Civil and Administrative Tribunal

New South Wales

Case Name:	D'Amico v The Owners-Strata Plan No 87635
Medium Neutral Citation:	[2020] NSWCATAP 65
Hearing Date(s):	23 March 2020
Date of Orders:	20 April 2020
Decision Date:	20 April 2020
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member D Robertson, Senior Member
Decision:	(1) The time for filing the Notice of Appeal be extended to 12 December 2019. (2) Leave to appeal refused. (3) Appeal dismissed (4) The Appellant is to pay the respondents' costs as agreed or assessed.
Catchwords:	APPEAL – Building and Construction – Home Building Act 1989 (NSW) – Building dispute – appellant ordered to pay compensation for defective building work – appellant denied that he was the builder – Home Owners Warranty insurance issued in the name of the appellant – appeal dismissed – no issue of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Cominos v Di Rico [2016] NSWCATAP 5 Jackson v NSW Land & Housing Corporation [2015] NSWCATAP 281 Manbead Pty Ltd v The Owners-Strata Plan No 87635 [2017] NSWSC 1629

Texts Cited:	Nil
Category:	Principal judgment
Parties:	Gino Christopher D'Amico (Appellant) The Owners-Strata Plan 87635; Geoffrey Dengate and Jacqueline Dengate; Nicole Louise Nicholson; Kristopher David Parish and Christina Heather Parish; Catrina Callaghan and Lucas Prohm; Robert Taylor and Margaret Taylor (Respondents)
Representation:	Counsel: I George (Respondents) Solicitors: Appellant (Self Represented) Plowes Lawyers (Respondent)
File Number(s):	AP 19/55667
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	13 November 2019
Before:	L Wilson, Senior Member
File Number(s):	HB 18/49918; HB 18/49933; HB 18/49936; HB 18/49963; HB 18/49970; HB 18/49972

REASONS FOR DECISION

1 The appellant in this appeal (Mr D'Amico) appeals against the decision made in the Consumer and Commercial Division on 13 November 2019 in which he was ordered to pay amounts ranging from $136,739.81 to $140,443.84 in six applications brought by the respondents to the appeal.

2 The respondents to the appeal are the Owners Corporation of Strata Plan 87635 and the owners of five lots, each of whom had filed an application in the

Tribunal seeking relief pursuant to the *Home Building Act 1989* (NSW) in respect of defects in the building which is Strata Plan 87635.

Background to the appeal

3 The background to the appeal is set out in the Tribunal's decision at [22] to [35] which it is convenient to repeat in full:

> 22 In 2011 Mr D'Amico was engaged by the developer to construct a new low-rise multi-unit development on Campbell Street, Woonona which was to become strata plan 87635. There are 6 units in the strata plan. After the residents moved into the new strata plan they noticed building defects in the units and in the common property and on 14 January 2015 the owners corporation commenced proceedings against the developer and Gino D'Amico.
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> 23 The developer of the strata scheme was Manbead Pty Ltd. It is now in liquidation and is no longer a party to the proceedings. The applicants asked that it be removed as a respondent on 1 July 2019 and, pursuant to s.44 of the Civil and Administrative Tribunal Act, it was.
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> 24 The remaining respondent, Mr D'Amico, was described by the Appeal Panel [in an earlier appeal brought by Manbead Pty Ltd] as the Builder but he contests that label. He will be referred to by his name in these reasons.
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> 25 On 16 January 2015 the owners of 5 of the 6 units followed the owners corporation and commenced home building proceedings against Manbead Pty Ltd and Mr D'Amico. The file numbers were HB15/02899 (owners corporation) and HB15/02986, HB15/02919, HB15/03070, HB15/03020, HB15/03063 for each of the five lot owner applicants. On 28 May 2015 the Tribunal entered the following consent orders in all the 2015 files (2015 Consent Orders):
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> 2. By consent the Tribunal orders:
>
> (a) The second respondent [D'Amico] shall carry out or cause to be carries [sic] out the works shown in the Scope of Works of 79 pages and in accordance with the Program of Works of 2 pages being the folder handed to the Tribunal on 28/5/15 and signed by the presiding Member and placed with the papers. (Work Order).
>
> (b) The work pursuant to order 2(a) is to commence not later than 1 August 2015.
>
> (c) Save as provided herein the Applications are dismissed with no order as to costs.
>
> 3. The Tribunal notes the agreement between the parties as follows:
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> (a) That the first respondent will:
>
> (i) cause the second respondent [D'Amico] to carry out works directly or by subcontractor;
>
> (ii) to the extent that the second respondent fails to carry out the Work Order, the first respondent [Manbead Pty Ltd] will pay to the applicants the reasonable cost of completing the works required by the Work Order.

(b) The parties agree that the works are to be carried out to the reasonable satisfaction of the parties' expert Shawn Moore (for the applicants) and the [sic] Stephen Campbell (for the respondents).

