Civil and Administrative Tribunal

New South Wales

Case Name:	Jayasooriah v Wisdom Properties Group Pty Ltd
Medium Neutral Citation:	[2020] NSWCATAP 81
Hearing Date(s):	20 April 2020
Date of Orders:	8 May 2020
Decision Date:	8 May 2020
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member D Goldstein, Senior Member
Decision:	(1) The time for filing the Notice of Appeal is extended to 30 January 2020. (2) The appeal is allowed, except in connection with orders 6 and 7. (3) The Tribunal decision of 27 September 2019 dismissing the proceedings is set aside. (4) That part of the proceedings that was before the Tribunal on 27 September 2019 is remitted to the Consumer and Commercial Division, differently constituted, and for the purposes of the remitted proceedings, the Appeal Panel directs that the remitted proceedings are to be heard: (i) on the same evidence as was before the Tribunal on 27 September 2019; and (ii) at the same time as any renewal proceedings as may be brought by the applicant in connection with the 12 July 2019 orders. (5) The Appeal Panel further directs that in hearing the remitted proceedings, the Tribunal is to consider whether an amendment to the appellant's claim will be necessary, as referred to in [54] of these Reasons. (6) Leave to appeal based on the ground that significant new evidence is now available that was not

	reasonably available at the time of the hearing is refused. (7) The respondent must pay the appellant's costs of the Appeal on a party/party basis, such costs if not agreed to be assessed on the basis set out in Division 3 of Part 7 of the Legal Profession Uniform Law Application Act 2014. (8) If a party to this Appeal seeks a different costs order that party must file and serve written submissions in favour of the order sought within 14 days of these orders. The other party must then file and serve submissions in response with a further period of 14 days. The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing
Catchwords:	APPEAL – Building and Construction –Functus officio – Failure to exercise jurisdiction
Legislation Cited:	Home Building Act 1989 Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Legal Profession Uniform Law Application Act 2014
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; 209 CLR 597 Yong v Antworks Pty Ltd [2016] NSWCATAP 14
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Jayasooriah (Appellant) Wisdom Properties Group Pty Ltd (Respondent)
Representation:	Counsel: B. A. Jacobs (Respondent) Solicitors:

	Appellant (Self Represented) Holding Redlich (Respondent)
File Number(s):	AP 20/04788
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial
Citation:	N/A
Date of Decision:	20 December 2019
Before:	FDL Holles, General Member
File Number(s):	HB 19/28468

REASONS FOR DECISION

1 The appellant appeals against a decision in the Consumer and Commercial Division of the Tribunal which was given on 20 December 2019. The appeal was lodged 14 days late. The respondent opposes an order being granted to extend the time for the appellant to file his Notice of Appeal.

2 Before we deal with the nature of the appellant's appeal and his claim for an extension of time for filing the appeal, we think that it is important briefly to describe the history of the proceedings at first instance.

Brief the history of the proceedings

3 The appellant's proceedings were filed on 20 June 2019 in relation to the construction of a customised house for a disabled person. The application was brought under the *Home Building Act* 1989 (the 'Act').

4 The appellant's application indicated that he was seeking orders relating to alleged defective work, the respondent causing delay and overcharging. The application also made it clear that the appellant was concerned with time limits for bringing claims under the Act and that he was proceeding on the understanding that the time for bringing an action for the breach of a two (2)

year statutory warranty under the Act would expire on 2 July 2019. From this information we infer that the appellant's claims were not for major defects, as ss18E (1)(a) and (b) of the Act states:

> Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions—
>
> (a) proceedings must be commenced before the end of the warranty period for the breach,
>
> (b) the warranty period is 6 years for a breach that results in a major defect in residential building work or 2 years in any other case,

5 The proceedings were listed for directions on 12 July 2019. Consent and other orders so far as relevant were made in the following terms:

