $500,000 was not of itself a reason for permitting a transfer. Rather, transfer (and vacation of the Tribunal hearing date) was a consequence if the grossly-late report was permitted to be relied upon.

31. Further, the effect of a transfer on the conduct of the proceedings was the same as a successful application to adjourn and vacate the hearing by reason of the grossly-late expert report being permitted to be relied upon. If the expert report had been within jurisdictional limit then adjournment (and vacation of the then-current hearing date) was the consequence if the report was permitted to be relied upon.

32. Accordingly, the test that had to be satisfied by the OC was the same whether or not the report was within the Tribunal's jurisdictional limit: – would the grossly-late expert report be permitted to be relied upon. The outcome – in terms of adjournment and vacation or transfer and vacation – was different according to the amount of the expert report sought to be relied upon, but the consequence of each outcome for the proceedings, for the Tribunal, for other litigants and for the other party to these proceedings was immediately the same.

33. The primary member did not indicate in [28]-[29] or elsewhere why she came to a different conclusion on transfer vacation from what would have been the likely conclusion on adjournment and vacation, given that the test to be satisfied leading to each outcome was the same.

34. In particular, the primary member did not say why the guiding principle in *CATA* s 36 quoted above was given effect to with a different balance in

relation to the very late report in the two different outcomes when the same test leading to those outcomes was involved.

35. Accordingly, the primary decision did not articulate an essential component of the reasoning leading to the conclusion reached, which is an error of law .

36. We also consider that, at [28]-[29] of the primary reasons, there was a further error of law. There was inadequate reasoned articulation of how the guiding principle led to the outcome at all in the circumstances of these proceedings.

37. Thus, at [25]-[27] and [38], also implicitly acknowledged at [28]-[29], the primary member correctly articulated the matters which militated against letting in the very late expert report. In summary, they were: the essentiality to the OC's case of proving the nature and amount of liability for the OC to succeed; the absence of compliance at any stage, before or during the proceedings, with procedural mandates; the severity of the non-compliance; the absence of any explanation for all of those matters except for the last which was a wholly-inadequate explanation: cp *Kelly v Mina* [2014] NSWCA 9.

38. Against the foregoing in the balance the primary decision at [28]-[29] simply referred to the current availability of expert evidence and its importance to the OC's case. At the least it should have been explained as to why that trumped in the balance the other factors, particularly when it was clear that the same two factors would not have trumped a refusal of an application to adjourn and vacate the imminent hearing date. The absence of explanation is an error of law.

39. *CATA* s 36(1) reflects, in the guiding principle, as do other statutes such as s 56 of the *Civil Procedure Act 2005* (NSW), the balance in the case law: see, for example, *AON Risk Services Australia Ltd v ANU* (2009) 239 CLR 175 at [90]-[103] which includes discussion as to why costs are not a cure for all prejudice and that the balancing exercise goes beyond prejudice. It is vital that the reasons for the balance leading to a particular outcome are explained when the factors are in tension between allowing a party an opportunity (however grossly dilatory it has been) to present its case and the interests of the other parties and other litigants in management of resources.

40. The OC submitted that "just, quick and cheap" in s 36(1) is in effect trumped by or subservient to resolution of the "real issues" in the proceedings. Such could not be the case. The two phrases are directed to different ends. The latter states the object of elucidating and determining what genuinely is in dispute between the parties. The former states the process by which that elucidation and determination occurs. If that was not the distinction then (as the OC effectively submitted) it would always be "just" to permit whatever impacted on the merits of the case because that concerned (subject to determination of relevance and other evidentiary matters at hearing) the "real issues".

41. The developer submitted in effect that the wrong test was applied because in effect the primary decision at [29] was a balancing of prejudice rather than a having regard to the guiding principle, and that such was an error of law. We agree. That appears to us to be clear from the focus of what is said at [29] in the primary reasons and from what we have already said in relation to the test expounded in *Aon*.

42. Related to this submission was the developer's submission that in the extreme circumstances of this case the exercise of discretion, on the correct

test of the guiding principle as expounded in case law and on the test applied by the primary member, was outside the range of reasonable outcomes and was an error of law.

43. Again, we agree. The extreme lateness and history of non-compliance on matters essential to the OC's case, that were unchallenged findings of fact and have been summarised above, placed outside the range of reasonable outcome an exercise of discretion in favour of letting in the very late report which would produce transfer and vacation because of excess of jurisdiction. We did not obtain in terms a satisfactory answer from the OC's counsel (in response to the developer's counsel's submission) as to when, if this exercise of discretion was in the range of reasonable outcomes, there would be a circumstance (except, possibly, during the actual hearing as in *AON* itself) when the balance would be in favour of rejecting the report. That is not a criticism of the OC's counsel who put her client's difficult case with customary skill, as did her opponent for the developer. Rather, it is an implicit acknowledgement that no circumstance could be pointed to.

…

49. Under *CATA* s 81 we have power to substitute our decision for that of the primary member and for that purpose to exercise the functions conferred on the Tribunal at first instance. We think that appropriate to do in the present case. It is the most economical and expeditious means of progressing the proceedings to a final hearing and resolution that also accords with justice. Remission for re-exercise of discretion could simply prolong the process with further procedural appeals. The material to exercise the discretion is before us.

…

52. In our view the extreme unexplained lateness of an expert report which should have been obtained prior to and for the purpose of launching proceedings means that the report should not be permitted to be placed into evidence on final hearing. The fact that there has been delay by reason of the primary decision and this appeal does not change that situation. There has been no occasion during that process of resistance and challenge for the developer to be required to spend the time, effort and cost to meet the report.

53. Once the report is excluded from evidence on final hearing there is no impediment to the matter being permitted to stay in the Tribunal and to proceed as rapidly as possible to final hearing on the existing evidence. This is the closest outcome to what would have been the case if the primary decision had been as we have found it should have been and the hearing had proceeded on 20 September 2017."

31 The Appeal Panel allowed the appeal; refused leave for the Owners Corporation to rely upon the Lemon report dated 13 September 2017; ordered that the proceedings be remitted to the Consumer and Commercial Division and listed for an expedited hearing date; and so far as costs were concerned, ordered that in addition to the costs orders made by the Principal Member, the Owners Corporation was to pay Ralan's costs of the appeal as agreed or assessed on an ordinary basis.

Whether leave to appeal should be granted in this Court

32 The first issue to be determined is whether the Owners Corporation should be granted leave to appeal in this Court pursuant to s 83(1) of the *CAT Act*. Section 83(1) of *CAT Act* provides that the Owners Corporation requires leave from the Supreme Court and may only appeal on a question of law. Ralan opposes the granting of leave.