26 It is unknown why the parties did not include in the 2015 Consent Orders a date for the works to be completed or why paragraph 3 was a notation and not an order. As to the date for completion, it is noted that the Program of Works of 2 pages was marked "B" by the Tribunal and placed with the 2015 files. The Program nominated 40 days to compete the scope of works re unit 1 and 45 days to complete the scope of works re units 2 to 6 and that "It is recommended that the rectifications works proceed in an ordered format starting at either unit 6 to the rear or Unit 1 at the front… Each unit is to be completed prior to moving to the next unit". It could be that the period specified by the Tribunal for the Work Order to be complied within were these 40 and 45 day periods, as per Order 2(a) in the 2015 Consent Orders. If the works were to commence by 1 August 2015 and the period specified by the Tribunal were the 40 and 45 days referred to in the Program of Works, they amounted to 265 days and therefore may have had to be completed by 23 April 2016. However this is on the basis of a 7 day working week which is impractical and unlikely. Therefore, it is not known with precision what is the "period specified by the Tribunal" for compliance with the Work Order.

27 On 11 February 2016 the owners corporation lodged a further home building application against Manbead and Mr D'Amico which was file number HB16/07476. That application first came before the Tribunal on 4 April 2016 at which time the Tribunal made orders including that if the other applicants in HB15/02986, HB15/02919, HB15/03070, HB15/03020 and HB15/03063 wished to lodge applications for renewal of the 2015 Consent Orders they were to do so by 20 June 2016. The reasons for those orders were:

> The matter of HB16/07476 was listed today for directions. HB16/07476 is a renewal application of HB15/02899. In HB15/02899, and five related matters being HB15/02986, HB15/02919, HB15/03070, HB15/03020 and HB15/03063, consent orders were entered by Principal Member Harrowell on 28 May 2015.
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> The Applicant [owners corporation] alleges those consent orders have not been complied with and now seeks a money order in lieu of the work orders entered by consent.
>
> On Friday just gone, being 1 April 2016, the First Respondent Manbead Pty Ltd lodged an appeal against HB15/02899 and the related matters, claiming that the consent orders made on 28 May 2016 were 'ultravires'. This means that the First Respondent claims that the Tribunal did not have the power or jurisdiction to make the orders that it made. This appeal has been lodged out of time and the First Respondent will, among other things, need to seek an extension of time to run the appeal.
>
> What the appeal means for the renewal proceedings is that the renewal proceedings will need to wait until resolution of the appeal. That is because the renewal proceedings are premised on the validity of the 28 May 2015 consent orders. There is no point making orders in relation to the compliance or non compliance with the 28 May 2015 consent orders if those orders are held to be outside of the Tribunal's jurisdiction.

> The Tribunal aims to resolve disputes in a quick, just and cheap manner. It does not give adjournments, particularly long adjournments, easily. The Member allowed parties time to have discussions and make submissions about adjourning the renewal proceedings to allow the appeal to be determined. The parties appreciated this was the most appropriate direction to make, and the two respondents expressly consented to this course. Mr Ayoub who appeared as agent for the lawyers representing the applicant was unable to call those lawyers so could not expressly consent but appreciated it was the best course.
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> The Member also made clear that the owners corporation (the current applicant) cannot lodge a renewal about non-compliance with work proposed to be done to lots. Those lot owners must lodge their own applications. The parties agreed that those renewal applications must be lodged before the next directions hearing of this matter which is 12 weeks away to allow the appeal to progress.

28 The Appeal referred to in the 4 April 2016 directions above was commenced by Manbead Pty Ltd naming the owners corporation as the first respondent and Mr D'Amico as the second respondent. Mr D'Amico represented himself in the Appeal.

29 On 26 July 2016 the Appeal Panel refused to extend time for the developer to appeal the consent orders HB15/02899: *Manbead Pty Ltd v The Owners – Strata Plan No 87635* [2016] NSWCATAP 167. In its reasons for decision, the Appeal Panel said:

> [5] A renewal of proceedings application can be made against the party ordered to do work in the original order. The renewal can be made for one or all of the orders made in the original order. In the renewal proceedings [HB16/07476 lodged on 11 February 2016 as above] the Owners Corporation sought an order the developer pay an amount totalling $568,000.
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> …
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> [8] The developer acknowledged that the notations at point 3 of the orders have no legal effect…

30 The Appeal Panel considered the strength of the grounds of appeal, which included that the 2015 proceedings were out of time, not a building claim and exceeded the jurisdictional limit, and "concluded that the prospects of the appeal succeeding on any of those grounds is weak": [38].

31 Manbead appealed the Appeal Panel's refusal to extend time to the Supreme Court: *Manbead Pty Ltd v The Owners – Strata Plan No 87635* [2017] NSWSC 1629.