> 1. By consent, the respondent WISDOM PROPERTIES GROUP PTY LTD 17-19 Central Hills Drive GREGORY HILLS NSW 2557 is to carry out the following work on or before 30- October-2019 in a proper and workmanlike manner.
>
> Details of Work order:
>
> a. Complete items numbered 1. to 6. in Annexure 'A" to these orders.
>
> b. Supply and install new shower screen measuring 500 mm wide and 1.8 metre height to the second ensuite;
>
> c. Install a compliant GPO in the second ensuite
>
> 2. By consent, the respondent will provide to the applicant on or before 22-July-2019 the names of three building experts, from which the applicant will choose one and the parties agree to be bound by the chosen expert's assessment of which if any, or all of the defects in Annexure "B" to these order are to (be) the the subject of rectification by the respondent.
>
> 3. By consent, all rectification work identified by the nominated third party expert, will be completed by the respondent on or before 30-October-2019.
>
> 3. By consent, the respondent will reimburse the applicant the sum of up to $550 on or before 22-July-2019 for expenses he incurred for temporary rectification, on production of the tax invoice by the applicant.
>
> 4. Leave is granted to the applicant to amend the application to include a claim for the following:
>
> a. Liquidated damages;
>
> b. Costs associated with the relocation of a power pole which the applicant alleges was not installed in accordance with a verbal agreement
>
> In relation to the two amendments to the application the Tribunal makes the following directions:
>
> 5. The applicant is to provide the respondent and the Tribunal either in person or by post with a copy of all documents on which he intends to rely by the 26-July-2019.

> 6. The respondent is to provide the applicant and the Tribunal either in person or by post with a copy of all documents on which the respondent intends to rely by the 09-August-2019.

6 There has been no appeal from the above orders. Orders 1 - 3 were made pursuant to s48O(1)(c) of the Act. By making those orders the Tribunal had clearly dealt with that part of the application relating to defective work. We find that orders 1 – 3 were a decision for the purposes of s5(1)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') which states:

> In this Act, decision includes any of the following—
>
> (a) making, suspending, revoking or refusing to make an order or determination,

7 The Tribunal then made orders 4 – 6 to prepare the proceedings for a hearing on the remainder of the issues in the proceedings as identified in order 4 which may be described as monetary claims.

8 The proceedings were then heard on 27 September 2019. The decision was reserved and the parties were ordered to file and serve written submissions.

The decision appealed against

9 On 20 December 2019 a written decision was provided which stated:

> 'The matter is dismissed'

10 Reasons in support of the decision were given in ten (10) paragraphs.

11 The Tribunal Member referred to the Tribunal orders of 12 July 2019 and to an assertion from the respondent that the orders made on 12 July 2019 were complied with, except for one (1) order relating to the provision of documents.

12 There followed a discussion of the fact that the appellant's defect claims were not for major defects, the date of the contract, the time allowed for completion of the works, the practical completion inspection date, the date of the handover of the residence and that the appellant had accepted compensation for a fifteen (15) week period of overrun.

13 The Tribunal Member then referred at [7] to the fact that there is a two year time period within which to bring applications for defect claims that were not major defects and the time period runs from '*the time of the completion inspection".* Importantly the Tribunal Member stated:

> ‘The application is clearly made on the basis of a (sic) the statutory warranty [see application form].’

14 This statement overlooks orders 4 – 6 of the 12 July orders, which as we have observed were made to prepare the proceedings for a hearing on the issues identified in order 4.

15 At [9] and [10] of the decision the Tribunal member concluded by stating:

> ‘S48K(7) provided that the Tribunal does not have jurisdiction where the claim is lodged outside the S18E period. Considering all the factors contained in S 18E(d) I am satisfied that, given the commencement date of these proceedings on the 20 June 2019, the Tribunal has no jurisdiction as the proceedings should have been commenced before 3 November 2018
>
> I note advice from the respondents that the order for works made by Member Campbell have been completed, and in those circumstances, the matter is dismissed as the remedy sought has been provided.’

16 The above paragraphs contain an inconsistency. On the one hand the Tribunal Member states that the Tribunal has no jurisdiction as the proceedings should have been commenced before 3 November 2018. He then states that the work the subject of the work order of 12 July had been completed and the remedy sought had been provided. We note that if the proceedings should have been commenced before 3 November 2018, then there was no basis for the 12 July orders.