33 Section 83 of the *CAT Act* relevantly reads:

> "**83 Appeals against appealable decisions**
>
> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.
>
> …
>
> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:
>
> > (a) an order affirming, varying or setting aside the decision of the Tribunal,
> >
> > (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.
> >
> > …"

The Owners Corporation's submissions

34 The Owners Corporation referred to the decision of Hamill J in *The Owners - Strata Plan 73943 v Gazebo Penthouse Pty Ltd* [2014] NSWSC 1536 ("*Gazebo Penthouse*") as authority on the matters which must be considered when assessing whether leave should be granted pursuant to s 83 of the *CAT Act*. Hamill J at [18] stated:

> "18 An appeal to this Court under s 83(1) CAT Act can only be brought with the leave of the Court. Whether or not leave should be granted is the first matter that I should consider. In doing so, I will apply the comments of Basten JA in *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] 1201 NSWCA 164:
>
> > "32 The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:
> >
> > > It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Limited* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must

> demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute.
>
> 33 In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of *Carolan,* noting that Kirby P had recognised 'that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable': at [46]."

35 The Owners Corporation submitted that leave pursuant to s 83 of the *CAT Act* should be granted firstly, on the basis that the alleged errors of law involve the proper construction of provisions of the *Home Building Act* and the *CAT Act*; secondly, the alleged errors of law also involve the proper test and matters to be considered in an application for transfer of proceedings from NCAT to a court of appropriate jurisdiction; thirdly, that there is a public interest in ensuring that NCAT acts according to law; and finally, that the decision represents an injustice which is more than merely arguable.

36 The manner in which the Owners Corporation drafted its amended summons is more than confusing. It contains 35 grounds of appeal, loosely collected within headings A through F, followed by 10 questions of law under heading G. Ralan complained that there was a real problem in the way the Owners Corporation conducted its appeal. An appeal on a question of law is not merely a qualifying condition to the right of appeal, but the question of law is the subject matter of the appeal: see *Davis v NSW Land and Housing Corporation* [2016] NSWCA 325 per McColl JA at [77]. Questions of law are not to be distilled from the grounds of appeal itself, but should be clearly identified: see *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320; [2010] HCA 24 per French CJ, Gummow and Bell JJ at [21]. Questions of law should not simply be statements to the effect that the Tribunal made legal errors, but should state questions of law to support the orders sought on appeal: see *Australian Securities & Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290; (2003) 202 ALR 450 per Branson J at [47].

37 As the Owners Corporation has a right to appeal on a question of law, but only with leave, I shall address the matters set out under headings A through F when I determine whether the appeal is more than merely arguable.

38 As stated above, in addition to its 35 grounds of appeal under headings A through F, the Owners Corporation submitted under heading G that the present appeal concerns 10 questions of law. These are as follows:

(1) What is the test to be applied by NCAT in relation to a transfer of proceedings application from NCAT to the Supreme Court of New South Wales?

(2) What is the test to be applied by NCAT in determining an application for leave pursuant to s 80(2) of the *CAT Act?*

(3) Are the considerations by NCAT for an adjournment application the same are those to be undertaken in relation to a transfer application?

(4) Does s 36 of the *CAT Act* apply in the circumstances of a transfer application pursuant to s 48K of the *Home Building Act*?

(5) Did the Appeal Panel fail to consider or properly consider s 48K of the *Home Building Act*?

(6) Did the Appeal Panel fail to consider or properly consider cl 6 of Sch 4 of the *CAT Act*?

(7) Did the Appeal Panel fail to consider or properly consider s 38 of the *CAT Act* in making its decision?

(8) Did the Appeal Panel fail to apply or properly apply s 38 of the *CAT Act* in making its decision?

(9) In the event NCAT does not have jurisdiction, is it able to determine or hear an adjournment application?

(10) In exercising s 81 of the *CAT Act,* was the Appeal Panel empowered to refuse leave for the Owners Corporation to rely upon the Lemon report in circumstances where no such application was made?

39 In the alternative, the Owners Corporation sought judicial review pursuant to s 69 of the *Supreme Court Act.*

Ralan's submissions

40 Ralan submitted that leave to appeal should be refused for the following reasons. Firstly, there is no question of principle or question of general public importance in this appeal, but rather a question of practice and procedure. The principles under which courts and tribunals grant leave to serve late evidence are well established. There is no reason for the Court to grant leave under

these circumstances. To do so risks encouraging other litigants, who have been denied leave to rely on late evidence, to appeal.

41 Secondly, the Owners Corporation's complaint is entirely of its own making. Its position is the product of its own repeated breaches of NCAT's orders. This is not the sort of case in which the Court should grant leave. This is the sort of case where the balance contained in s 58 of the *Civil Procedure Act 2005* (NSW) favours leave being refused.

42 Furthermore, Ralan submitted that the proceedings were set down to be heard on 20 September 2017, more than seven years after the development finished. It is only because of the Owners Corporation's own conduct that the proceedings were not heard on that day. If leave is refused, the proceedings will be set down to be heard on an expedited basis. If leave is granted and the appeal is allowed, there will be substantial further delay while Ralan's experts consider the Owners Corporation's new evidence, prepare a further report and then engage in joint conclaves. That will cause further expense and amplify the prejudice to Ralan.

43 Ralan submitted that with regards to the Owners Corporation's application for judicial review, s 34(1)(c) of the *CAT Act* provides that the Supreme Court may refuse to conduct a judicial review of a decision of the Tribunal if an internal appeal or an appeal to a court could be, or has been, lodged against the decision. Ralan submitted that this provision appears to apply in addition to the usual common law principle that where alternative remedies are available, courts have a discretion to refuse judicial review: see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017, Lawbook Co) at [17.90].

44 Ralan further submitted that through s 83 of the *CAT Act*, Parliament made a deliberate choice to limit appeal rights to questions of law with leave. The Owners Corporation failed to identify any reason why, in light of that deliberate choice, this Court should engage in any broader review. Absent any such identification, Ralan argued that the Court should, pursuant to s 34(1)(c) of the *CAT Act*, refuse to conduct a judicial review. The Court should be all the more

inclined to refuse judicial review in circumstances where the basis for review is born out of the applicant's own breach.

Consideration

45 The Owners Corporation has failed to clarify in its submissions how the 35 grounds of review and 10 questions of law in its amended summons relate to one another and to s 83 of the *CAT Act* and/or its juridical review. Many of the appeal grounds and stated questions of law are redundant or concern substantially the same issues.

46 Section 34 of the *CAT Act* relevantly reads:

> "**34 Inter-relationship between Tribunal and Supreme Court**
>
> (1) The Supreme Court may:
>
> …
>
> (c) refuse to conduct a judicial review of a decision of the Tribunal if an internal appeal or an appeal to a court could be, or has been, lodged against the decision.
>
> …"

47 Under my discretion pursuant to s 34 of the *CAT Act*, I refuse the Owners Corporation's application for judicial review of its 35 grounds of appeal pursuant to s 69 of the *Supreme Court Act.*

48 In relation to an order for this Court to grant leave in relation to the Owners Corporation's appeal under s 83 of the *CAT Act*, the relevant factors that I should consider are those set out by Campbell JA (with Young and Meagher JJA agreeing) in *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]. Specifically, these are whether the present proceedings concern an issue of principle, a question of general public importance or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable, that the primary decision was in error: see also Bathurst CJ, Macfarlan and Barrett JJA in *Lee*.