32 On 5 April 2017 the Supreme Court heard the appeal lodged by Manbead against the owners corporation and Mr D'Amico and dismissed it on 28 November 2017. In so doing, Justice McCallum said (the emphasis is mine):

> [4] The respondents to the [2015] claims were Manbead Pty Ltd (the developer) and Gino D'Amico. It is appropriate to record that, while Mr D'Amico was joined as a respondent in his ostensible capacity as the builder, he asserts that he did not, and was not permitted to, fulfil the role of builder for the development and that his builder's licence was used by the developer without his authority after the developer chose a different builder to undertake the works. Mr D'Amico claims that his

> role in the development was confined, in effect, to that of a casual labourer. Although he is joined in the claim by the owners, he is entirely supportive of their claims and would hold Manbead responsible for the defects alleged. *It is not necessary for present purposes to determine any issue relating to those contentions; I am merely recording the information which Mr D'Amico communicated to the Court with considerable passion at the hearing of the present application.*
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> …
>
> [7] It may be noted that the only operative order of the Tribunal [in the 2015 Consent Orders] was against Mr D'Amico. Specifically, order 2 required Mr D'Amico to carry out or cause to be carried out the works listed in the scope of works. Paragraph 3 of the Tribunal's "orders" was not in itself an order of the Tribunal. That paragraph simply noted an agreement between the parties in the terms set out.
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> …
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> [11] During argument on the present application, I raised an issue as to whether the renewal proceedings may be misconceived. That is not an issue that arises for my determination in these proceedings but, having raised it, I should correct any misapprehension I may have created. My concern was based on the fact that the original orders did not operate against Manbead but only noted an agreement with it. The only operative order was against the hapless Mr D'Amico.
>
> [12] Upon further consideration, it appears my concern may have been misplaced. Clause 8 of Sch 4 of the *Civil and Administrative Tribunal Act* allows renewal of proceedings by the person in whose favour an order was made (here, the Owners Corporation and the five individual lot owners) if the order is not complied with. *However, the relief that may be obtained in renewal proceedings is not, in terms, confined by reference to the party who failed to comply with the order. Clause 8(4) confers power on the Tribunal, in renewal proceedings, to make "any other appropriate order under this Act or enabling legislation as it could have made when the matter was originally determined".* Accordingly, my apprehension that the Owners Corporation may have to seek specific performance of the agreement noted in par 3 of the Tribunal's orders made 28 May 2015 appears to have been misplaced. In any event, as already noted, it is not necessary for me to determine that issue.

33 The Appeals having been dismissed, the five lot owners filed their renewal proceedings on 22 February 2018 (despite the Tribunal having ordered them to file by 20 June 2016). These new files married up with the owners corporations' file HB16/07476 being also against the developer Manbead and Mr D'Amico. The five files - HB18/09159, HB18/09162, HB18/09182, HB18/09146 and HB18/09250 – were listed together with HB16/07476 henceforth.

34 On 14 June 2018 the Tribunal entered the following consent orders (2018 Consent Orders):

> On 14 June 2018 the following orders are made by consent of the applicants and Manbead Pty Ltd in relation to matters HB16/07476,

HB18/09159, HB18/09162, HB18/09182, HB18/09146 and HB18/09250:

> 1. By consent order 3 made on 28 May 2015 is varied as follows:
>
> 2. The Tribunal orders that the respondent Manbead Pty Ltd c/- Pellegrino Perri Accountants 3/172 Cowper Street WARRAWONG NSW 2502 Australia will at its own cost cause the work defined in order 2 of the orders made on 28 May 2015, to be completed by a licensed builder or licensed subcontractor.
>
> 3. By consent, Manbead Pty Ltd will enter into a formal building contract and procure Home Owners Warranty Insurance with the licensed builder or licensed tradesman and Insurer.
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> 4. The works referred to in order 2 above are to commence by 1 August 2018 and to be completed on or before 28 February 2019.
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> 5. Order 3(b) of the orders made 28 May 2015 is varied so that the works are to be carried out to the reasonable satisfaction of the parties experts being Shawn Moore (for the applicants) and George zakos or his nominee (for the first respondent), all at the cost of Manbead Pty Ltd.
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> 6. Manbead Pty Ltd will pay for the alternate accommodation and removal costs for all the applicants which is not to exceed $12,000 in total.
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> 7. Each party is to bear their own costs of these proceedings.
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> 8. It is noted that the [sic] on completion of the work order each party has agreed to pay its own costs and any incidental cost to the appeal proceedings (including the Appeal Panel and Supreme Court)
>
> 9. The application is other dismissed. [sic]

35 It is these 2018 Consent Orders that the applicants have renewed by the six related applications all filed on 20 November 2018.

4 The Tribunal noted that it was agreed that none of the rectification works ordered to be performed in either of the 2015 Consent Orders or the 2018 Consent Orders were completed.