The basis of the appeal

17 The appellant appeals against the order of the Tribunal dismissing his application. His amended Notice of Appeal seeks leave to appeal because he was denied natural justice with the result that the decision was not fair and equitable. He also states that significant new evidence is now available that was not reasonably available at the time of the hearing.

18 We have had regard to the appellant’s submissions filed on 17 March and 16 April 2020 which traverses a number of issues including when the residence was practically complete. Importantly at [16] of his Reply submissions the appellant points out that in the proceedings on 27 September 2019, there was no mention of statutory warranty issues, and that was because those issues had been dealt with by the Tribunal’s 12 July 2019 orders. The appellant submits that the issues before the Tribunal on 27 September were those identified in his written submissions. At [17] of the Reply submissions the

appellant points out that he did not raise statutory warranty issues in his submissions and that the Tribunal erred in not considering claims that it recognized as being '*substantive in setting aside the rectification orders previously made without any appeal process and in dismissing the entire application under S48K(7) on grounds that it was filed outside the S18E period'*.

19 In *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel stated at [12]:

> In circumstances where the appellants are not legally represented, it is apposite for the Tribunal to approach the issue by looking at the grounds of appeal generally.

20 We have adopted the approach of looking at the appellant's grounds of appeal generally in order to ascertain the basis of his appeal. The Amended Notice of Appeal makes it clear that the appellant appeals on the basis that the Tribunal did not consider a number of arguments put to it in connection with financial loss suffered by the appellant. For reasons which we will explain later in these reasons, we will treat these matters as assertions that the Tribunal's 27 September decision contained errors of law for which leave is not required. In addition we think that it is clear that the appellant appeals on the basis that the Tribunal erred in setting aside the rectification orders when there had been no appeal against them and further that the Tribunal erred in dismissing the whole of the application on the basis of s48K(7) of the Act.

21 Except in connection with the assertion that there is significant new evidence now available that was not reasonably available at the time of the hearing for which leave is required, we understand the appellant's grounds of appeal to proceed on the basis of errors of law in the Tribunal decision.

The Respondent's position

22 In its Amended Reply to the Appeal the respondent supports the Tribunal Member's Reasons for Decision as being correct and submits that leave to appeal should not be granted.

23 In further and more detailed submissions dated 1 April 2020, signed by its solicitors, the respondent submits that there was no error of law in connection with what it describes as the appellant's 'Primary claim'. In connection with

what it describes as the appellant's 'Additional Claims' the respondent at [58] of its submissions states that it agrees that the Tribunal failed to discharge its statutory function by failing to deal with the Additional Claims which were relevantly before it and which required determination. At [59] the respondent submits that it is appropriate that the Additional Claims are remitted for consideration by the Tribunal pursuant to s81(1)(e) of the NCAT Act.

Appeal directions

24 On 18 February 2020 directions were given in these appeal proceedings which required the parties, among other things, to lodge with the Appeal Panel the evidence provided to the Tribunal below and any fresh evidence on which the appellant would seek leave to rely.

25 We have been provided with some documents. However it is not clear to us what documents were provided to the Tribunal below, or what new evidence the appellant refers to. The respondent states that it has filed a 538 page folder of documents. Unfortunately those documents were not provided to us prior to the hearing, although a copy was provided after the Appeal hearing was concluded.

26 The appellant has not provided us with the document(s) that he refers to as the significant new evidence that is now available that was not reasonably available at the time of the hearing.

Extension of time

27 The appellant had 28 days within which to file his appeal. The appeal was filed on 30 January 2020, which the respondent submits was fourteen (14) days late.