49 One relevant but discretionary factor to be considered by this Court is the size of the claim. Even when relatively small amounts are involved, leave ought not to be denied where there has been a clear injustice: see *He v Yeung* [2015] NSWCA 392 at [49] per Bergin CJ with Beazley P and Meagher JA agreeing.

50 There are several factors in the present proceedings which weigh against leave being granted. To date, the proceedings have been subject to significant delay due in large part to the Owners Corporation. The Owners Corporation had ample opportunity to provide the Lemon report, but only did so on 14 September 2017, more than six weeks after the final date of compliance on 27 July 2017. The Owners Corporation has provided no satisfactory explanation for its failure to comply with NCAT's orders. As was also stated in the Principal Member's decision dated 18 September 2017, the Owners Corporation did not raise the fact that the quantum claimed might exceed the jurisdiction until three weeks after the quantum evidence was due to be filed and served (at [27]). If leave to appeal is granted and the Lemon report is accepted into evidence, there will be further delay in the resolution of the dispute. There will also be an increased expense for both parties. In particular, Ralan will require time to respond to the report by acquiring its own experts and preparing conclave evidence. The case is not one of public importance nor does it concern an issue of principle. Whether an expert's report should be permitted to be filed late such that the matter exceeds the jurisdiction of the Tribunal is not an issue of principle to be determined in this Court. This is a matter that falls to the Tribunal to decide.

51 However, these factors must also be balanced against those which favour leave. The evidence in the Lemon report, if accepted, suggests that the rectification costs may exceed $800,000, which is far from a trivial sum. It is also a far greater sum than was initially contemplated when proceedings were commenced within NCAT. A further relevant consideration that I need to consider is whether the Owners Corporation's amended summons raises questions of law which are more than merely arguable.

52 I will now turn to consider whether the 10 questions of law in the Owners Corporation's amended summons are more than merely arguable. Because many of the questions consider substantially the same submissions, I will consider the questions grouped in the following order: firstly, questions one, four and five; secondly, question two; thirdly, questions three and nine; fourthly, question six; fifthly, questions seven and eight; and finally, question ten.

Questions one, four and five – test to be applied by NCAT when considering a transfer application based on jurisdiction

53 Questions one, four and five concern the test which is to be applied by NCAT when considering applications to transfer proceedings pursuant to s 48K of the *Home Building Act*.

54 In its amended summons filed 23 February 2018, the Owners Corporation pleaded that these three related questions of law are, firstly, what is the test to be applied by NCAT in relation to an application to transfer proceedings from NCAT to the NSW Supreme Court; secondly, does s 36 of the *CAT Act* apply in the circumstances of a transfer application based on jurisdiction; and finally, in making its decision, did the Appeal Panel fail to consider or properly consider s 48K of the *Home Building Act?* As these questions of law concern substantially the same issues, it is convenient that I consider them together.

55 It is noted that although the Owner's Corporation set out the 10 questions of law within heading G of its amended summons, it made no submissions specifically in relation to each question. It also failed to present arguments as to what the answer to the questions should be, or why those questions would impact on the orders which this Court might make. Under headings A through F of its amended summons in relation to its application for judicial review, the Owners Corporation made various submissions which touched upon the questions of law. It is those submissions which I consider in relation to each question.

Owners Corporation's Submissions

56 The Owners Corporation submitted that the Appeal Panel failed to consider and apply s 48K(1) of the *Home Building Act,* which defines the jurisdiction of NCAT in relation to building claims.

57 In interpreting s 48K, the Owners Corporation pointed to well-established principles of statutory interpretation from *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (*"Engineers Case"*) and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ("*Project Blue Sky*"), including that the duty of the court is to give the words of a statutory provision the meaning intended by the legislature. That meaning will ordinarily

correspond with the grammatical meaning of the provision, informed by the words in context, the consequences of the literal or grammatical construction and the purpose of the statute or the cannons of construction: see *Project Blue Sky* per McHugh, Gummow, Kirby and Hayne JJ at [78]. The Owners Corporation submitted that the effect of s 48K is that once NCAT is satisfied that the amount claimed is in excess of $500,000, it cannot continue to hear and determine the claim.

58 The Owners Corporation submitted that the Appeal Panel ignored s 48K of the *Home Building Act* and failed to apply the principles of the *Engineers Case* and *Project Blue Sky* in considering whether Principal Member Rosser had correctly determined the jurisdictional issue and the transfer application. The Appeal Panel erred in focusing on what they thought the outcome of the transfer application should have been. It based its decision upon matters of discretion, rather than a consideration s 48K of the *Home Building Act* and whether NCAT had jurisdiction to hear the claim. The Owners Corporation submitted that discretionary factors have no relevance to a transfer application based on jurisdiction.

Ralan's Submissions

59 Ralan submitted that in relation to question one, the general test for a transfer application is whether the transfer will give effect to the guiding principle under s 36 of the *CAT Act*, namely whether it will facilitate a just, quick and cheap resolution of the real issues in the proceedings. That would make the test consistent with the test applied by this Court to a substantially similarly worded provision under s 140 of the *Civil Procedure Act*. This test was accepted as correct by the Owners Corporation on the hearing before the Appeal Panel.

60 Ralan submitted that the argument the Owners Corporation raised in these proceedings was wrong. Section 48K(1) of the *Home Building Act* provided that NCAT had jurisdiction to hear and determine any building claim in which the amount claimed did not exceed $500,000. It is a provision which did no more than set out the jurisdictional limit of NCAT. It did not mandate the circumstances in which a claim could be amended to engage the jurisdictional limit.

61 At the time of the Owners Corporation's application, it did not plead a claim in excess of $500,000, nor did it have evidence which it was permitted to adduce in the substantive proceedings of a claim of more than $500,000. Its home building application expressly stated the total value of the claim as "$500,000". The Owners Corporation would only be permitted to make a claim in excess of the NCAT's jurisdiction if, pursuant to s 36 of *CAT Act,* the Tribunal granted the Owners Corporation leave either to amend its claim, or in the substantive proceedings, to rely on the late-served Lemon report. The Tribunal's decision regarding whether to grant leave needed to be balanced against the countervailing considerations. The Appeal Panel was therefore correct in determining that the test in s 36 of *CAT Act* needed to be applied.

62 Ralan submitted that the Owners Corporation's claim only exceeded the jurisdiction of the Tribunal if it was granted leave to rely on the Lemon report, or if it was granted leave to amend its claim. Both those questions engaged s 36 of the *CAT Act*. Taken to its logical extreme, the Owners Corporation seemed to suggest that it would be entitled at any time to amend its claim in excess of NCAT's jurisdictional limit and thereby automatically have the proceedings transferred. For example, if after having opened the case but before the evidence was closed, the Owners Corporation was not satisfied with the way the proceedings were conducted, it could at that point assert that it had new evidence causing its claim to be greater than the jurisdictional limit of the Tribunal and be automatically entitled to a transfer. Such an approach is not permitted because of s 36 of *CAT Act*. Even absent s 36, Ralan submitted that the Court should not permit s 48K of the *Home Building Act* to be given such an absurd and unworkable construction.