Decision under appeal

5 The Tribunal identified a number of issues arising in the proceedings and resolved them as follows:

(1) The Tribunal found that it had the power to make a money order against one respondent on the renewal of proceedings in which a work order was made against another respondent. The Tribunal referred to the finding of McCallum J in *Manbead Pty Ltd v The Owners-Strata Plan No*

87635 [2017] NSWSC 1629 at [12] (which was set out in paragraph [32] of the Tribunal's decision, extracted above). The Tribunal noted that the observations were obiter dicta and not binding but noted "I agree entirely with her Honour's observations and endorse them". Mr D'Amico did not challenge that finding.

(2) The Tribunal found that the fact that the renewal proceedings were commenced before the date work was required to be completed under the order the subject of the renewal proceedings was not of significance for the proceedings. The Tribunal noted that it was agreed that Manbead had taken no steps towards fulfilling the work orders notwithstanding that the orders required work to be commenced by 1 August 2018. The Tribunal also noted that in any event the date for completion of the work was well past by the time the renewal applications were heard. Mr D'Amico did not challenge this finding

(3) The Tribunal held that it was not significant that the renewal proceedings were lodged more than 12 months after the 2015 Consent Orders were made (compelling Mr D'Amico to perform work). The Tribunal noted that, under clause 8(2) of Schedule 4 to the *NSW Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) the relevant date was the date the work order had to be completed, not the date the orders were made and that the 2015 Consent Orders did not have a completion date. Mr D'Amico did not challenge this finding.

(4) The Tribunal held that the Tribunal may take into account evidence to show the cost of rectifying defects as at the date of the renewal hearing and is not restricted in making a money order for such rectification by the amount claimed in the original application. Mr D'Amico did not challenge this finding.

(5) The Tribunal found that Mr D'Amico was the builder engaged in the building works at the site that has become Strata Plan 87635, and, more importantly, was the party who consented to carry out works in accordance with the Scope of Works the subject of the 2015 Consent Orders.

6 It is apparent that Mr D'Amico's Notice of Appeal seeks to challenge this last conclusion.

7 The grounds of appeal stated in the Notice of Appeal are lengthy and do not identify with clarity the alleged errors (of law or fact) upon which Mr D'Amico relies.

8 In oral submissions at the hearing, Mr D'Amico identified his grounds of appeal as follows:

(1) The Tribunal erred in finding that Mr D'Amico was the builder. In Mr D'Amico's words "the [respondents] never produced any evidence to prove that I had anything to do with the building [of Strata Plan 87635]".

9 Mr D'Amico also identified other alleged errors in the Tribunal's decision as follows:

(1) When the Consent Orders were amended in 2018 Mr D'Amico wasn't removed as a respondent.

(2) That the Tribunal had ignored evidence that Mr D'Amico was not the builder.

(3) That the Supreme Court (McCallum J) had made orders for the payment of all moneys sought by the respondents and there was accordingly no warrant for the making of orders against Mr D'Amico.

10 We note that this fourth basis of appeal was not expressed with clarity by Mr D'Amico. The above statement of that ground is the interpretation of his submissions most favourable to him.

11 We note the comments of the Appeal Panel concerning the appropriate approach to the identification of grounds of appeal raised by self-represented appellants in *Cominos v Di Rico* [2016[NSWCATAP 5 at [12]-[13]:

> 12 The Appeal Panel must give effect to the guiding principle when exercising functions under the CAT Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). This is reinforced by s 38(4) which provides that the Tribunal is required 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."
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> 13 It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v Liew* [2013] NSWCA 297 at [68] citing *Hamod v State of New South Wales* [2011] NSWCA 367 at [309]-[316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice."

12 In applying the approach suggested by the Appeal Panel in *Cominos v Di Rico,* we consider it is appropriate to consider Mr D'Amico's appeal by reference to the four grounds identified in his oral submissions as outlined above.

Material before the Appeal Panel

13 In determining the appeal, the Appeal Panel has had regard to the material filed by the parties which was as follows:

(1) The Notice of Appeal dated 12 December 2019.

(2) The Respondents' Reply to Appeal dated 23 December 2019.

(3) A bundle of documents said to constitute 81 pages, filed by Mr D'Amico on 16 March 2020.

(4) Notice of directions made by the Appeal Panel on 7 January 2020.

(5) A statutory declaration of Ian David Plowes, the solicitor for the respondents, dated 20 March 2020.

(6) An email from Mr D'Amico to the Tribunal dated 22 March 2020.

(7) The decision under appeal dated 13 November 2019.

(8) The renewal applications filed by each of the respondents on 20 November 2018.