28 In *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 an Appeal Panel stated at [21] and [22] in connection with an appeal filed late for which an extension of time was sought under s41 of the NCAT Act:

> 21 Time limits, including the specification of the time within which an appeal from an internally appealable decision to the Appeal Panel of the Tribunal must be lodged, are established by legislation for the purpose of promoting the orderly and efficient conduct of proceedings in the Tribunal, providing certainty for the parties to proceedings, especially the party in whose favour orders have been made, and achieving finality in litigation. For these reasons, these time limits should generally be strictly enforced. That is not to say, however,

that exceptions should not be made where the interests of justice so require. The express power in s 41 of the Act to grant extensions of time allows the Tribunal to prevent the rigid enforcement of time limits becoming an instrument of injustice. As the decision in Gallo v Dawson quoted above makes clear, it is generally the case that in order for the power to extend time to be exercised in an appellant's favour there must be material upon which the Appeal Panel can be satisfied that to refuse the application for an extension of time would work an injustice.

22 The considerations that will generally be relevant to the Appeal Panel's consideration of whether to grant an extension of time in which to lodge a Notice of Appeal include:

> (1) The discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the appellant - Gallo v Dawson [1990] HCA 30, 93 ALR 479 at [2], Nanschild v Pratt [2011] NSWCA 85 at [38];
>
> (2) The discretion is to be exercised in the light of the fact that the respondent (to the appeal) has already obtained a decision in its favour and, once the period for appeal has expired, can be thought of as having a "vested right" to retain the benefit of that decision - Jackamarra v Krakouer (1998) 195 CLR 516 at [4], Nanschild v Pratt [2011] NSWCA 85 at [39] and, in particular, where the right of appeal has gone (because of the expiration of the appeal period) the time for appealing should not be extended unless the proposed appeal has some prospects of success - Jackamarra at [7];
>
> (3) Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:
>
> > (a) The length of the delay;
> >
> > (b) The reason for the delay;
> >
> > (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),
>
> - Tomko v Palasty (No 2) (2007) 71 NSWLR 61at [55] (per Basten JA) but note also [14], Nanschild v Pratt [2011] NSWCA 85 at [39] to [42]; and
>
> (4) It may be appropriate to go further into the merits of an appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of time can show that his or her case has more substantial merit than merely being fairly arguable - Tomko v Palasty (No 2) (2007) 71 NSWLR 61 at [14] (per Hodgson JA, Ipp JA agreeing at [17]) and Molyneux v Chief Commissioner of State Revenue [2012] NSWADTAP 53 at [58] - [59].

29 The respondent opposes the grant of an extension of time despite the fact that it concedes that certain of the appellant’s claims should be remitted to the Tribunal for rehearing. It is our view that to refuse the appellant the extension

of time he seeks would impose an injustice to him. It is our view that the length of the delay was minor, especially as it occurred over the Christmas/New Year period and that the appellant has provided an adequate explanation for the delay. Importantly, we are of the view that the appellant's prospects of success are high, given that the respondent has conceded that certain claims should be remitted. We would also add that we are unable to identify any real prejudice that would be suffered by the respondent if an extension of time were granted.

30 We will make an order pursuant to s41 of the NCAT Act extending the time for the filing of the appellant's Notice of Appeal to 30 January 2020.

Internally appealable decisions

31 The decision of the Tribunal below is an internally appealable decision and an appeal can be made from that as of right where there is an error of law and with the leave of the Appeal Panel on specified grounds: see, s 80(1) and (2)(b) of the NCAT Act.

32 As the decision the subject of appeal is a decision of the Tribunal in the Consumer and Commercial Division, the Appeal Panel may only grant leave to appeal where it is satisfied the appellant may have suffered a substantial miscarriage of justice because:

> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (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).
>
> (see NCAT Act, Sch 4, cl 12)

Principles to be applied in an application for leave

33 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled.

34 The statutory regime referred to above has been considered and explained by an Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17. The statutory regime involves a two stage process. First, has the appellant satisfied the Appeal Panel that he may have suffered a substantial miscarriage of justice because the decision at first instance was not fair and equitable, or against the

weight of evidence, or because new evidence has arisen which was not reasonably available at the hearing? Only if so satisfied, the Appeal Panel may proceed to the second stage to determine whether it should exercise its discretion to grant leave and that discretion should be exercised in accordance with well-established principle.