Consideration

63 Section 48K(1) provides that the Tribunal has jurisdiction to hear and determine any building claim brought before it which does not exceed $500,000. At the time the Owners Corporation brought its claim, it stated the value of the claim to be $500,000, within the Tribunal's jurisdiction. To then demonstrate that the Tribunal lacked jurisdiction to hear the claim, the Owners Corporation required leave either to amend its claim or to rely on the Lemon report, which was served out of time. It was the issue of whether to grant leave

which the Principal Member determined, and for which the Appeal Panel substituted its own decision.

64 These three questions of law submitted by the Owners Corporation reflect a fundamental misunderstanding of the nature of the Appeal Panel's decision. The Appeal Panel stated at [30] and [32]:

> "30. The fact that the late report took the amount of the claim over $500,000 was not of itself a reason for permitting a transfer. Rather, transfer (and vacation of the Tribunal hearing date) was a consequence if the grossly-late report was permitted to be relied upon.
>
> …
>
> 32. Accordingly, the test that had to be satisfied by the OC was the same whether or not the report was within the Tribunal's jurisdictional limit: – would the grossly-late expert report be permitted to be relied upon…"

65 In the circumstances of this case, the relevant test to be applied in relation to s 48K of the *Home Building Act* was whether, taking into consideration s 36 of the *CAT Act*, the Owners Corporation was allowed to amend its claim, and/or have leave to rely on new evidence, which would then exceed the jurisdictional limit of the Tribunal. Given the reasoning of the Appeal Panel set out above, namely at [30], [32] of its decision, it is my view that questions one, four and five are not more than merely arguable.

Question two – test to be applied by NCAT when granting leave

66 The second question of law submitted by the Owners Corporation asks, what is the test to be applied by NCAT in determining an application for leave pursuant to s 80(2) of the *CAT Act?*

Owners Corporation's Submissions

67 The Owners Corporation made no submissions which directly relate to this question of law.

Ralan's Submissions

68 Ralan submitted that the test for leave is well established in NCAT guidelines and by the Tribunal in *Collins v Urban* [2014] NSWCATAP 17 ("*Urban*"). Moreover, the question does not seriously arise on this appeal and would have no impact on the outcome.

Consideration

69 NCAT's Guideline 1 provides information and guidance to parties who seek to appeal appeal from a decision of the Tribunal to an internal Appeal Panel. Clause 23 of the guideline states:

> **"Considerations relevant to being given leave to appeal**
>
> 23. In deciding whether or not to grant leave to appeal, the Appeal Panel will often consider whether the matter involves issues of principle, questions of public importance or a clear injustice. In addition, the Appeal Panel may take into account the cost to the parties and to the Tribunal and whether it is proportionate to the importance and complexity of the subject matter of the proceedings. General principles in relation to granting leave to appeal were considered in *Collins v Urban* [2014] NSWCATAP 17 at [80] to [84]."

70 In *Urban*, the Appeal Panel set out the principles concerning granting leave to appeal at [80]-[84]:

> "**Leave to Appeal – General Principles on the Grant of Leave**
>
> [80] If the Appeal Panel is satisfied that the applicant for leave to appeal from a decision of the Consumer and Commercial may have suffered a substantial miscarriage of justice on one of the grounds identified in cl 12(1)(a), (b) or (c), then the Panel "may" grant leave under s 80(2)(b) of the Act.
>
> [81] Thus, even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12 of Sch 4 to the Act, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).
>
> [82] The principles which govern the granting of leave to appeal by the Appeal Panel under s 80(2)(b) should generally be consistent with those which are applied by Courts when considering the question of leave to appeal. These have recently been summarised by the Court of Appeal in *BHP Billiton Ltd v Dunning* [2013] NSWCA 421. In addition, the Supreme Court has considered the principles which apply when granting leave to appeal to the Court from a decision of the Guardianship Tribunal in a number of cases including *SAB v SEM* [2013] NSWSC 253. The Guardianship Tribunal has now been absorbed into the Tribunal as the Guardianship Division. As there are alternate rights of appeal from decisions of the Guardianship Division to the Supreme Court or the Appeal Panel (see cl 12 to 14 of Sch 6 to the Act) both by leave in the case of interlocutory decisions or on grounds other than a question of law, the same principles should apply in deciding whether to grant leave to appeal to the Court or to the Appeal Panel.
>
> [83] Further, the Appeal Panel has addressed the relevant principles to be applied when deciding whether to grant leave to extend an appeal to the merits of the decision (under s 113(2) of *Administrative Decisions Tribunal Act 1997* (NSW)) *in Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10. These principles may be applied by analogy when considering whether to grant leave to appeal under s 80(2)(b) of the Act.
>
> [84] The general principles derived from these cases can be summarised as follows:

> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: BHP Billiton Ltd v Dunning [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
>
> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,
>
> *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [20] and the authorities cited there, *SAB v SEM* [2013] NSWSC 253 at [8] and [9] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
>
> (3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21] and the authorities cited there."

71 At [45] of its judgment, the Appeal Panel in these proceedings stated:

> "[45] Leave is required to raise a question of law in relation to an appeal from a primary procedural decision: *CATA* s 80(2)(a). We consider that the errors of law, which involve important principles and their application in this context of home building disputes, clearly warrant such a grant of leave, all the more so when (as we have found) there is a clear error of law which works an injustice to the developer and contains a mistaken basis for exercise of discretion leading to an unreasonable factual conclusion: *Collins v Urban* [2014] NSWCATAP 17 at [84]."

72 The NCAT Guideline and decided authorities above outline the test to be applied by NCAT in determining an application for leave pursuant to s 80(2) of the *CAT Act*. The Appeal Panel made reference to and applied the relevant principles in its decision. It is my view that this question of law is not more than merely arguable.

Questions three and nine – considerations relevant to an adjournment application

73 The third and ninth questions of law submitted by the Owners Corporation ask firstly, whether NCAT must have regard to the same considerations when considering an adjournment application and a transfer application; and secondly, whether in the event NCAT lacks jurisdiction, it is able to determine or hear an adjournment application.

Owners Corporation's Submissions

74 In its application for judicial review, the Owners Corporation made various submissions which relate to these questions of law. Firstly, it submitted that the Appeal Panel erred by incorrectly treating the matter before it as an application for an adjournment rather than an application for transfer pursuant to s 48K of the *Home Building Act*. The Owners Corporation submitted that because the application before NCAT was a transfer application based upon jurisdiction, the Appeal Panel erred in finding that the Owners Corporation had not provided evidence in support of an application for an adjournment, which it had not sought.

75 Secondly, the Owners Corporation argued that Principal Member Rosser did not finally determine an adjournment application and did not find that an adjournment application would have failed. The Appeal Panel therefore erred in formulating its decision to allow the appeal upon the basis of the finding that the adjournment application would have failed. The Owners Corporation argued that this finding was irrelevant in the determination of a transfer application based upon jurisdiction.

Ralan's Submissions

76 The Owners Corporation submitted that Principal Member Rosser did not finally determine an adjournment application, and did not definitively find that the adjournment application would have failed. On this point, Ralan submitted that the Appeal Tribunal recognised that the Principal Member considered it "unlikely" that the Tribunal would have adjourned the hearing. However, the Appeal Panel went on to find that had the Principal Member considered the question properly through the correct test, the Primary Member would not have granted an adjournment. In light of the transcript of the hearing before the

Principal Member now in evidence, the Appeal Panel's interpretation of what the primary member would have done had there been an adjournment application was clearly correct. In any event, Ralan submitted that the issue is immaterial, as it gives rise to no appealable question of law.

77 The Owners Corporation further submitted that the application before NCAT was a transfer application, not an application for adjournment, and that it should not have been criticised for not leading evidence in support of an adjournment application. Ralan submitted that the relevant criticism made by the Appeal Panel was that there were a number of evidentiary matters that militated against permitting a transfer, including the lack of an explanation for why the expert report was served so late. That criticism was relevant both to an adjournment and a transfer application.

78 Moreover, Ralan submitted that the Owners Corporation failed to make any submissions as to why NCAT had no jurisdiction to determine or hear an adjournment application. It submitted that NCAT and the Appeal Panel plainly had jurisdiction to hear the application before it.

Consideration

79 This case did not involve an adjournment application. The Owners Corporation's submissions in relation to these questions of law misunderstand the Appeal Panel's comments on the relevance of an adjournment application to this case.

80 The principles relevant to question nine are helpfully set out in in the case of *The Owners – Strata Plan 70030 v Decon Australia PL* [2014] NSWSC 347 ("*Decon*"), to which the Appeal Panel in these proceedings referred in its decision at [23]. *Decon* involved a building claim before the Tribunal for $329,005. Late in the proceedings, the Owners Corporation made an application for transfer to the Supreme Court of NSW, on the basis of a new expert report which evaluated the claim at $1.8 million. When the Tribunal struck out the claim, the plaintiff argued that pursuant to s 48K of the *Home Building Act*, the Tribunal lacked jurisdiction to make such orders.

81 In *Decon*, Schmidt J stated at [59]-[62]:

> "[59] The plaintiff's application was made in 2009 by the filing of a printed form entitled 'application for an order.' There was no question that it fell within the Tribunal's jurisdiction, being for a 'building claim' as defined in s 48K of the Home Building Act, for an amount of $329,005. It has never been amended.
>
> [60] It follows that, contrary to the case advanced for the plaintiff in these proceedings, unless the claim brought before the Tribunal was amended to increase it beyond the statutory limit of $500.000, the proceedings remained within the Tribunal's jurisdiction.
>
> [61] That was not how the plaintiff perceived the legislative scheme. It relied on its new expert's statutory declaration to provide a basis for its transfer application, taking the view that his advice that what was claimed would amount to some $1.8 million, was a sufficient basis to bring the claim beyond the Tribunal's jurisdiction. That is not how the *Home Building Act* operates. Section 48K confines the Tribunal's jurisdiction under the Act to claims brought to the Tribunal which fall below the specified amount, not the advice on which those claims rest."
>
> [62] The tribunal had jurisdiction to decide for itself if the statutory conditions necessary for it to hear and determine a dispute have been satisfied (see *Bailey & Anor v Owners Corporation of Strata Plan 62666* [2011] NSWCA 293 at [55]).

82 Question nine in these proceedings supposes that, upon an application for transfer pursuant to s 48K of the *Home Building Act*, NCAT automatically lacks jurisdiction to hear the claim. For the reasons outlined in *Decon* and in relation to question one, this question is misguided and does not arise out of the circumstances of this case. The Tribunal had jurisdiction to hear the application before it, which was an application for leave to rely on the late-served Lemon report. In my view, this question of law is not more than merely arguable.

83 To address question three, it is necessary to consider the comments of the Principal Member and the Appeal Panel in relation to adjournment applications.

84 As [23]-[25] of its decision, the Appeal Panel stated:

> "[23] The adjournment application, which was heard only 5 days before the allocated hearing date, became a formalised application to transfer only upon service of the expert report. No further explanation by way of a further affidavit was offered as to the date of earlier inspection, why that had not produced a more prompt report and (if necessary) a transfer application at an earlier date or an original filing in another jurisdiction where the report was within the monetary limit, why the OC's expert report was so delayed altogether, why it took a further 3 weeks to be served once the adjournment application was foreshadowed, and why it had grown in that 3 weeks to a definite position greatly in excess (by about $300,000) of the Tribunal's jurisdictional limit. There was no application to amend the OC's claim: cp *OC SP 70030 v Decon Australia PL* [2014] NSWSC 347 at [60].
>
> [24] In those circumstances it is not surprising that the primary member found at [25] and [38] the following:

> [25] In my view, the applicant has not conducted the proceedings before the Tribunal in a satisfactory manner.
>
> [38] The failure to obtain the quantum evidence in accordance with Tribunal orders remains unsatisfactorily explained. In the absence of both the quantum evidence and a satisfactory explanation for its failure to be provided by 27 July, I consider it unlikely that the Tribunal would have adjourned the hearing, even if such an order had been requested by consent.
>
> [25] This conclusion about adjournment was supported by authority: see, eg, *O'Neill v T&I Engines PL* [2015] NSWCATAP 77 at [20]-[23]."

85 The Owners Corporation argued that the Appeal Panel erred in basing its decision to allow the appeal on its determination that an adjournment application would have failed. The Owners Corporation emphasised that the Primary Member never made such a determination. The Appeal Panel was therefore wrong to characterise her decision in that way.

86 At [38] of the primary decision, the Principa Member stated:

> "…I consider it unlikely that the Tribunal would have adjourned the hearing, even if such an order had been requested by consent."

87 It was the Appeal Panel's position that the effect of the Principal Member's words, in the context of her findings about the unsatisfactory conduct of the Owners Corporation, was that she would not have granted the application if it had been for an adjournment. Specifically, the Appeal Panel stated at [28]-[35]:

> "[28] It is clear from the views expressed at [38] and [28] quoted above that the primary member would have come to a different view if the matter had been treated as an adjournment application for a report served this late that particularised the amount of the claim as under $500,000. That conclusion was strongly supported by the primary member's sensible findings at [25]-[27] about the conduct by the OC of the proceedings and the interlocutory application which are paraphrased in the description already given in these reasons. None of those findings was challenged on appeal by the OC.
>
> [29] We respectfully agree with the primary member's views that an adjournment application would have failed for a grossly-late and central expert report within jurisdictional limit, leaving the OC, as the primary member noted in her orders, with the option of no expert evidence or reliance upon the existing expert evidence filed by the developer.
>
> [30] The fact that the late report took the amount of the claim over $500,000 was not of itself a reason for permitting a transfer. Rather, transfer (and vacation of the Tribunal hearing date) was a consequence if the grossly-late report was permitted to be relied upon.
>
> [31] Further, the effect of a transfer on the conduct of the proceedings was the same as a successful application to adjourn and vacate the hearing by reason of the grossly-late expert report being permitted to be relied upon. If the expert

> report had been within jurisdictional limit then adjournment (and vacation of the then-current hearing date) was the consequence if the report was permitted to be relied upon.
>
> [32] Accordingly, the test that had to be satisfied by the OC was the same whether or not the report was within the Tribunal's jurisdictional limit: - would the grossly-late export report be permitted to be relied upon. The outcome – in terms of adjournment and vacation or transfer and vacation – was different according to the amount of the expert report sought to be relied upon, but the consequence of each outcome for the proceedings, for the Tribunal, for other litigants and for the other party to these proceedings was immediately the same.
>
> [33] The primary member did not indicate in [28]-[29] or elsewhere why she came to a different conclusion on transfer vacation from what would have been the likely conclusion on adjournment and vacation, given that the test to be satisfied leading to each outcome was the same.
>
> [34] In particular, the primary member did not say why the guiding principle in CATA s 36 quoted above was given effect to with a difference balance in relation to the very late report in the two different outcomes when the same test leading to those outcomes was involved.
>
> [35] Accordingly, the primary decision did not articulate an essential component of the reasoning leading to the conclusion reached, which is an error of law."

88 As the above paragraphs make clear, the Appeal Panel at [33] characterised the Principal Member's comments as relating to the "likely conclusion on adjournment". It did not represent her as having made a determination on the subject. Moreover, the purpose of the Appeal Panel's consideration of the issue was to note that the Principal Member failed to articulate why the reasoning between an adjournment and transfer application would be different under the circumstances, which was an error of law.

89 The Appeal Panel did not decide to allow the appeal on the basis that an adjournment application would have failed. It merely considered that in a case where a late-served expert report provides the basis for an application for an adjournment, or an application for transfer, both needed to satisfy the same test: whether that report would be permitted to be relied upon ([32]). The fact that the Principal Member indicated that she would have treated an application for adjournment and an application for transfer differently was illustrative of her misapplication of that test. It was for that purpose that the Appeal Panel considered the issue of an adjournment application.

90 As such, question three again represents a misunderstanding of the function of s 48K of the *Home Building Act* in these proceedings. In this case, the

considerations which were relevant for NCAT to consider were the considerations relevant to the granting of leave to rely on the late-served Lemon report. In my view, question three is not more than merely arguable.

Question six – failure to properly consider cl 6(1) Sch 4 of the CAT Act

91 This question of law asks whether in making its decision, the Appeal Panel failed to consider or properly consider cl 6(1) Sch 4 of the *CAT Act*.

Owners Corporation's Submissions

92 The Owners Corporation submitted that pursuant to cl 6(1) of Sch 4 of the *CAT Act*, NCAT had power to transfer proceedings to a court that had jurisdiction either by the consent of the parties, of its own motion or by application of a party. The application before Principal Member Rosser was a transfer application to the Supreme Court of New South Wales made by the Owners' Corporation, on the basis that the current claim exceeded the jurisdictional limit of NCAT. The application was grounded in the Lemon report's evidence of the quantum of the claim. The question for determination was whether NCAT had jurisdiction to hear a building claim for that amount.

93 At no time before Principal Member Rosser did Ralan object to the Lemon report being relied upon by the Owners Corporation in support of its transfer application. Nor did Ralan submit to the Appeal Panel that Principal Member Rosser erred in relying upon the Lemon report. Instead, counsel for Ralan submitted before the Appeal Panel by reference to the Lemon report (Aff, Bacon 12 April 2018, Annexure TCB-2, 15 at 39-41):

> "It was evidence that the Owners Corporation potentially had a claim for granting the jurisdictional limit. I accept on its face that that is prima facie evidence of that.""

94 The Owners Corporation submitted that once Principal Member Rosser accepted the Lemon report and its contents, she correctly found that the claim was in excess of the jurisdictional limit and therefore "provided a basis for the transfer of the application" (Aff, Bacon 12 April 2018, Annexure TCB-7, 138 at [24]).

95 The Owners Corporation submitted that on the basis of cl 6(1) Sch 4 of the *CAT Act*, once it was determined that NCAT lacked jurisdiction to hear the

application pursuant to s 48K of the *Home Building Act*, the proceedings had to be transferred to a court of the appropriate jurisdiction.

Ralan's Submissions

96 Ralan submitted cl 6(1) Sch 4, which is substantially similar to s 140 of the *Civil Procedure Act*, is to be applied subject to s 36 of the *CAT Act*. Clause 6(1) Sch 4 does not have the effect that a transfer application pursuant to s 48K of the *Home Building Act* is entitled to an automatic transfer, without consideration of the guiding principle.

Consideration

97 Clause 6 Sch 4 relevantly reads:

> "**6 Transfer of proceedings to courts or to other tribunals**
>
> (1) If the parties in any proceedings for the exercise of a Division function so agree, or if the Tribunal of its own motion or on the application of a party so directs, the proceedings are:
>
> (a) to be transferred to a court (in accordance with the rules of that court) that has jurisdiction in the matter, and
>
> (b) to continue before that court as if the proceedings had been instituted there.
>
> …"

98 The regulation in cl 6 Sch 4 states that Tribunal may direct for proceedings to be transferred to the Supreme Court of New South Wales, either of its own motion or on the application of a party. Nothing in this regulation requires a Tribunal Member to make a mandatory decision in relation to an application for transfer. It merely provides for that transfer if the Tribunal so directs. This, if it is actually a question of law, is not more than merely arguable.

Questions seven and eight – consideration and application of s 38 of the CAT Act

99 These questions of law ask whether in making its decision, the Appeal Panel failed to consider or properly consider, or failed to apply or properly apply, s 38 of the *CAT Act*.

Owners Corporation's Submissions

100 The Owners Corporation argued that even if it was open for the Appeal Panel to exercise discretion under s 36 of the *CAT Act* when considering the transfer application, it was required to do so in a way which upheld the interests of

justice. In *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; (1997) 141 ALR 353, Dawson, Gaudron and McHugh JJ stated at 357:

> "…
>
> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

101 The Owners Corporation identified the interests of justice in these proceedings to include the quantum of the claim, and the necessity to transfer in reliance upon the Lemon report. The Owners Corporation submitted that in the event that s 36 of the *CAT Act* did apply, it should have been balanced by s 38, which provides for a level of flexibility in the application of procedural rules. The Appeal Panel erred in not applying s 38 of the *CAT Act*, and in the weight it gave to the history of the Owners Corporation's non-compliance when balanced against the prejudice it would suffer in not being able to seek the entire quantum of its claim.

Ralan's Submissions

102 Ralan understood the Owners Corporation's position to be that in the event that s 36 of the *CAT Act* applied, it should have been balanced by s 38, which provides flexibility in applying the procedural rules. The Owners Corporation asserted that the Appeal Panel erred in not applying s 38.

103 On a proper construction of the *CAT Act*, the power in s 38 must be exercised pursuant to the guiding principle in s 36. That is made plain by s 36(2)(b). The Appeal Panel should not have made any order under s 38 which would be contrary to the guiding principle. Further, other than asserting that the Appeal Panel should have applied s 38, the Owners Corporation did not explain with any clarity what the Appeal Panel should have done, or why anything that could be done under s 38 would have had any impact on the result of the Appeal Panel's decision.

Consideration

104 Section 38 of the *CAT Act* relevantly reads:

> "**38 Procedure of Tribunal generally**

> (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
>
> (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.
>
> …
>
> (4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
>
> …"

105 In relation to this question of law, the Owners Corporation submitted that if the Appeal Panel was permitted to exercise the discretion under s 36 of the *CAT Act*, it was required to do so in a way which upheld the interests of justice. The Owners Corporation seemed to suggest that the effect of s 38 is that the Tribunal should have considered the merits of the case over technicalities, such as a party's delay in serving evidence.

106 The Owners Corporation referred to *J L Holdings*. *J L Holdings* was considered in *Aon Risk Services Limited v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 ("*Aon*"), where the Court stated at [96], [98]-[99], [101]-[103]:

> "[96] An important aspect of the approach taken by the plurality in *J L Holdings* was that it proceeded upon an assumption that a party should be permitted to amend to raise an arguable issue subject to the payment of costs occasioned by the amendment. So stated it suggests that a party has something approaching a right to an amendment. That is not the case. The 'right' spoken of in *Cropper v Smith* needs to be understood in the context of that case and the Rule, which required amendment to permit the determination of a matter already in issue. It is more accurate to say that parties have the right to invoke the jurisdiction and the powers of the court in order to seek a resolution of their dispute. Subject to any rights to amend without leave given to the parties by the rules of the court, the question of further amendment of a party's claim is dependent upon the exercise of the court's discretionary power.
>
> …
>
> [98] Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a 'just resolution' is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be

permitted to raise any arguable case at any point in the proceedings, on payment of costs.

[99] In the past it has been more readily been assumed that an order for the costs occasioned by the amendment would overcome injustice to the amending party's opponent.…The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment….

…

[101] In *Ketteman* Lord Griffiths recognised, as did the plurality in *J L Holdings*, that personal litigants are likely to feel the strain far more than business corporations or commercial persons. So much may be accepted. But it should not be thought that corporations are not subject to pressures imposed by litigation. A corporation in the position of a defendant may be required to carry a contingent liability in its books of account for some years, with consequent effects upon its ability to plan financially, depending upon the magnitude of the claim. Its resources may be diverted to deal with the litigation. And, whilst corporations have no feelings, their employees and officers who may be crucial witnesses, have to bear the strain of impending litigation and the disappointment when it is not brought to an end. The stated object of the Court Procedures Rules, of minimising delay, may be taken to recognise the ill-effects of delay upon the parties to proceedings and that such effects will extend to other litigants who are also seeking a resolution in their proceedings.

[102] The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the nature and importance of the amendment to the party applying cannot be overlooked. Whilst r 21 assumes some ill-effects will flow from the fact of a delay, that will not prevent the parties dealing with its particular effects in their case in more detail. It is the extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to flow and that which is shown, which are to be weighed against the grant of permission to a party to alter its case. Much may depend upon the point the litigation has reached relative to the trial when the application to amend is made. There may be cases where it may be properly concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.

[103] The fact that an explanation had been offered for the delay in raising the defence was regarded as a relevant consideration in *J L Holdings*. Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case."

107 Similarly to r 21 of the Court Procedure Rules 2006 (ACT) in *Aon*, s 36 of the *CAT Act* in this case emphasises that the relevant procedural rules are to be applied to facilitate the just, quick and cheap resolution of the real issues in the proceedings. However, as *Aon* makes clear, the requirement to do justice to the "real issues" of a case does not provide license to a party to disregard procedural rules on payment of costs.

108 A relevant consideration to the Appeal Panel in reviewing the Principal Member's exercise of the discretion under s 36 was, as in *Aon*, the behaviour of the Owners Corporation and whether it was able to provide a reasonable explanation for its delay. It was the Appeal Panel's determination at [37], [39]-[41], [43], [52]:

> "37. Thus, at [25]-[27] and [38], also implicitly acknowledged at [28]-[29], the primary member correctly articulated the matters which militated against letting in the very late expert report. In summary, they were: the essentiality to the OC's case of proving the nature and amount of liability for the OC to succeed; the absence of compliance at any stage, before or during the proceedings, with procedural mandates; the severity of the non-compliance; the absence of any explanation for all of those matters except for the last which was a wholly-inadequate explanation: cp *Kelly v Mina* [2014] NSWCA 9.
>
> …
>
> 39. CATA s 36(1) reflects, in the guiding principle, as do other statutes such as s 56 of the *Civil Procedure Act 2005* (NSW), the balance in the case law: see, for example, *AON Risk Services Australia Ltd v ANU* (2009) 239 CLR 175 at [90]-[103] which includes discussion as to why costs are not a cure for all prejudice and that the balancing exercise goes beyond prejudice. It is vital that the reasons for the balance leading to a particular outcome are explained when the factors are in tension between allowing a party an opportunity (however grossly dilatory it has been) to present its case and the interests of the other parties and other litigants in management of resources.
>
> 40. The OC submitted that "just, quick and cheap" in s 36(1) is in effect trumped by or subservient to resolution of the "real issues" in the proceedings. Such could not be the case. The two phrases are directed to different ends. The latter states the object of elucidating and determining what genuinely is in dispute between the parties. The former states the process by which that elucidation and determination occurs. If that was not the distinction then (as the OC effectively submitted) it would always be "just" to permit whatever impacted on the merits of the case because that concerned (subject to determination of relevance and other evidentiary matters at hearing) the "real issues".
>
> 41. The developer submitted in effect that the wrong test was applied because in effect the primary decision at [29] was a balancing of prejudice rather than a having regard to the guiding principle, and that such was an error of law. We agree. That appears to us to be clear from the focus of what is said at [29] in

> the primary reasons and from what we have already said in relation to the test expounded in *Aon*.
>
> …
>
> 43. The extreme lateness and history of non-compliance on matters essential to the OC's case, that were unchallenged findings of fact…placed outside the range of reasonable outcome an exercise of discretion in favour of letting in the very late report…. We did not obtain in terms a satisfactory answer from the OC's counsel (in response to the developer's counsel's submission) as to when, if this exercise of discretion was in the range of reasonable outcomes, there would be a circumstance (except, possibly, during the actual hearing as in AON itself) when the balance would be in favour of rejecting the report. That is not a criticism of the OC's counsel who put her client's difficult case with customary skill, as did her opponent for the developer. Rather, it is an implicit acknowledgement that no circumstance could be pointed to.
>
> …
>
> 52. In our view the extreme unexplained lateness of an expert report which should have been obtained prior to and for the purpose of launching proceedings means that the report should not have been placed into evidence in the final hearing…."

109 It was the Appeal Panel's determination that the prejudice imposed by granting the Owners Corporation leave to rely on its late evidence could not be sufficiently compensated by an order for costs. In its reasoning, the Appeal Panel clearly took into account not only the Owners Corporation's extreme lateness and history of non-compliance with technical requirements, but also its failure to provide reasons for the delay.

110 The Owners Corporation has failed to demonstrate in its submissions how the effect of s 38 of the *CAT Act* should have materially altered the Appeal Panel's decision such that it failed to consider or properly consider the provision. Even under the most generous interpretation of the Owners Corporation's arguments, it cannot be said that the Appeal Panel had regard to technicalities and not the substantial merits of the case. In my view, this ground of review is not more than merely arguable.

Question 10 – power to refuse leave under s 81 of the CAT Act where no application was made

111 This question of law asks whether, under s 81 of the *CAT Act,* the Appeal Panel has the power to refuse leave for the Owners Corporation to rely on the Lemon report in circumstances where no application was made.

Owners Corporation's Submissions

112 The Owners Corporation submitted that the Appeal Panel's jurisdiction is limited by the combined disposition of s 80(2) and cl 12 Sch 4 of the *CAT Act,* which confer jurisdiction to determine, in this case, whether the Principal Member made an error of law. It was open to the Appeal Panel to determine whether the Principal Member had applied the appropriate test once the Lemon report was let in. However, it was not open to the Appeal Panel to determine whether the Lemon report should be let in. By doing so, the Appeal Panel attempted to review the merits of the decision by stepping into the shoes of the Principal Member Rosser, in excess of its jurisdiction. The Owners Corporation argued that by then refusing leave for the Owners Corporation to reply upon the Lemon report, the Appeal Panel again exceeded its jurisdiction and denied the Owners Corporation natural justice.

113 The Owners Corporation further submitted that the Appeal Panel erred in denying the Owners Corporation reliance upon the Lemon report in circumstances where:

(1) no such application was before the Appeal Panel;

(2) Ralan did not seek to raise the fact the Lemon report had been let in as an appeal point;

(3) at no time did Ralan make such an application or take an objection to the reliance upon the Lemon report by the Owners Corporation before Principal Member Rosser;

(4) no such application was ever made during the Appeal Panel hearing; and

(5) the Owners Corporation was not afforded an opportunity to meet such an application by providing submissions on this point.

Ralan's Submissions

114 The Owners Corporation submitted that the evidence before the Court established that Ralan did not object to the Lemon report being relied upon, and also did not seek to appeal the decision of the Principal Member to allow the Owners Corporation to rely on it. Ralan argued that this submission was wrong and required correction. Ralan did not, because it had no right to, object to the Lemon report being relied on by the Owners Corporation for the purposes of its transfer application. The Owners Corporation was entitled to

rely on any admissible evidence it wished to in support of its application. However, that is not to say that Ralan did not object to the Lemon report being relied on by the Owners Corporation in the substantive proceedings. There can be no question that Ralan objected to the Lemon report being relied on in the substantive proceedings. That was the primary basis of Ralan's opposition to the Owners Corporation's application. The transcript of the application before the Principal Member records that the very first thing that counsel for Ralan said in opposition to the application was:

> "... the first question you need to consider is whether they [SP 83405] should be permitted to rely on this report and have an adjournment... what the Owners Corporation now wants to do is rely upon a report that was ordered to be served some 6 months ago and I'll take you to the evidence of that" (Annexure TCB 8, p 147 [1-31]).

115 Further, there is no question that Ralan's objection was understood by Principal Member Rosser:

> "Okay. So just in brief, so that I understand your- the primary position is that the hearing should go ahead and it should go ahead based on the liability evidence that had been served but then on the respondent's quantum evidence but not on the applicant's quantum evidence" (Annexure TCB 8, p 154 [5-15]).

116 Ralan submitted that its application was expressly made in its notice of appeal, and that the issue was addressed by both parties in written and oral submissions before the Appeal Panel. Ralan clearly sought for the Appeal Panel to exercise its power under s 81 of the *CAT Act* to refuse leave for the Owners Corporation to rely on the Lemon report.

117 The Owners Corporation further submitted that it was not open to the Appeal Panel to determine whether the Lemon report should have been "let in" because it did not have jurisdiction to determine that question. Ralan submitted that this argument was wrong. The Appeal Panel recognised that under s 81 of the *CAT Act,* it had the power to substitute its decision for that of the primary member. Section 81 gave the Appeal Panel broad powers to "make such orders as it consider[ed] appropriate in light of its decision on the appeal." Further, pursuant to s 81(2), the Appeal Panel had the power to "exercise such functions on grounds other than those relied upon at first instance." That provision plainly gave the Appeal Panel the power to order that the proceedings be remitted and listed for an expedited hearing and in order to

facilitate that order, to refuse the Owners Corporation leave to rely upon the Lemon report. The Appeal Panel clearly stated that it made its decision because it had the necessary material to exercise the discretion, and it wanted to ensure that the process was not prolonged.

Consideration

118 Section 81 of the *CAT Act* states:

> "**81 Determination of internal appeals**
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
>
> (c) the decision under appeal to be quashed or set aside,
>
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
>
> (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.
>
> (2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance."

119 Section 81(1) of the *CAT Act* confers upon the Appeal Panel broad powers to "make such orders as it considers appropriate in light of its decision". Section 81(2) further provides that the Appeal Panel "may exercise all the functions that are conferred or imposed by this Act…on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance." Those functions include granting or refusing to grant leave for a party to rely on late-served evidence.

120 It was the Appeal Panel's determination that it should substitute its own decision to refuse to grant leave in place the decision of Principal Member Rosser, especially as it had before it all of the material to exercise the discretion itself ([49]). The Appeal Panel explained that its orders were "the most economical and expeditious means of progressing the proceedings to a

final hearing and resolution that also accords with justice" ([49]). The Appeal Panel's decision to refuse leave to the Owners Corporation to rely on the Lemon report was clearly within the broad powers outlined in s 81 of the *CAT Act*. In my view, this question of law is not more than merely arguable.

Disposition

121 I have considered the 10 questions (some of which do not appear to be questions of law) set out by the Owners Corporation in its amended summons. In my view, none of them are more than merely arguable. Furthermore, the Owners Corporation was responsible for the unexplained delays in producing the Lemon report on which it sought to rely. In these circumstances, the plaintiff has failed to demonstrate that these proceedings concern an issue of principle or a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable, that the primary decision was in error.

122 Overall, in the exercise of my discretion, I refuse to grant leave to appeal.

123 The result is that the plaintiff's application for leave to appeal the decision of the Appeal Panel dated 6 December 2017 pursuant to s 83 of the *CAT Act* fails. The plaintiff's application for judicial review pursuant to s 69 of the *Supreme Court Act* also fails. The plaintiff's amended summons filed 23 February 2018 is dismissed.

Costs

124 Costs are discretionary. Costs usually follow the event. The plaintiff is to pay the defendant's costs on an ordinary basis.

The Court orders that:

(1) The plaintiff's application for leave to appeal the decision of the Appeal Panel of the Civil and Administrative Tribunal dated 6 December 2017 in proceedings numbered AP 17/40943 pursuant to s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW) is refused.

(2) The plaintiff's application for judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW) is refused.

(3) The plaintiff's amended summons filed 23 February 2018 is dismissed.

(4) The plaintiff is to pay the defendant's costs on an ordinary basis.

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