14 We note that on 24 March 2020, the day following the hearing, Mr D'Amico forwarded a further email to the Tribunal Registry, purporting to make further submissions in his appeal. Mr D'Amico had not been given leave to file any further submissions. Unless expressly given leave to do so, parties should not seek to file further submissions after a hearing has concluded. Mr D'Amico's attempted further communication with the Appeal Panel was improper, and we have had no regard to the further communication in reaching our decision.

Extension of time

15 Mr D'Amico filed his Notice of Appeal on 12 December 2019. In the Notice of Appeal Mr D'Amico asserted that he received "the second decision" on 19 November 2019. The decision under appeal was delivered on 13 November 2019. It is apparent from Mr Plowes' statutory declaration that an amended version of the decision was issued pursuant to s 63 of the NCAT Act on 19 November 2019. The correction in question appears to be to the spelling of the name of one of the respondents in the formal orders.

16 Rule 25(4)(c) of the NSW Civil and Administrative Tribunal Rules 2014 (NSW) requires a Notice of Appeal to be filed within 28 days of the day on which the appellant was notified of the decision to be appealed.

17 At the appeal hearing, Mr George of Counsel, who appeared for the respondents, stated that the decision had been published to the parties by email on 13 November 2019. On that basis the Notice of Appeal should have been filed no later than 11 December 2019 and was filed one day late.

18 Although, in his Notice of Appeal Mr D'Amico acknowledged that he required an extension of time for his filing of an appeal, at the hearing Mr D'Amico denied receiving the decision by email.

19 The reasons given by Mr D'Amico in his Notice of Appeal to explain why the appeal was not filed in time do not address that question in any way. They rather suggest that Mr D'Amico was not conscious that the relevant matter to be explained was why he had not filed the appeal in time.

20 Mr George did not identify any prejudice to the respondents from the late filing of the appeal beyond the fact that his clients were required to respond to the appeal.

21 The Appeal Panel has power pursuant to s 41 of the NCAT Act to extend time for the filing of the appeal. The matters to be taken into account in considering whether to grant an extension of time are set out in *Jackson v NSW Land & Housing Corporation* [2015] NSWCATAP 281 at [22]-[23] as follows:

> Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:
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> (a) The length of the delay;
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> (b) The reason for the delay;
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> (c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and
>
> (d) The extent of any prejudice suffered by the respondent (to the appeal),

22 In this case, both because the extension of time required, if required, is extremely short, being only one day, and because it is not unequivocally clear that Mr D'Amico did receive the notice of the decision on 13 November 2019, and it is thus not unequivocally clear that he in fact required an extension of time, we have decided to extend the time for the filing of the Notice of Appeal to 12 December 2019.

The nature of the appeal

23 Mr D'Amico's rights of appeal are limited by s 80(2)(b) of the Civil and Administrative Tribunal Act 2013 (NSW) ("the NCAT Act"), which provides that an appeal against a decision other than an interlocutory decision of the Tribunal may be made:

> As of right on any question of law, or with the leave of the Appeal Panel, on any other ground.

24 As this appeal is brought from a decision of the Consumer and Commercial Division of the Tribunal, by virtue of clause 12(1) of schedule 4 of the NCAT Act, leave may only be granted under s 80(2)(b):

> if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
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> (a) the decision of the Tribunal under appeal was not fair and equitable, or
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> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

25 In *Collins v Urban* [2014] NSWCATAP 17 the meaning of "substantial miscarriage of justice" was summarized at [71] and [79] as follows:

> [71] [I]t can be seen that the concept of a substantial miscarriage of justice refers to a failure in the way a matter was conducted or decided which deprived the appellant of a chance that was fairly open of achieving a better outcome than occurred…
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> …
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> [79] In order to show that a party has been deprived of a "significant possibility" or a "chance which was fairly open" of achieving a different and more favourable result . . . it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred."

26 Mr D'Amico sought leave to appeal on each of the bases set out in clause 12 of schedule 4, that is that the decision was not fair and equitable, that it was against the weight of evidence and that significant new evidence is now available that was not reasonably available at the time of hearing. The matters relied upon by Mr D'Amico in support of these grounds reflect the matters raised by Mr D'Amico as questions of law and we will address Mr D'Amico's

application for leave to appeal in conjunction with our consideration of his grounds of appeal.

Consideration

27 We turn to consider the grounds of appeal raised by Mr D'Amico.

Grounds 1 and 3 - Was Mr D'Amico the builder?