Errors of law

35 We have come to the conclusion that on 12 July 2019 when the Tribunal made orders 1 - 3 pursuant to s48O(1)(c) of the Act, it made a decision determining that part of the application relating to defective work. The orders gave effect to the guiding principle of the NCAT Act*,* namely *'to facilitate the just, quick and cheap resolution of the real issues in the proceedings*' by entering consent orders determining the greater part of the appellant's complaints promptly after the application had been filed on 20 June 2019.

36 In *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 the High Court considered an administrative tribunal's capacity to correct its own error when, in consequence of that error, it had failed to discharge its statutory function. At [7 – 8] Gleeson CJ stated, footnotes excluded :

> 7 In *Chandler v Alberta Association of Architects* Sopinka J, speaking for the majority in the Supreme Court of Canada, pointed out that, as a general rule, subject to a power to correct a slip or an error of expression, a tribunal cannot revisit its own decision because it has changed its mind, or recognises that it has made an error within jurisdiction, or because there has been a change of circumstances. However, the Court held that the principle of *functus officio* should not be strictly applied if the tribunal has failed to discharge its statutory function and "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."
>
> 8 The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal

> may revisit the exercise of its powers or, to use the language of Lord Reid, reconsider the whole matter afresh?

37 In applying what was said in the passages extracted above, we find that on 12 July 2019 the Tribunal had discharged the functions imposed upon it by the Act to provide for the determination of a building claim as referred to in s48I, and to make orders in determining a building claim as referred to in s48O(1) of the Act. The Act does not allow the Tribunal to revisit a determination once made. Nor does the NCAT Act except in the circumstances that we refer to below.

38 It is our view that after the orders of 12 July 2019 had been made, the Tribunal was *functus officio* as regards the subject matter of orders 1 – 3., subject to the exception in s63 of the NCAT Act which allows for the correction of errors in decisions A further exception to this proposition is contained in clause 8 of Schedule 4 of the NCAT Act which states that:

> (1) If the Tribunal makes an order in exercise of a Division function in proceedings, the Tribunal may, when the order is made or later, give leave to the person in whose favour the order is made to renew the proceedings if the order is not complied with within the period specified by the Tribunal.
>
> (2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.
>
> (3) The provisions of this Act apply to a notice lodged in accordance with subclause (2) as if the notice were a new application made in accordance with this Act.
>
> (4) When proceedings have been renewed in accordance with this clause, the Tribunal—
>
> (a) may make any other appropriate order under this Act or enabling legislation as it could have made when the matter was originally determined, or
>
> (b) may refuse to make such an order.
>
> (5) This clause does not apply if—
>
> (a) the operation of an order has been suspended, or
>
> (b) the order is or has been the subject of an internal appeal.

39 We would add that if there is a dispute about whether the 12 July 2019 orders have been complied with, the appellant may file a renewal application in accordance with clause 8 of Schedule 4 of the NCAT Act.

40 It follows from the preceding paragraphs that it is our view that when hearing the balance of the appellant's claim on 27 September 2019, the Tribunal did not have the power to reconsider whether the proceedings so far as they related to the work the subject of the Tribunal's 12 July 2019 orders were brought within the time permitted by the Act. Insofar as it did we are of the view that the Tribunal erred in law in purporting to revisit matters which had already been determined.

What issues were before the Tribunal on 27 September 2019?

41 The appellant's submissions attach a copy of his final written submissions to the Tribunal at first instance. This document makes it clear that the following claims, valued at $47,104.00, were before the Tribunal at the hearing on 27 September 2019:

(a) Power connection to AUSGRID (no amount claimed);

(b) Relocation of Power Pole, amount claimed $4,230.00;

(c) Price increase of fixed price tender, amount claimed $13,000.00;

(d) Purported Amendment to the Agreement, amount claimed $7,566.00; and

(e) Liquidated damages, amount claimed $22,308.00.

42 The Tribunal Member's decision of 20 December 2019 does not refer to these claims at all. As stated at [13] above the Tribunal Member stated:

> The application is clearly made on the basis of a (sic) the statutory warranty [see application form].

43 It will be an error of law if a Tribunal Member does not deal with an issue that was before him or her for determination. In *Yong v Antworks Pty Ltd* [2016] NSWCATAP 14 at [31- 34] an Appeal Panel cited the following authorities in support of this proposition:

> 31 In *Yates Property Corporation Pty Ltd (In Liquidation) v Darling Harbour Authority* 24 NSWLR 156 at 186 Handley JA stated:
>
> > 'The duty of a judicial officer to hear and determine a claim made in judicial proceedings conducted before that officer is also an incident of the judicial process. Since breaches of the duty to give proper reasons and to observe procedural fairness involved errors of law, there seems every reason to hold that a breach of the duty to hear and determine a claim made in judicial proceedings also gives rise to such an error.

> 32 In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 Gaudron J in context of the Migration Act (Cth) discussed a constructive failure to exercise jurisdiction stating:
>
> > 'It follows from what has been written above that the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act.'
>
> 33 In *Fox v Australian Industrial Relations Commission* [2007] FCAFC 150 Marshall and Tracey JJ stated at paragraph 38:
>
> > 'In the present case the complaint is not that the full bench ignored the evidence but rather that it did not deal with an important ground raised by Mr Fox. This case is more akin to one where there is a failure by a Tribunal to deal with necessary issues. Such a failure constitutes a jurisdictional error.'
>
> 34 In *Khan v Kang* (supra) the Appeal Panel found that the Tribunal had made an error of law by failing to consider a claim made by Mr Khan. The Appeal Panel observed at [28] as follows:
>
> > 'It is possible to characterise what occurred either as a failure to give reasons for the Tribunal's decision or a failure to exercise the jurisdiction conferred on the Tribunal and invoked by the appellant in relation to this claim in respect of excess timber - see Waterways Authority v Fitzgibbon [2005] HCA 57 at [129] - [130] and Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33 at [42]. Whichever way it should be characterised, the Tribunal's failure to consider such a claim at all in its Reasons for Decision amounted to an error of law by the Tribunal below'

44 The respondent's submissions at [58 – 59] clearly recognise that the Tribunal Member erred at law in not dealing with the Additional Claims.

45 We find that in not dealing with the appellant's claims as referred to in his closing written submissions the Tribunal Member erred at law.

46 So far as the relocation of the power pole is concerned, the respondent submits that there are defences to the claim, including that there is no contractual justification for it, leading to the submission that the claim ought to be dismissed.

47 Because there was an error of law in that the Tribunal Member did not determine the appellant's claims that have that we have referred to at [41], we will remit those claims to the Tribunal for determination. It will at that point be open to the respondent to raise the matters it has referred to in its submissions about the relocation of the power pole in response to the appellant's claim regarding that subject matter in the remitted proceedings

Application for leave

48 As we have referred to above, the appellant states that significant new evidence is now available that was not reasonably available at the time of the hearing. This evidence is stated to be an admission from the respondent on 13 December 2019 that the works as executed drawing contained false information, that the stormwater pit was non–compliant and the stormwater pit needed further investigation 'as to rectification works'.

49 The appellant's submissions do not refer to the 13 December 2019 document as referred to in the Amended Notice of Appeal, or attach it. Further, the appellant's submissions do not coherently explain how the evidence that the appellant refers to could have affected the decision under appeal, or why he may have suffered a substantial miscarriage of justice because of the unavailability of this evidence. The documents that the appellant refers to in his submissions indicate that issues with the stormwater pit were raised as early as April 2017 and that in February and March 2020, in some unexplained way, the appellant became aware that the as constructed stormwater pit differed from the work as executed drawings.

50 Since the 27 September 2019 hearing was not concerned with statutory warranty issues as stated at [17] of the appellant's Reply submissions, we find that the absence of the evidence to which the appellant refers, could not have caused a substantial miscarriage of justice.

51 For the reasons provided, we refuse to grant leave to appeal based on the ground that the appellant may have suffered a substantial miscarriage of justice because significant new evidence is now available that was not reasonably available at the time of the hearing.

Disposition of the Appeal

52 As stated above, we will make an order extending the time for the filing of the appellant's Notice of Appeal to 30 January 2020.

53 We will allow the appeal and set aside the Tribunal decision of 27 September 2019.

54 Because the Tribunal Member failed to determine the issues that were before him on 27 September 2019 as identified at [41], we will remit those issues to the Consumer and Commercial Division, differently constituted. Those issues include issues that were not raised in the appellant's application and were not the subject of the leave to amend the application granted when the proceedings were first before the Tribunal on 12 July 2019: see Tribunal's orders of 12 July 2029 extracted at [5] above. In the remitted proceedings the Tribunal will also need to consider whether further leave to amend the application should be granted. For the purposes of the remitted proceedings, we will direct that:

(1) the issues remitted be heard on the same evidence as was before the Tribunal on 27 September 2019; and

(2) the issues remitted be heard at the same time as any renewal proceedings as may be brought by the applicant in connection with the 12 July 2019 orders.

55 Leave to appeal based on significant new evidence now being available that was not reasonably available at the time of the hearing is refused.

Costs

56 We find that the unrepresented appellant is the successful party.

57 In *The Owners – Strata Plan No 74835 v Pullicin (Costs)* [2020] NSWCATAP 49 an Appeal Panel stated:

> 'The general rule in relation to costs in the Tribunal is that each party pays their own costs unless there are special circumstances warranting an award of costs: NCAT Act, s 60(1). However, that rule does not apply to these proceedings because the proceedings are in the Consumer and Commercial Division and the amount claimed or in dispute is more than $30,000. Clause 38(2)(a) of the Civil and Administrative Tribunal Rules 2014 (NSW) (NCAT Rules) provides that in those kinds of proceedings, the Tribunal may award costs in the absence of special circumstances. The same costs rule applies to internal appeals from such proceedings: NCAT Rules, cl 38A.'

58 In accordance with the passage extracted above, we are of the view that the costs of this Appeal are to be determined pursuant to Rule 38A of the *Civil and Administrative Tribunal Rules* 2014 because the proceedings at first instance were heard in the Consumer and Commercial Division of the Tribunal and more than $30,000.00 was in issue in those proceedings and also in this

appeal. In that regard we refer to [41] above which refers to claims of $47,104.00 which are to be remitted.

59 We have found that the appellant is the successful party in these proceedings. We further find that no disentitling conduct may be attributed to him and in accordance with usual principles, he is entitled to his costs of the appeal. We will make an order that the respondent must pay the appellant's costs of the Appeal on a party/party basis, such costs if not agreed to be assessed on the basis set out in Division 3 of Part 7 of the *Legal Profession Uniform Law Application Act* 2014.

60 If a different costs order is sought, the party seeking such different order must file and serve written submissions in favour of the order sought within 14 days. The other party must then file and serve submissions in response with a further period of 14 days. The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.

Orders

(1) The time for filing the Notice of Appeal is extended to 30 January 2020.

(2) The appeal is allowed, except in connection with orders 6 and 7.

(3) The Tribunal decision of 27 September 2019 dismissing the proceedings is set aside.

(4) That part of the proceedings that was before the Tribunal on 27 September 2019 is remitted to the Consumer and Commercial Division, differently constituted, and for the purposes of the remitted proceedings, the Appeal Panel directs that the remitted proceedings are to be heard:

  (i) on the same evidence as was before the Tribunal on 27 September 2019; and

  (ii) at the same time as any renewal proceedings as may be brought by the applicant in connection with the 12 July 2019 orders.

(5) The Appeal Panel further directs that in hearing the remitted proceedings, the Tribunal is to consider whether an amendment to the appellant's claim will be necessary, as referred to in [54] of these Reasons.

(6) Leave to appeal based on the ground that significant new evidence is now available that was not reasonably available at the time of the hearing is refused.

(7) The respondent must pay the appellant's costs of the Appeal on a party/party basis, such costs if not agreed to be assessed on the basis set out in Division 3 of Part 7 of the Legal Profession Uniform Law Application Act 2014.

(8) If a party to this Appeal seeks a different costs order that party must file and serve written submissions in favour of the order sought within 14 days of these orders. The other party must then file and serve submissions in response with a further period of 14 days. The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing

****

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