28 It is convenient to deal together with the grounds we have identified as grounds 1 and 3.

29 The submission of Mr D'Amico that there was no evidence that he was the builder is clearly contradicted by paragraphs 61 to 64 of the Tribunal's decision which we set out below:

> 61 Mr D'Amico obtained the only home owners warranty insurance that has been obtained for the site that is now the strata plan 87635. The Tribunal accepts the evidence in the statutory declaration of Mr Prowes [sic] dated 6 August 2019 that the home owners warranty insurance in Mr D'Amico's name has never been cancelled.
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> 62 Mr D'Amico accepts under his oath he worked on the site from the date of obtaining the home owners warranty insurance (15 June 2011) to the date he had the accident on site (23 April 2012). He contends he was only a labourer on site. He contended that Justice McCallum accepted he was a labourer; her Honour did not. Her Honour said as follows (at [4]):
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> > It is appropriate to record that, while Mr D'Amico was joined as a respondent in his ostensible capacity as the builder, he asserts that he did not, and was not permitted to, fulfil the role of builder for the development and that his builder's licence was used by the developer without his authority after the developer chose a different builder to undertake the works. Mr D'Amico claims that his role in the development was confined, in effect, to that of a casual labourer. Although he is joined in the claim by the owners, he is entirely supportive of their claims and would hold Manbead responsible for the defects alleged. It is not necessary for present purposes to determine any issue relating to those contentions; I am merely recording the information which Mr D'Amico communicated to the Court with considerable passion at the hearing of the present application
>
> 63 Mr D'Amico's builders licence was the licence which was used to construct the townhouses which became the strata plan. Mr D'Amico participated in these proceedings from 2015 to date. Mr D'Amico participated in the conclave held with a Tribunal Member and the other two parties' experts in May 2015 and he did so in his capacity as the builder of the townhouses, despite objecting strongly to these assertions. There was no other reason for him to participate in the conclave. Also Mr D'Amico and Manbeads' expert Mr Campbell conducted testing at the site and Mr D'Amico was there in his capacity as a builder: T95-96 and T99. Mr D'Amico entered consent orders, which he did not appeal, in 2015 to rectify the defects set out in the 79 page joint report of the experts. Mr D'Amico was involved in the 2018 renewal

> proceedings which made orders against Manbead and did not ask to be removed as a party at that time, instead he consented to the 2018 Consent Orders.
>
> 64 On 10 August 2015 Mr D'Amico sent the strata manager for the strata scheme an email which is page 226B of the Applicants' Main Bundle. In it he described work and testing he needed to perform. He complained access had been denied or had been overly prescriptive and limiting and suggested the strata manager "Keep in mind that this is how quality Tradesmen are discouraged and lost" page 226B Applicants' Main Bundle. The Tribunal finds this correspondence is more evidence that the respondent conducted himself and in fact was, the builder of the townhouses and the builder who consented to carry out the rectification works.

30 Mr D'Amico did not put before the Appeal Panel any of the transcript of the hearing to which the Tribunal referred or the email at page 226B of the applicant's Main Bundle. Thus we have no basis to determine for ourselves whether that evidence in fact supported the conclusions the Tribunal has drawn from it. The Tribunal found that the evidence supported the conclusion that Mr D'Amico was the builder. We cannot say that the Tribunal was in error in making that finding.

31 In any event Mr D'Amico did not suggest that the facts recorded by reference to that evidence were not correct. Rather, Mr D'Amico asserted that the Tribunal ignored evidence that he was not the builder.

32 The evidence to which Mr D'Amico referred in the course of the hearing of the appeal as being evidence that he was not the builder was:

(1) A complaint or complaints apparently filed by the Owners Corporation with Fair Trading NSW in which the Owners Corporation had referred to Mr Alfonso Espasito as the builder.

(2) Three documents contained in Mr D'Amico's bundle, identified as G, H and I, being:

G – a handwritten schedule in the following terms:

"total chqs paid $1,524,218.00

Cash wages paid $ 58,990.00

_____

$1,583,208.00

Fonzi $ 75,601.00

Gino $ 72,591.00

_____

Total Vito spent to date $1,731.400.00

Moneys received - settlement statement

Unit 1	$ 563,728.00
Unit 2	$ 460,798.00
Unit 3	$ 471,089.00
Unit 4	$ 428,422.00
Unit 5	$ 452,077.00
Unit 6	$ 493,730.00
Total received	$2,869,844.00
Total to ANZ	$1,609.887.00"

H – An ANZ Bank statement in respect of an account in the name of Manbead Pty Ltd, identifying payments totalling $1,609,887.00, and

I – An email from Ms Capocchiano, Assistant Manager, ANZ Business Banking, to Vito Pennimpede, the director of Manbead, listing "draw downs on your progressive draw facility"

(3) The judgment of McCallum J; and

(4) A further document from Mr D'Amico's bundle, identified as document L, headed "Transcript of formal hearing conducted by M Harrowell on 28 May 2015".

33 It is not clear to us from the material included in the appeal papers that any of this material, other than the judgment of McCallum J, was included in the evidence before the Tribunal, or, if the material was before the Tribunal, what submissions were made to the Tribunal concerning them. On that basis alone we could not comfortably reach the conclusion that the Tribunal had erred in failing to refer to that evidence in its decision. We note that the Tribunal did refer to the decision of McCallum J and clearly identified that the decision did not carry the significance which Mr D'Amico sought to place on it.

34 Moreover, even if this material was before the Tribunal, we would not conclude that the Tribunal erred in failing to make reference to it. In our view none of the material is supportive of the conclusion that Mr D'Amico was not the builder.

35 The documents filed by the Owners Corporation with Fair Trading NSW, which refer to Mr Alfonso Espasito as the builder, clearly identify Mr D'Amico as the builder's licence holder in respect of the relevant work and Mr Espasito as the "builder/contractor on site". This is not inconsistent with Mr D'Amico being the builder and Mr Espasito being an on-site representative.

36 In any event, the only basis upon which these documents might support Mr D'Amico's case would be that they constitute an admission on the part of the respondents. In our view, these documents do not constitute an admission binding on the Owners Corporation or the lot owners. Neither the Owners Corporation nor the lot owners were parties to the original arrangements which Manbead, as developer of Strata Plan 87635, made with Mr D'Amico or Mr Espasito or anyone else. Any statements concerning the identity of the builder, made by the Owners Corporation or individual lot owners in their initial correspondence with Fair Trading NSW, reflect no more than the initial impression or understanding held by those parties. The statements were not made in the course of formal legal proceedings and there is no suggestion in the evidence, or in Mr D'Amico's submissions, that Mr D'Amico acted to his detriment in reliance upon those statements.

37 The document identified as G establishes no more than that each of Mr Espasito (Fonzi) and Mr D'Amico (Gino) received payments from Manbead Pty Ltd. It says nothing about the arrangements pursuant to which those payments were made and says nothing about the content of the cheques, amounting to in excess of $1.5 million, which are also included within the description 'total chqs paid".

38 The documents identified as H and I establish no more than the fact that the developer of Strata Plan 87635, Manbead, borrowed moneys for the development from the ANZ Bank.

39 As we have noted above, the Tribunal recorded Mr D'Amico's submissions concerning the judgment of McCallum J and, correctly, observed that the passages upon which Mr D'Amico sought to rely did not have the significance or meaning which Mr D'Amico sought to place upon them.

40 The document headed "Transcript of formal hearing conducted by M Harrowell on 28 May 2015" appears on its face to be a communication between Mr D'Amico and an underwriting manager from Calliden Home Warranty Insurance, the insurer which had issued the Home Warranty Insurance policy for the development in Mr D'Amico's name. The passages which purport to be a transcript of a hearing before then Principal Member Harrowell on 28 May

2015 are clearly not a transcript. The respondents, through their Counsel, Mr George, denied that the document constituted a transcript of any hearing before Principal Member Harrowell.

41 The appropriate process for establishing the content of submissions and evidence and any other relevant discussions at hearings of the Tribunal is to obtain a copy of the recording of the hearing and have a transcript made, the accuracy of which can be confirmed by the other party and if necessary, by the Tribunal. We do not accept that the document identified as "Transcript of formal hearing conducted by M Harrowell on 28 May 2015" carried any evidentiary value and are not persuaded that the Tribunal could have erred by failing to refer to the document, even if, which has not been established, the document was in evidence.

42 It follows that grounds 1 and 3 do not disclose an error of law. Nor could it be said that the finding that Mr D'Amico was the builder was made against the weight of evidence or that it was not fair and equitable. These grounds of appeal must be rejected.

Ground 2 – failure to remove Mr D'Amico as a respondent in 2018

43 We do not understand the basis upon which Mr D'Amico suggested that in some way an error may have been made in the making of the Consent Orders in 2018. Mr D'Amico included in his bundle of documents a handwritten document which appears to be the template for the formal orders entered in the Tribunal. There is no substantive difference between the handwritten version of the document, which appears to be signed by Mr Pennimpede, the director of Manbead Pty Ltd, and not by anybody else, and the formal orders made on 14 June 2018.

44 Order 3 of the 2015 Consent Orders noted an agreement that Manbead would cause Mr D'Amico to carry out the agreed rectification works "directly or by sub-contractor" and that, to the extent Mr D'Amico failed to carry out the works, Manbead would pay the applicants the reasonable cost of completing the works.

45 By the 2018 Consent Orders, Order 3 was varied so as to require Manbead, at its own cost, to cause the works "to be completed by a licensed builder or

licensed sub-contractor". Although the 2018 Consent Orders record that they were made by consent "of the applicants and Manbead Pty Ltd", Mr D'Amico explicitly acknowledged in the grounds of appeal included in his Notice of Appeal (paragraph 1) that the 2018 Consent Orders "were made with the consent of all the parties present". Mr D'Amico does not suggest that he was not present on that occasion.

46 The 2018 Consent Orders left entirely unaffected Order 2 of the 2015 Consent Orders, which required Mr D'Amico to undertake the relevant rectification work. There is no foundation for Mr D'Amico's suggestion that, by reason of the variation of Order 3 by the 2018 Consent Orders, he should necessarily have been removed from the proceedings. There is no evidence that any other party agreed to Mr D'Amico being removed from the proceedings.

47 We note that, in his Notice of Appeal Mr D'Amico stated that he had made an application on 24 January 2019 to be formally removed as a respondent and that he had received no reply. There is nothing in the appeal papers or in the Tribunal's decision to suggest that that matter was raised before the Tribunal. No evidence of the filing of any such application was put before the Appeal Panel. In any event, even if such an application had been filed it would have been likely to have resulted in the same outcome as the decision under appeal, for the same reasons, that is, that the evidence suggests that Mr D'Amico <u>was</u> the builder.

48 This ground of appeal must be rejected. No error of law is disclosed. Nor has Mr D'Amico established that the decision was not fair and equitable or was against the weight of evidence.

Ground 4 – that the Supreme Court decision finalised the dispute to the extent that further orders could not be made against Mr D'Amico

49 As noted above, Mr D'Amico's submissions in respect of this basis for his appeal were not clear. Having listened to Mr D'Amico's submissions, we do not consider there is any substance in the submissions.

50 The proceedings before McCallum J were an appeal by Manbead against an Appeal Panel decision dismissing an appeal brought by Manbead against the work orders contained in the 2018 Consent Orders. The basis of the appeal

was that the value of the work orders cumulatively exceeded the monetary jurisdiction of the Tribunal. McCallum J dismissed the appeal and ordered Manbead to pay the other parties' costs. Insofar as Mr D'Amico is concerned, the only significance of that decision is that he obtained a costs order in his favour in respect of the costs of the appeal. The decision has no further significance.

51 To the extent Mr D'Amico stated in the course of his submissions that, by reason of the decision of McCallum J, the lot owners and the Owners Corporation had been "paid out in full" we accept Mr George's submission that there was no basis for that submission. There was no reason that it should have been a consequence of her Honour's decision and there is no evidence to suggest that it was.

52 In his Notice of Appeal, Mr D'Amico relied upon "the Official Stamped Judgment Order from the NSW Supreme Court which was issued on 21 August 2019", that is after the hearing at first instance, and which "specifically state that Gino D'Amico is the Second Defendant and a recipient of those Orders is awarded costs", as the significant new evidence said to warrant the grant of leave to appeal.

53 We note that an official stamped copy of the judgment would have added nothing to the evidence before the Tribunal who was clearly aware of the decision of McCallum J and, correctly, treated it as irrelevant to the issues she was required to determine. We also note that it could not be said that the "official stamped judgment order" was not reasonably available at the time of the hearing. The decision of McCallum J was delivered on 28 November 2017. Mr D'Amico could have obtained a sealed copy of the orders at any time after that date.

54 Accordingly the fourth ground of appeal must also be rejected and leave to appeal on the basis that there is new evidence should be refused.

Conclusion

55 Although the time for filing the Notice of Appeal will be extended to 12 December 2019, leave to appeal will be refused and the appeal will be dismissed.

56 Mr George sought an order for costs in the event that the appeal was dismissed.

57 Section 60 of the NCAT Act provides that the Tribunal may award costs in relation to proceedings before it "only if it is satisfied that there are special circumstances warranting an award of costs".

58 However, rules 38 and 38A of the Civil and Administrative Tribunal Rules provide:

> **38 Costs in Consumer and Commercial Division of the Tribunal**
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—
>
> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.
>
> **38A Costs in internal appeals**
>
> (1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of—
>
> (a) enabling legislation, or
>
> (b) the Division Schedule for the Division of the Tribunal concerned, or
>
> (c) the procedural rules.
>
> (2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

59 The amount in issue in the proceedings of the Tribunal at first instance clearly exceeded $30,000. Accordingly, the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance differed from those in s 60 of the NCAT Act because of the operation of the procedural rules, and therefore, when deciding whether to award costs in

relation to the appeal, the Appeal Panel is required to apply the "first instance costs provisions", which are those set out in rule 38.

60 The amount in dispute in the appeal, involving as it did an appeal against each of six money orders each in excess of $100,000, also clearly exceeded $30,000. Therefore, by the operation of rules 38 and 38A, the Appeal Panel may award costs in relation to this appeal, even in the absence of special circumstances.

61 The respondents have been successful in the proceedings. The usual order in relation to costs is that a successful party is entitled to its costs. Mr D'Amico has not put forward any reason why the usual costs order should not apply in this case. Accordingly we will order that Mr D'Amico pay the respondents' costs of the appeal as agreed or assessed.

62 Our orders will be:

(1) The time for filing the Notice of Appeal be extended to 12 December 2019.

(2) Leave to appeal refused.

(3) Appeal dismissed

(4) The Appellant is to pay the respondents' costs as agreed or assessed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar