Civil and Administrative Tribunal

New South Wales

Case Name:	Ashton v Stevenson; Stevenson v Ashton
Medium Neutral Citation:	[2020] NSWCATAP 233
Hearing Date(s):	16 March 2020
Date of Orders:	9 November 2020
Decision Date:	9 November 2020
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President T Simon, Principal Member
Decision:	(1) In appeal AP 19/5551 (Stevenson Appeal), leave to appeal is granted in respect of the decision concerning the rear terrace drainage defect. (2) Unless otherwise agreed, the rectification costs for the rear terrace drainage defect will be assessed by the Appeal Panel following receipt of further submissions on quantum from the parties and final orders made in respect of this item. (3) Save as provided above, leave to appeal is refused and the appeal is dismissed. (4) In appeal AP 20/13241 (Ashton Appeal), leave to appeal is refused and the appeal is dismissed. (5) In respect of appeal AP 19/48919 (Ashton Costs Appeal), the time to file the Notice of Appeal is extended to 30 October 2020, the appeal is allowed and the costs order made 14 August 2018 is set aside. (6) In respect of the assessment of damages under order 2, the following directions are made: (a) On or before 27 November 2020, the parties are to advise the Appeal Panel of any agreement regarding damages, in which case an order will be made for the agreed amount; (b) On or before 27 November 2020 Mr Stevenson is to

file and serve any submissions and other documents concerning the assessment of the reasonable costs of rectifying the rear terrace drainage defect;
(c) On or before 11 December 2020, Ms Ashton is to file and serve any submissions and documents in reply;
(d) On or before 18 December 2020 Mr Stevenson is to file and serve any submissions in response.
(e) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing.
(7) In respect of costs of the proceedings at first instance and of the appeal, the following directions are made:
(a) On or before 27 November 2020 Mr Stevenson is to file and serve any submissions and other documents in respect of any application for costs he wishes to make (Stevenson costs application);
(b) On or before 11 December 2020, Ms Ashton is to file and serve any submissions and documents in reply to the Stevenson costs application and any submissions and documents in support of any application for costs she wishes to make (Ashton costs application);
(c) On or before 18 December 2020 Mr Stevenson is to file and serve any submissions in response to either the Stevenson costs application or the Ashton costs application.
(d) On or before 23 December 2020, Ms Ashton is to file and serve any submissions in response in relation to the Ashton costs application.
(e) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing.

Catchwords: BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – major defect – major element – caused or likely to cause the inability to inhabit the building or part of the building or the destruction of the building or part of the building or a threat of collapse of the building or part of the building. – meaning of waterproofing – evidence relevant to determination of whether defect likely to cause prescribed

	consequences APPEALS – leave to appeal – substantial miscarriage of justice – new evidence following completion of work subsequent to determination of claim
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Adam Eftimoski v Metricon Homes Pty Ltd [2014] NSWCATCD 254 Leung v Alexakis [2018] NSWCATAP 11 Andy and Patrick Floor Covering Pty Ltd t/as Silver Trading Timber Floor v Li [2018] NSWCATAP 172 Ashton v Stevenson; Stevenson v Ashton [2019] NSWCATAP 67 Ashton v Stevenson; Stevenson v Ashton (No 2) [2019] NSWCATAP 238 Bailey v Owners Corporation of Strata Plan 62666 [2011] NSWCA 293 Collins v Urban [2014] NSWCATAP 17 Dasreef Pty Ltd v Hawchar [2001] HCA 21 Stevenson v Ashton [2018] NSWCATCD 25 Stevenson v Ashton [2019] NSWSC 1689
Texts Cited:	Nil
Category:	Principal judgment
Parties:	AP 19/48919 & AP 20/13241: Jacqueline Ashton (Appellant) Phillip Stevenson (Respondent) AP 19/55511 Phillip Stevenson (Appellant) Jacqueline Ashton (Respondent)
Representation:	AP 19/48919 & AP 20/13241: Counsel: M McMahon (Appellant) M Pesman (Respondent) Solicitors: Hughes & Taylor Solicitors (Appellant)

	Chambers Russell Lawyers (Respondent) AP 19/55511 Counsel: M Pesman (Appellant) M McMahon (Respondent) Solicitors: Chambers Russell Lawyer (Appellant) Hughes & Taylor Solicitors (Respondent)
File Number(s):	AP 19/48919; AP 19/55511, AP 20/13241
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of NSW
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	25 November 2019
Before:	D Robertson, Senior Member
File Number(s):	HB 16/50587

REASONS FOR DECISION

Introduction

1 These appeals relate to a long running dispute concerning residential building work in respect to a property at Darlinghurst. They come before this Appeal Panel in consequence of orders made by the Supreme Court of New South Wales on 6 December 2019. The Supreme Court set aside an earlier decision of the Appeal Panel (differently constituted) and remitted the proceedings for further hearing by the Appeal Panel. The Court provided reasons for its decision: *Stevenson v Ashton* [2019] NSWSC 1689 (SC Reasons). The orders made by the Supreme Court were as follows:

1. Leave to appeal is granted.

> 2. The decisions of the Appeal Panel dated 26 March 2019 and 25 September 2019 are set aside.
>
> 3. The matter is remitted to NCAT for determination according to law.
>
> 4. The defendant is to pay the plaintiff's costs of the amended summons filed 6 November 2019 on an ordinary basis.
>
> 5. Costs in relation to the proceedings before the Appeal Panel are reserved

2 It is common ground the Court remitted to the proceedings to the Appeal Panel, not the Tribunal at first instance, the orders which were set aside by the Supreme Court being those of the Appeal Panel and not the Tribunal at first instance. On remittal, the proceedings were AP 19/55511 and AP 20/13241. There was a further appeal, not part of the challenge in the Supreme Court. This appeal, AP 19/48919, related to a Notice of Appeal filed 30 October 2019. The appeal was lodged by Ms Ashton who challenged the costs order made by the Tribunal at first instance on14 August 2018 (Costs Appeal).

3 Ms Ashton, the respondent in appeal AP 19/55511 and the appellant in appeals AP 19/48919 and AP 20/13241, had carried out renovation work to the property (work) pursuant to an owner-builder permit dated 7 August 2013. The permit had been issued under the *Home Building Act 1989* (NSW) (HB Act). The works were carried out following the issue of a Development Approval dated 7 June 2013 (DA). The DA described the works as follows:

> Demolition of front wall with asbestos and rear walls on ground floor. Extension of rear living room and kitchen to boundary. New wall to front of house. Extension to rear on first floor and replacement of rear skillion roof. New dormer and rear roof extension to attic (second floor).

4 Following completion on the works, Ms Ashton sold the property to Mr Stevenson, who is the appellant in appeal AP 19/55511 and the respondent in appeals AP 19/48919 and AP 20/13241. A contract for sale was exchanged on 29 March 2016, completion occurring on 24 May 2016. Consequently, Mr Stevenson became the immediate successor in title to Ms Ashton within the meaning of s 18C of the HB Act. In doing so, he obtained the benefit of the statutory warranties contained in s 18B of the HB Act in respect of the works.

5 In about June 2016, Mr Stevenson asserted that he noticed the roof of the property was leaking. Following enquiries with Ms Ashton as to who the builder was, Mr Stevenson sought for Ms Ashton to take responsibility for rectification of the alleged defects. He did so because she was the holder of an owner-

builder permit upon whom liability in respect of the statutory warranties was imposed pursuant to s 18C of the HB Act.

6 Mr Stevenson filed application HB 16/50587 (application) in the Tribunal claiming compensation for breach of the statutory warranty said to arise from the allegedly leaking roof. At this time the claim was for approximately $34,000. However the application was subsequently amended to seek compensation for further defects, the amount of the amended claim totalling approximately $272,000.

History of proceedings

7 It is appropriate to set out a brief history of the proceedings before the Tribunal, the Appeal Panel and the Supreme Court.

Proceedings at first instance

8 Mr Stevenson's application was filed with the Tribunal on 20 November 2016. The application was heard over 3 days in November 2017 and February 2018.orders being made on 28 June 2018. Mr Stevenson was awarded compensation in the sum of $42,317.77. Orders were also made to permit the parties to file submissions on costs.

9 The Tribunal published reasons for decision: *Stevenson v Ashton* [2018] NSWCATCD 25 (Tribunal reasons).

10 The issues in the proceedings at first instance included:

(1) Were the alleged defects major defects within the meaning of s 18E(4) of the HB Act.

(2) Were the proceedings out of time in respect of all or any of the defects? Section 18E(1)(b) of the HB Act provides 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. Section 18E(1)(c) provides the warranty period starts on completion of the work to which it relates.

(3) When were the works completed? Section 3B(2) of the HB Act provides that where there is no contract, completion occurs on the date of practical completion. Section 3B(3)(d) provides it is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work in the case of owner-builder work is the date that is 18 months after the issue of the owner-builder permit for the work.

11 In respect of when the works were completed, and therefore when the limitation period expired, the Tribunal made the following findings:

(1) The presumed date for completion under s 3B of the HB Act, namely 18 months after the owner-builder permit was issued, was 7 February 2015: At [34].

(2) If 7 February 2015 was the applicable date for completion, the limitation period to commence proceedings for defects other than major defects would expire on 7 February 2017: At [35]. In these circumstances, claims brought by Mr Stevenson, whether or not for major defects, would have been within time, the proceedings having been commenced on 20 November 2017.

(3) However, despite the presumption, the Tribunal accepted Ms Ashton had established an earlier date for the purpose of s 3B(3) of the HB Act. The Tribunal found the works were in fact practically complete in May 2014: At [58]-[62].

(4) Consequently, the claims by Mr Stevenson in respect of any defect that was not a major defect were out of time: At [63]

12 The Tribunal identified various items of defects about which claims were made by Mr Stevenson. These were dealt with under the following headings - the balcony, roof, level 2 ensuite, rear courtyard, cladding, windows in eastern wall and plumbing: At [14]. In respect of these matters the Tribunal made the following findings.

Balcony

13 There were defects in the balcony relating to waterproofing. This constituted a major defect within the meaning of the HB Act. An award was made for $10,987.68: At [67]-[93].

Roof

14 This item included complaints about the eaves, gutters and roof flashing lap joints. The Tribunal dealt with this aspect at [94]-[143]. While the Tribunal accepted there were defects in the roof, the Tribunal found that there was an "absence of evidence that any of the roof defects have led to sustained or substantial (or even any) water penetration over 3 years" and that the Tribunal was "not persuaded that the roofing defects are sufficiently serious that they are "likely" to lead to any of the consequences necessary to establish that the defects are major defects": At [135]. In reaching this conclusion the Tribunal said at [135]:

> To be "likely" to cause a consequence requires more than that a consequence is a possibility.

15 Consequently, the Tribunal determined this claim was out of time: At [137].

16 Against the possibility the Tribunal was incorrect concerning its finding as to whether this defect was a major defect, the Tribunal determined the rectification costs were $44,275: At [143].

Plumbing

17 This item included defects relating to the sewer stack vent location, a temperature control device for the hot water system, the failure to provide a "step up between the waste fixture branch line and the soil sanitary plumbing", the absence of a basin overflow, the absence of a sewer surcharge protection system and the absence of an overflow system to prevent flooding in the external rear terrace area. These issues were dealt with at [144]-[163].

18 The Tribunal found that none of these items were major defects and consequently dismissed these claims: At [161]. Against the possibility it was incorrect in respect of specific items, the Tribunal determined at [163] that the cost to rectify those items was as follows:

(1) basin overflow – $632.50 inclusive of GST;

(2) Sewer surcharge protection and stormwater overflow for terrace – $9195.50 inclusive of GST:

Cladding

19 This issue related to cladding installed on the vertical faces of the rear extension of the attic and the rear wall of level 2 bedroom, being the installation of compressed fibre cement sheeting. The Tribunal dealt with this claim at [164]-[184].

20 The Tribunal accepted that the cladding had not been installed in a proper and workmanlike fashion or in accordance with applicable building codes. In this regard the Tribunal accepted the evidence of Mr Karsai, the expert for Mr Stevenson, which evidence the Tribunal said was "not directly contested by Mr Dietrich", the expert for Ms Ashton: At [166].

21 The Tribunal found at [177] that the defects "are clearly a defect in waterproofing". The Tribunal continued:

> … whether or not they have had to date any significant impact in terms of water penetration, it is likely that they will in due course, both by reason of the encouragement of condensation on the inside of the sarking and by reason of water penetration through joints in the sarking and where the sarking has been installed by the apron flashing, leading to deterioration and the structural failure of the internal timber wall framing.

22 In doing so, at [178] the Tribunal distinguished its conclusions in respect of the roof and gutters on the basis "the issues with the cladding are more significant and exist throughout the cladding". The Tribunal accepted Mr Karsai's evidence that the defects in the cladding will lead to long-term deterioration of the timber framing due to rot.

23 The Tribunal determined the reasonable cost of rectifying this defect was $31,330.09, inclusive of GST.

Windows

24 This item was dealt with by the Tribunal at paras [185]-[191] of the reasons .

25 The Tribunal rejected this claim, determining that the evidence of Mr Karsai, was not sufficient to establish there was a defect in relation to the installation of the windows and their flashing. The Tribunal said the evidence of Mr Karsai did not identify specific locations where moisture readings were taken nor did the expert provide any photographs or other evidence of the alleged water penetration: At [188]. Consequently, the Tribunal did not accept Mr Stevenson had established a breach in connection with the construction of the windows on the eastern side of the building: At [190].

Section 48MA work order or damages

26 In determining to award damages the Tribunal;

(1) rejected a claim that the defects would have been obvious and therefore no loss would have been suffered due to an allowance being made in the purchase price of the property (at [192]-[198]; and

(2) determined that a work order should not be made under s 48K of the HB Act (at [199]-[207].

27 Consequently the Tribunal made an award for $42,317.77 : At [208].

Original appeal proceedings

28 Mr Stevenson and Ms Ashton each appealed the Tribunal's decision.

29 These were appeals AP 18/31090, Ashton v Stevenson (now AP 20/13241) and AP 18/32837 Stevenson v Ashton (now AP 19/55511). These appeals were heard on 5 December 2018, the Appeal Panel's principal decision being provided on 26 March 2019. The Appeal Panel made the following orders:

> In AP 18/31090:
>
> (1) The appeal on grounds 1, 2, 3 and 4 allowed.
>
> (2) Set aside Order 1 in the Decision and the Respondent is to immediately pay to the Appellant any amount paid under the Order.
>
> In AP 18/32837:
>
> (1) Appeal on Grounds 1, 2, 3, 4, 5, 6, 7, 9, 10, and 12 are dismissed.

30 In effect, Mr Stevenson's claim was dismissed as the Appeal Panel determined there were not major defects and the limitation of 2 years for non-major defects had expired. The Appeal Panel provided reasons for its decision: *Ashton v Stevenson; Stevenson v Ashton* [2019] NSWCATAP 67 (AR).

31 Subsequently the Tribunal made costs orders requiring Mr Stevenson to pay Ms Ashton's costs of the appeal (appeal costs decision). The Appeal Panel provided reasons for its costs decision: Ashton v Stevenson; Stevenson v Ashton (No 2) [2019] NSWCATAP 238.

32 Essentially, the Appeal Panel said:

(1) The Tribunal was in error in concluding the defects in respect of waterproofing were major defects. In part, this was due to the absence of evidence to show water ingress had occurred and there was an "evidentiary vacuum [that] necessitated the acceptance by the Tribunal of an unexplained possibility for a causation of the type listed in s 18E (4) of the HB Act".

(2) Concerning s 3B and completion of the works, Mr Stevenson would need to prove the work was not completed before 20 November 2014, otherwise the proceedings were out of time unless the defects were major defects within the meaning of s 18E of the HB Act.

Supreme Court proceedings

33 The Supreme Court granted to Mr Stevenson leave to appeal on questions of law and allowed the appeal on two grounds.

34 First, the Supreme Court determined the Appeal Panel was in error in its construction of s 18B(4) of the HB Act.

35 The Supreme Court concluded that the expression "causes, or is likely to cause" found in s 18E(4)(i) to (iii) of the HB Act is plain language, little turning on the Appeal Panel's consideration of the 2014 Home Building Act reforms. The use by the Appeal Panel of the phrase "must be shown to have, or to probably have, a proven consequence" does not adopt the language of "causes, or is likely to cause" found in s 18E(4)(a) of the HB Act: SC Reasons at [69].

36 The Supreme Court said the expression "proven, or probable" used by the Appeal Panel arguably mirrors the expression "causes or is likely to cause. The Supreme Court said the Appeal Panel imported language such as "possible consequences" and "real possibility of destruction" not found in the HB Act: SC Reasons at [73]-[74]. These were not necessarily errors.

37 However, as to the statement by the Appeal Panel at AR [72], namely that "to prove that a defect has caused either of the consequences there has to be evidence as to actual impact", the Supreme Court said this statement suggested that the Appeal Panel "was only concerned with defects which had already caused the consequences in 18E(4)(i) to (iii)" and that the Appeal Panel omitted to consider "likely" consequences of defects: SC Reasons at [73].

38 In relation to its statement at AR [73], the Appeal Panel was incorrect in its conclusion that evidence from the homeowners (users or occupiers) will be necessary to establish that a major defect exists. Here the Supreme Court said:

> … The legislation does not require such evidence, nor is the likelihood of a major defect causing the consequences in s 18E(4)(a)(i) to (iii) a matter about which a homeowner may be capable of giving evidence. It may well be that the evidence is better, or even exclusively, the subject of expert opinion. I will return to this issue shortly.

39 Further, the Supreme Court rejected the statement made by the Appeal Panel at AR [75] that a major defect must be "imminent or probable". The language of s 18E(4) does not "require any degree of imminence to the damage", nor does it "require that a major defect is one which is presently manifested and dire": SC Reasons at [76].

40 In this context, the Supreme Court analysed the evidence concerning the findings by the Tribunal at first instance in relation to defects in the balcony and cladding.

41 In respect of the balcony, the Supreme Court determined the Appeal Panel did not accurately characterise the decision of the Tribunal at first instance or the expert evidence on which it was found. At SC Reasons [87] the Court continued:

> …The Senior Member concluded that although he was not persuaded that the stains were the result of the defect, he was nevertheless persuaded by expert evidence that the defect existed. The Appeal Panel's statement that the stains on the ceiling were the "only evidence" of the prescribed consequences of water penetration was inaccurate. In considering the role of the expert evidence in establishing a major defect under the *Home Building Act*, the Appeal Panel again seemed to require that the relevant consequences are presently manifested, which omits the inclusion in s 18E(4)(a) of consequences which the defect is also "likely to cause".

42 In respect of the cladding, having set out the reasons of the Appeal Panel at AR [90]-[100], the Supreme Court said at [92] of the SC Reasons:

> The Appeal Panel's application of Mr Karsai's evidence is, with respect, incorrect. At [96], the Appeal Panel again placed too great an emphasis on the present manifestation of the consequences under s 18E(4)(a)(i) to (iii), despite the legislation also permitting defects which are "likely to cause" those consequences to be major defects. Mr Karsai's extensive evidence was that those consequences were "inevitable", and it was open to the Senior Member to accept that evidence, and to prefer it to that of Mr Dietrich. As such, the Appeal Panel's consideration of the cladding defects, and its conclusion at [100] that the Senior Member had reached his conclusion in an "evidentiary vacuum", was in error.

43 The Supreme Court determined the Appeal Panel's conclusions concerning the operation of s 18E(4) of the HB Act reveal clear errors of law: At [93].

44 The Supreme Court remitted this question to the Appeal Panel for determination according to law.

45 Secondly, the Supreme Court considered the Appeal Panel's conclusions in respect to the operation of s 3B of the HB Act and when the works were completed.

46 The Supreme Court concluded that the Appeal Panel had erroneously reversed the onus of proof so as to require Mr Stevenson to prove the date for completion and that his proceedings were brought within time. The Supreme

Court found that the obligation is on a party asserting a limitation period. In this case, it was for Ms Ashton to prove the works had been completed in May 2014, thereby displacing the presumed date for completion being 7 February 2015 (a period of 18 months after the owner-builder permit had been issued). On the question of who bore the onus, the Court relied on the decision of the Court of Appeal in *Bailey v Owners Corporation of Strata Plan 62666* [2011] NSWCA 293: SC Reasons at [109] and following.

47 The Supreme Court rejected the submission of Mr Stevenson that this error could have no consequences because of the findings of the Tribunal at first instance. Rather, in light of the contradictory evidence provided by Ms Ashton concerning the circumstances about when the works were practically complete, the Court was not satisfied that "a different result could not be produced": At [116]. Having previously stated at [105] that the issue of whether the presumed date for practical completion had been displaced was an issue to be determined by the Appeal Panel, the Supreme Court decided that this issue should also be remitted to the Appeal Panel for determination according to law.

Issues on remittal and hearing of the appeal

48 The Supreme Court set aside the orders of the Appeal Panel in its principal decision made 26 March 2019 and the costs orders made by the Appeal Panel on 25 September 2019 and remitted the proceedings for rehearing.

49 The parties filed written submissions in respect of the issues for determination on remittal. Mr Stevenson's submissions in chief were dated 7 February 2020 (AC) and his reply submissions were dated 13 March 2020 (ARS). Ms Ashton submissions in reply dated 6 March 2020 (RS) and a further submission entitled Owner-Builders Additional Submissions in respect of 48MA dated 19 March 2020 (RF).

50 The hearing of the appeal occurred on 16 March 2020.

51 The issues raised by Mr Stevenson in written submissions in chief included:

(1) What was the date of completion?

(2) Whether the defects in connection with the balcony, roofing, plumbing (being basin overflow, rear terrace drainage and sewer surcharge) and cladding were major defects?

(3) Whether the Tribunal was correct in its assessment of damages having regard to its analysis of quotations?

(4) Should the Appeal Panel permit fresh evidence as to the costs actually incurred in carrying out rectification work subsequently to the original hearing and, if so, what award for damages should be made?

52 As to the Costs Appeal, Mr Stevenson accepted the costs order should not have been made in circumstances where there was a stay and did not oppose the extension of time to bring the Costs Appeal.

53 In addition to dealing with the above subject matter, Ms Ashton challenged:

(1) the making of a money order rather than a work order having regard to s 48MA of the HB Act; and

(2) the admission of and reliance upon expert evidence from Mr Nesbitt, Mr Karsai and Mr McGill, the experts for Mr Stevenson.

54 As necessary, we will refer to the submissions made by reference to the issues to be determined on remittal.

Consideration of substantive appeals

55 The Court set aside the orders of the Appeal Panel and remitted the proceedings for determination according to law.

56 To the extent the issues raised by a party on remittal do not raise a question of law, we must also consider whether leave to appeal should be granted: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). Leave may only be granted if a party may have suffered a substantial miscarriage of justice because the decision was not fair and equitable, against the weight of evidence, or there is significant new evidence that was not reasonably available at the time the original proceedings were dealt with: Sch 4 cl 12)(1) NCAT Act. The principles set out in *Collins v Urban* [2014] NSWCATAP 17 are relevant to a determination of the question of leave.

57 As noted above, each of Mr Stevenson and Ms Ashton filed appeals. As necessary we will consider whether the challenges made by each of them require leave and, if so, whether leave should be granted

Date of completion

58 In relation to the date of completion, the Tribunal at first instance found practical completion occurred in May 2014. Consequently, any claims for

defects which were not major defects within the meaning of s 18E of the HB Act were out of time.

59 At the hearing of the appeal, the Appeal Panel was advised by Mr Stevenson that the finding of the Tribunal at first instance that completion was in May 2014 was no longer an issue. Consequently, disposition of this appeal only requires us to determine what of Mr Stevenson's claims constitutes major defects, damages for such defects and the issues raised by Ms Ashton.

What constitutes a major defect?

60 It is appropriate to first consider what constitutes a major defect and what evidence is required to establish that fact.

61 In oral submissions, Mr Stevenson only relied on s 18E(4)(i) and(ii) of the HB Act and said that each of the defects about which claims were made constitutes a major defect within these provisions. Therefore, each of the claims were made in time.

62 Relevant parts of s 18E(4) are as follows:

> (4) In this section—
>
> major defect means—
>
> (a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause—
>
> (i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
>
> (ii) the destruction of the building or any part of the building, or
>
> (iii) a threat of collapse of the building or any part of the building,
>
> ...
>
> Note—
>
> The definition of ***major defect*** also applies for the purposes of section 103B (Period of cover).
>
> ***major element*** of a building means—
>
> (a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major element of a building.

63 As can be seen, test in s 18E(4) has two parts. Relevantly, in order to be a major defect, it must be:

(1) "a defect in a major element of a building" attributable to one of the specified matters,

(2) "that causes or is likely to cause":

(a) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(b) the destruction of the building or any part of the building, or

(c) a threat of collapse of the building or any part of the building, or

64 In the present case, Mr Stevenson said each of the defects was in relation to waterproofing and therefore constituted a defect in a major element of the building which has caused or is likely to cause the inability to inhabit or use the building or part of the building for its intended purpose or caused or is likely to cause the destruction of the building or any part of the building.

65 In setting aside the orders of the Appeal Panel and remitting the proceedings, the Supreme Court found the Appeal Panel was in error in so far as it concluded a claimant must prove the major defect is presently manifested or dire. Further the Supreme Court noted that s 18E(4) does not require any degree of imminence to the damage: at [76]. Rather, the language of the section is clear, requiring a defect to have caused or be likely to cause in the future the consequences set out in subs 18(4)(a)(i) to (iii).

66 In relation to the evidence required to establish these matters, the Supreme Court said at [74]:

> However, its conclusion that evidence from the homeowners will be necessary to establish that a major defect exists cannot be correct. The legislation does not require such evidence, nor is the likelihood of a major defect causing the consequences in s 18E(4)(a)(i) to (iii) a matter about which a homeowner may be capable of giving evidence. It may well be that the evidence is better, or even exclusively, the subject of expert opinion. I will return to this issue shortly.

67 By this we take it that the Supreme Court considered that expert evidence may be necessary to establish the fact of the defect and the likely effect on the ability to inhabit the building or cause the destruction of the building.

68 However, we do not take the Supreme Court's reasons as excluding a party being able to rely upon lay evidence. This might include evidence of observations such as the absence of relevant elements of the work (for example missing or obviously defective tiles or cladding), the location of staining, the fact of water ingress during a rain or flooding event, photographs of such matters or other observations about which a non-expert could give evidence and which could rationally affect the determination of what is likely in the future.

69 Further, whether a particular defect is likely to cause the relevant consequences in the future must also be evaluated in the context of:

(1) how long the defect has existed; and

(2) whether the defect has resulted in any damage that might indicate the likelihood the premises will become uninhabitable or destroyed in the future by reason of the defect.

70 In this regard, the design life of the structure and the materials used may be relevant considerations, noting that the statutory warranty period in respect of major defects is 6 years after the work was practically complete.

Challenge to expert evidence

71 There is a preliminary matter to deal with in respect of the expert evidence. In her Notice of Appeal, Ms Ashton challenged the Tribunal's treatment of the evidence of Mr Stevenson's expert, Mr Karsai and Mr McGill.

72 She did so in an application for leave to appeal on the basis the decision was not fair and equitable. The application for leave was made in respect of the issue of cladding.

73 The first part of the challenge concerned an assertion that the evidence of Mr Karsai did not meet the requirements of an expert report and should have been accorded little or no weight.

74 The second part of the challenge concerned additional evidence provided by Mr McGill, the roofing expert for Mr Stevenson. Mr McGill had provided a

further report between when the hearing commenced on 3 November 2017 and when it resumed on 8 February 2018.

75 In her Notice of Appeal, Ms Ashton says the report was admitted over objection in circumstances where Mr Karsai and her expert Mr Dietrich were being cross-examined. She submits that whilst the Tribunal "crossed out many of the observations made by Mr McGill, the photographs were admitted". She further submits that the Tribunal's decision was both "procedurally unfair" and there was "a clear violation of the expert code of conduct of Mr McGill". In short, Ms Ashton says she had been "ambushed", was not prepared and was unable to do anything as her expert was still in cross-examination. Further she says that the report of Mr McGill was prepared "to assist Mr Karsai overcomes (sic] the patent deficiencies in his report as [had] been evidenced during cross-examination".

76 Ms Ashton, in her Notice of Appeal, referred to the decision of the High Court in *Dasreef Pty Ltd v Hawchar* [2001] HCA 21, and said the expert evidence of Mr Karsai "should be accorded little or no weight".

77 In written submissions, Ms Ashton appeared to expand her challenge in respect of Mr Stevenson's evidence to include the evidence provided by Mr Nisbett.

78 No application was made for leave to amend her Notice of Appeal and we reject the challenge in respect of the evidence of Mr Nisbett.

79 Counsel for Ms Ashton provided submissions on the issue of expert evidence and its late admission. Having accepted that the rules of evidence do not apply in the Tribunal, Counsel referred to "a number of common law rules that exist in relation to expert opinion". These were described as "the assumption identification rule", "the proof of assumption rule" and "the statement of reasoning rule".

80 In respect of these rules, no submissions were made concerning the evidence of Mr McGill on the issue of the roofing, Counsel noting "that [Mr McGill's] evidence with respect to the roofing claim failed so nothing further needs to be said": RS [76]. However, Counsel submitted that the conduct of Mr McGill

"seriously undermined his position as an independent witness". This conduct included an assertion that Mr McGill "took it upon himself to produce his own report on the cladding"… "based on further destructive investigation undertaken by Mr McGill"… which "included numerous photographs after additional cladding was removed": RS [79].

81 This report, Ms Ashton submitted, was "prejudicial and a breach of procedural fairness". Ms Ashton said that in admitting the report the Tribunal "allowed Mr Kansai to strap up his opinion and rectify the manifest inadequacies of his first report, his opinion and his evidence as became evidence during his first day of cross-examination".

82 Otherwise, Counsel submitted Mr Kansai's first report should be struck out as offending the statement of reasoning rule, namely that Mr Kansai failed to set out the process of reasoning by which he arrived at his opinion.

83 In reply, Mr Stevenson said the Tribunal had rejected the criticisms of Mr McGill as not being independent and said "Ms Ashton was given the opportunity (albeit a short time prior to the last day of the hearing) to send her expert witness to attend the property whilst the relevant sections of the cladding were removed and the photographs were taken": ARS [22]. Reference was made to the transcript, Day 3, T 6.73-7.91 found in folder 4, Tab 48 pp 1575-6 of the Appeal Bundle (AB). Mr Stevenson also noted the Tribunal granted a short adjournment so that Ms Ashton's Counsel "could take instructions from Mr Dietrich regarding whether he was in a position to respond to the photographs in the report: ARS [22]. Reference was made to the transcript Day 3 T8 .116-9.123. Finally, Mr Stevenson noted that "Ms Ashton chose not to require Mr McGill to formally verify each photograph" after they were admitted into evidence: ARS [24].

84 Finally, Mr Stevenson submitted that he would, in any event, have been successful even if the photographs were not admitted having regard to the additional photographs relied upon by the Tribunal and the findings of the Tribunal at [174]-[175] of the reasons for decision.

85 As to the conduct of Mr McGill obtaining additional evidence, the Tribunal rejected any impropriety of Mr McGill as an expert witness. At [96]-[99] the Tribunal said:

> 96 The respondent's submissions were critical of Mr McGill by reason of a number of matters which were said to indicate that he was not an independent impartial expert. Those matters included lack of transparency as to the instructions he received when initially attending the site, taking it upon himself to advise the instructing solicitor that he believed the cladding system might have been installed incorrectly notwithstanding that he had no expertise in the area, and taking apart a section of cladding without specific instructions to do so.
>
> 97 The respondent submits that this constituted Mr McGill "setting out upon a frolic of his own to obtain evidence in relation to building works outside his expertise in order to assist the home owner". This is said to be "the clearest example of an expert acting an advocate that one could ever see".
>
> 98 I do not accept that Mr McGill's conduct indicated that he was acting as an advocate. In my view Mr McGill was simply trying to be helpful. When he saw something he considered might be defective but was outside his area of expertise, he notified the solicitors. This does not suggest that Mr McGill displayed any lack of impartiality.
>
> 99 Having observed Mr McGill giving evidence I accept that he, as I find were all the experts, was seeking to assist the Tribunal to the best of his ability. I accept that he was qualified to give the evidence he gave and that, as the applicant pointed out, Mr McGill has specific specialist experience in plumbing and hydraulics whereas Mr Dietrich does not.

86 Otherwise, the Tribunal recorded what evidence from the additional report it was admitting and the reasons for doing so. At [21]-[26] of the Tribunal reasons, the Tribunal said:

> 21 The initial two days in November 2017 allocated for the hearing proved to be insufficient and the proceedings were adjourned for a third day's hearing in February 2018.
>
> 22 Shortly before the third day of hearing, the applicant served a further report from Mr McGill dated 2 February 2018. The respondent objected to the applicant relying upon that report. The report had been prepared as a result of a number of questions addressed to Mr Karsai in the course of his evidence on the second day of the hearing. Mr Karsai had been challenged on his interpretation of certain photographs taken by Mr McGill when he had arranged to have a sheet of the cladding, which had been installed as part of the works, removed.
>
> 23 Mr McGill's further report included photographs taken after Mr McGill had removed or arranged the removal of further areas of cladding to expose the underlying membrane and flashing and fixing systems.
>
> 24 At the commencement of the third day of the hearing Mr Davie sought to tender the photographs and the accompanying description of the content of each photograph but did not seek to rely upon any opinions expressed by Mr McGill.

> 25 As Mr Dietrich had yet to complete his evidence and was able to comment upon the photographs, I admitted the photographs and the accompanying descriptions as Exhibit 8. The elements of the descriptions which constituted expressions of opinion by Mr McGill were struck through and not received into evidence. I have not in reaching my decision taken account of any material in the report besides the photographs and the accompanying descriptions (not including the parts which had been struck through).
>
> 26 As noted above, the respondent and Mr Edwards gave oral evidence at the hearing and were cross-examined by Mr Davie. Each of the experts gave oral evidence. The procedure adopted was that each of the applicant's experts in turn gave evidence in respect of the defects addressed in their respective reports, while Mr Dietrich gave his evidence in respect of the relevant defects concurrently with each of the applicant's experts.

87 It seems clear from the Tribunal's reasons, the transcript and submissions from the parties that the evidence from Mr McGill contained in a further report was served shortly before the resumption of the hearing. Ms Ashton was offered an opportunity to obtain advice and consult her expert about the subject matter of this report, which was admitted on a limited basis being the "photographs and descriptions". These photographs became Exhibit 8. Ms Ashton's expert was also offered an opportunity to visit the site.

88 No application was made to adjourn the hearing on 8 February 2018 nor was leave sought to adduce further evidence in reply. Ms Ashton otherwise had an opportunity to cross-examine all relevant witnesses on all reports and photographic material which the Tribunal received into evidence

89 In these circumstances, the assertion that there had been a denial of procedural fairness is not made out.

90 Finally, as noted by Counsel for Ms Ashton, the rules of evidence do not apply to the Tribunal. However, in evaluating expert evidence the Tribunal is to have regard to whether any expert opinion offered is relevant and probative of the matters in dispute.

91 In *Adam Eftimoski v Metricon Homes Pty Ltd* [2014] NSWCATCD 254 the Tribunal said at [15]-[17]:

> 15 Given that these proceedings involve a contest between the parties' respective experts, it is relevant to state that experts are required to provide a reasoning process to support the conclusions reached in their reports.
>
> 16 The decision of the Court of Appeal in the case of *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 makes it clear that a reasoning process is to be stated by an expert when giving opinion evidence. In particular, I have

had regard to paragraph 85 of Heydon JA's (as he was then) judgement, where his Honour states:

> "85 In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41])." [Emphasis added]

17 In the course of his judgement, commencing at paragraph 80, Heydon JA referred to a number of decisions of Anderson J. in the Supreme Court of Western Australia. In *Pownall v Conlon Management Pty Ltd* (1995) 12 WAR 370 at 389-90 his Honour Anderson J. stated:

> "Expert opinion is to be judged like any other evidence. It must be comprehensible and reach conclusions that are rationally based. The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about the reliability of them."

92 This statement is consistent with what the High Court said in *Dasreef*:

93 Similarly, the Appeal Panel said in *Andy and Patrick Floor Covering Pty Ltd t/as Silver Trading Timber Floor v Li* [2018] NSWCATAP 172 at [27]:

> In *Forster v Hunter New England Area Health Service* [2010] NSWCA 106, Macfarlan JA, referring to *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705, set out the requirements for expert evidence in order for it to be probative of a matter in issue. At [30]-[31] his Honour said:

> 30 As Heydon JA (as his Honour then was) indicated in *Makita,* for an expert report to be useful it is necessary for it "to comply with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions" (at [59]). Heydon JA referred to the observations of Lord President Cooper in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] SC 34 at 39-40 which included the following:
>
> > "The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole of other evidence in the case, but the decision is for the Judge or jury. In particular the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert" (cited in *Makita* at [59]).
>
> 31 To like effect are the statements, also quoted by Heydon JA, in *Makita* of Sir Owen Dixon in an extra-judicial address that "[c]ourts cannot be expected to act upon opinions the basis of which is unexplained" (*Makita* at [60]) and of the authors of *Phipson on Evidence*, 15th edition (2000) London Sweet & Maxwell, that "[i]n general, an expert may give evidence in chief as to the grounds on which he has reached his opinion, and it may be said that, without the grounds, the opinion is valueless" (*Makita* at [63]).

94 Whether or not the expert evidence provided by the parties' experts in this case is sufficient to prove or disprove the defects and the extent of the defects is a matter to be considered in the context of each of the claims made.

95 However, no error is demonstrated in the Tribunal receiving the evidence in the circumstances of this case.

96 Accordingly this ground of appeal raised by Ms Ashton fails.

Were the defects major defects?

97 The next issue to consider is whether the defects claimed by Mr Stevenson were major defects. This is relevant to the operation of s.48K(7) of the HB Act and the question of whether the proceedings are brought within time. We will deal with each defect in turn.

Balcony

98 The Tribunal determined that the defects in the balcony related to waterproofing and constituted a major defect.

99 The Tribunal accepted the evidence of Mr Nisbett, the expert for Mr Stevenson, recorded in the Tribunal's reasons at [67] concerning:

(1) the absence of an upturn to the waterproofing membrane;

(2) the absence of a "vertical upward termination over flashing" at the junction of the parapet walls and balcony floor; and

(3) "an inadequate step down between the floor surface at the balcony and the balcony surface level in non-compliance with the standard which required a minimum 40 mm step down".

100 The Tribunal then said at [82]:

> To the extent that evidence was necessary to establish that water penetration into building cavities is likely to cause the threat of collapse of the building or part of the building, Mr Nisbett and Mr Dietrich gave such evidence. As noted above, although the evidence of water penetration was scant, I am satisfied that there had been significant water penetration into the building as a result of the defective balcony and that if the defects are not rectified that water penetration is likely to recur with the consequences stated by Mr Nisbett and acknowledged by Mr Dietrich.

101 Ms Ashton said there was no evidence to support a finding of water ingress and no evidence to show a defect in the waterproofing system: RS [34]. Reference was made to the evidence of Mr Nisbett and concessions made in cross-examination. On the other hand, Ms Ashton accepted that her expert had "conceded that there was an insufficient step down between the bedroom and the outside balcony": RS [30].

102 The evidence as to the fact of water ingress is contained in the Tribunal's reasons at [65]. Similarly, there is evidence concerning the waterproofing system provided by Mr Nisbett referred to by the Tribunal at [67]. Consequently, the "no evidence" submission, while raising a question of law, is not made out.

103 Otherwise, in our view leave to appeal should not be granted.

104 There was a concession by Ms Ashton's expert, Mr Dietrich, that there was an inadequate step down. This constitutes part of the waterproofing system to prevent water ingress into the premises. There was evidence of flooding to the balcony which in turn has caused water to enter the premises. While there had been no destructive testing, the facts clearly establish there were defects in the waterproofing system, water ingress into the premises and a proper basis for

the Tribunal to conclude these defects caused or were likely to cause the inability to inhabit the premises or part of the premises.

105 In short, the challenge to the Tribunal's conclusion that the defects in the balcony constituted a major defect is not made out.

106 We will deal with Mr Stevenson's challenge as to the assessment of damages below.

Roofing

107 In relation to the roofing, the Tribunal considered six defects and whether, if found, they constituted a major defect within the meaning of the HB Act.

108 In doing so, the Tribunal also considered the challenge by Ms Ashton concerning the evidence of Mr McGill, an expert for Mr Stevenson. Ms Ashton contended that Mr McGill was not an independent expert but was rather acting as an advocate. The Tribunal rejected this submission, concluding that Mr McGill was attempting to assist the Tribunal and had "specific specialist experience in plumbing and hydraulics" whereas Ms Ashton's expert Mr Dietrich did not: At [98]-[99].

109 In relation to the individual defects the Tribunal made the following findings:

Item 1 - Sealed wall flashing integrated with apron flashing has not been provided

110 The Tribunal recorded agreement between the parties that where vertical elements of the building coincide with the roof a pressure seal joint had not been installed in accordance with the relevant code: At [101]. The Tribunal rejected the claim that the flashing at the parapet wall was defective. Otherwise, the Tribunal was satisfied at [105] of the reasons that the flashing installed at other points where the roof meets the walls constituted a breach of the statutory warranties.

Item 2 – Fixings lacking corrosion or whether resistance

111 The Tribunal noted that it was agreed between the experts that the fixings were not compliant with the requirements of the standard. In doing so, the Tribunal noted at [106]-[107] of the reasons that the evidence of Mr Dietrich that the

fixings would “continue to perform much like other similar fixings as he has observed on other residential and commercial properties”: However, because of the non-compliance the Tribunal found this defect established.

Item 3 – roof sheets with unsealed lap joints

112 The Tribunal accepted that the length of the sheeting was insufficient and not in accordance with the relevant Australian Standard. In this regard the Tribunal accepted the evidence of Mr McGill that he had measured the overlap of sheeting and that it was less than 150 mm. Consequently, the Tribunal found there was a defect that constituted a breach of the statutory warranties.

Item 4 – sealant overlaid joints in middle apron flashing

113 As noted at [114]-[115] of the Tribunal reasons, the experts agreed there was a failure to seal lap joints in roof sheeting around the dormer window at front: However, there was disagreement in relation to the sheeting at the rear of the property.

114 There was agreement between the experts that the standard required the roof to be sealed 1.8 m either side of where there is a consolidated stormwater discharge point. However Mr Dietrich contended at the rear of the property the defect had no practical consequence that would result from water entering.

115 At [118] of the reasons, the Tribunal accepted the work was defective as claimed by McGill

Item 5 – Eaves gutters

116 Mr McGill gave evidence that the gutters on the skillion roof at the western boundary were not installed in accordance with the standard and were installed so that in heavy rains the gutters would discharge onto the wall rather than over flowing away from the property. Mr Dietrich had given evidence that he had not been able to locate any water ingress as result of the configuration of the eaves: At [119]-[120] of the Tribunal reasons

117 The Tribunal found that there was no gap between the gutter on the wall and the front of the gutter was higher than the rear. Consequently, water would flow

back to the building and this constituted a defect in a breach of the statutory warranties: At [122] of the Tribunal reasons

Item 6 – roof flashing lap joint

118 This defect was at the junction of the skillion roof and the parapet at the northern end of the rear of the property. Mr McGill asserted that the flashing at this point is an overlapping joint which should be configured so that there is an air gap such that water cannot enter by capillary action as required by the relevant code. Mr McGill said no air gap was present and this would permit the entry of water by capillary action and that this constituted a breach At [123] of the Tribunal reasons.

119 Mr Dietrich did not dispute there was a relevant standard. Rather his evidence was to the effect that there was no way that the two flashings could be touching continuously all the way through. Consequently no capillary action could occur. At [126] of the Tribunal reasons .

120 At [126] the Tribunal accepted there was an absence of an anti-capillary break in this constituted a defect.

121 Having dealt with the individual items, the Tribunal then considered whether or not these defects constituted major defects. In doing so, the Tribunal accepted that the entire roofing system was part of the waterproofing of the premises and was therefore a major element of the building: see[128] of the Tribunal reasons.

Were the roofing defects major defects?

122 The Tribunal set out in some detail the cross-examination of Mr McGill and Mr Dietrich. The Tribunal then made the following findings:

(1) there was no suggestion that the defects had so far caused any relevant consequences: At [134];

(2) Mr Stevenson did not lead any direct evidence of water penetration and that the was an “absence of evidence that any of the roofing defects have led to sustained or substantial (or even any) water penetration over 3 years”: At [135];

(3) the only evidence of water penetration is six stains however Mr McGill did not undertake any moisture readings to assess the stains and there were other potential sources of stains: At [136].

123 Consequently, the Tribunal was not persuaded that the defects in the roof or guttering were likely to lead to significant or persistent water ingress that would cause any part of the premises to "become uninhabitable, be destroyed or collapse". That is, the Tribunal found the defects were not major defects and the claims in respect of these defects were not brought within the relevant time.

124 In doing so, the Tribunal determined the cost of rectification at $44,275 against the possibility it was wrong in concluding the defect was not a major defect.

125 Mr Stevenson challenges the conclusion that these defects were not major defects.

126 Having noted that the Tribunal accepted Mr McGill's evidence that the entire roofing system was part of the waterproofing of the premises was therefore a major element of the building, Mr Stevenson made the following submissions at AC [56] and following:

(1) The Tribunal accepted the evidence of Mr McGill recorded at [130] of the Tribunal reasons concerning the effect water ingress would have on the wooden framing system;

(2) There was no challenge or critical findings in relation to Mr McGill's evidence that the consequence of the roofing guttering defects was to permit water to gain passage through the defective membrane system into internal areas;

(3) Mr McGill was not challenged on his evidence that the unsealed gaps had flashings in the roof would continue to leak in the future and the Tribunal did not make a finding to the contrary;

(4) Mr McGill had given evidence concerning the consequences of ongoing water penetration from the leaking roof;

(5) Mr McGill gave unchallenged evidence, which was accepted by the Tribunal at [136] of the reasons that water entering the building would be diverted by the insulation into any number of locations throughout the internal structures.

127 Consequently, the evidence of Mr McGill was "clearly capable of establishing that the roofing defects were likely to cause "the destruction of the building or any part of the building" for the purpose of subsection 18E(4)(a)(ii)".The Tribunal should have found the roofing defects were major defects: AC 61.

128 In oral submissions, Mr Stevenson suggested there was no challenge to the findings of fact. Rather reference was made to the Tribunal reasons at [135]

and to his submissions at AC [58]-[59] (Appeal Bundle AB 5 Tab 56 p 1737), which we have summarised at para 126(3) and (4) above.

129 In reply, having quoted large extracts of the Tribunal decision and having noted the evidence of Mr McGill concerning the likely number of stains after 3 years, Ms Ashton submitted no error was disclosed. Oral submission were made to like effect, Counsel for Ms Ashton submitting there was no evidence the stains related to the renovation work, no moisture readings were taken and there was no evidence to suggest the defects were likely to render the premises uninhabitable or that they would be destroyed.

130 Despite the oral submissions from Mr Stevenson's Counsel, it seems to us that the challenge to the finding of the Tribunal as to the likely consequence of the roof defects as found does not raise a question of law. The Tribunal evaluated the evidence and found the defects had not caused or were not likely to cause:

(1) the inability to inhabit or use the building the premises (or part thereof) for their intended purpose; or

(2) the destruction of the building or any part of the building.

131 A determination of this matter was a question of fact.

132 Mr Stevenson does not otherwise say the reasons provided by the Tribunal were inadequate. Therefore leave is required.

133 It was not suggested that there was evidence that the defects had caused the building to become uninhabitable or to be destroyed in whole or in part. Rather, Mr Stevenson says the defects were likely to cause such outcomes.

134 Evidence is required from which it can be concluded the defects will likely cause the specified outcome.

135 Whilst it is inappropriate to try and catalogue all evidence that might be relevant to resolving the issue of whether the defects are likely to cause the building to become uninhabitable or to be destroyed in whole or in part, it can be readily accepted that the fact of water ingress arising from one or more of the defects would be relevant even though such an outcome had not presently manifested itself. The nature, location and extent of the defects would also be relevant in assessing the likelihood of the prescribed outcome. Lastly, expert

evidence assessing the likelihood of the particular defects causing the prescribed outcome would be relevant, it being noted that the evidence must be of a type which is “comprehensible and reach conclusions that are rationally based” in order to “furnish the trier of fact with criteria enabling the evaluation of the validity of the expert’s conclusion” .

136 In the present case, in his report dated 3 July 2017, Mr McGill’s said of the roof defects (for example AB 2 p 532 item 241 which dealt with the defective over-layered lap joint and the possibility of capillary action):

> **Current and future consequences of this defect**
>
> 241 The installation practices permit internal water entry into the building resulting in damage to wall and ceiling lining as documented to be occurring with captioned photographs located in Appendix A of this report.

137 This same comment was repeated for other roof defects.

138 Appendix A contains photographs of the particular defective items as well as images of internal ceiling linings (eg AB 2 p548 images ID#268-272). Against each of these images of the ceiling lining is the caption:

> The adjacent image depicts internal ceiling linings within the building that appear to be subject of previous internal water entry with surface discolouration evident.

139 In his further report dated 1 November 2017 Mr McGill sought to explain why the defects in the roof were major defects. At AB 2 p 697 para 39 he said:

> 39. Defect items H1, H3, H4, HS, HG, H7, H8, H13 & H15, as outlined in 'the HM Report' pertain to the suitability of the roof membrane system to prevent internal water entry into the building. The roof membrane system comprises of metal roof slating, metal cappings, metal flashings, skylight flashings, and wall flashings. In my opinion, these building elements are defective and have compromised the building's external membrane. I have reviewed the Building Code of Australia Volume Two ['BCA'] to obtain verification on the intention of a roof with regard to its required resistance to internal water entry or water transfer into the building. The BCA Part 3.5 - 'Roof and Wall Cladding - Explanatory Information' clarifies that "These provisions relate to installing systems to waterproof roofs, walls and walls openings". The BCA Section 3.5.1 'Roof Cladding' provides the performance and installation requirements for roof cladding membrane systems constructed from tiles and metal sheeting. Based on this explanatory information it is my understanding that a roof is a waterproof system. Further clarification is provided in BCA Part 3.8.1 'Wet Areas and External Waterproofing - Definitions Used In this Part' which defines meaning of waterproof as "property of a material that does not allow moisture to penetrate through it". The defects in the roof cladding systems (roof sheeting, roof flashings and roof cappings) that form part of the building’s roof membrane are in my opinion 'major' defects. These items are in my

> opinion considered to be 'major' defects on the basis they relate to unsuitable means of waterproofing the building's roof which is a major element. When the roof leaks from defective unsealed joints, defective flashings or inadequate resistance to consolidated water flows, the roof water is permitted passage through the defective roof membrane system into internal areas within the building. These internal areas within the building contain structural roof framing and structural wall framing that support both wall and ceiling linings. The roof water permitted to enter into the building through the defective roof membrane system will then eventually lead to decay of the wooden framing systems and decay and deterioration of wall and ceiling linings.

140 However, as a review of the passages of cross examination of Mr McGill and the other findings of the Tribunal reveal:

(1) The house was 100 years old and the works were by way of renovation, not rebuilding the whole of the premises.

(2) Mr McGill had taken no moisture meter readings of the areas of the ceiling showing signs of staining;

(3) In any event, Mr McGill was not able to say that the stains arose from water ingress in consequence of the defects; and

(4) Mr McGill gave evidence that he did not know whether the stains occurred one off or a couple of years ago.

141 Otherwise, we were not referred to any evidence from Mr Stevenson or his witnesses of any observations during rain events or testing to show the nature and extent of the possible water ingress arising from the defects nor were we referred to other evidence to suggest water ingress had occurred.

142 At para 39 of his report dated 1 November 12017, Mr McGill concluded that "the defective roof membrane system will then eventually lead to a decay of the wooden framing systems and the deterioration of the wall and roof linings".

143 The Tribunal rejected this conclusion because there was no direct evidence of water penetration and absent evidence of "sustained or substantial (or even any) water penetration over three years" it was not satisfied "the roofing defects are sufficiently serious that they are "likely" to lead to any of the consequences that the defects are major defects".

144 It seems to us that from a review of the evidence that it was open to the Tribunal to conclude the defects were not likely to cause:

(a) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(b) the destruction of the building or any part of the building, or

(c) a threat of collapse of the building or any part of the building

145 The Tribunal's conclusions could not be said to be against the weight of evidence or that the decision was unfair and inequitable.

146 The Tribunal identified the relevant evidence and evaluated it in deciding the defects were not likely to cause the prescribed consequence. It did so because it rejected the evidence about the source of staining depicted in the photographs and otherwise found there was an absence of any other evidence that the defects could or had permitted water ingress. Once the evidence regarding the source of staining was rejected, the statement in para 39 of Mr McGill's report that "the roof water is permitted passage through the defective roof membrane system into internal areas within the building" was unsupported by evidence that there was any water ingress due to the defects. In turn, there was no basis to conclude "roof water permitted to enter into the building through the defective roof membrane system will then eventually lead to decay of the wooden framing systems and decay and deterioration of wall and ceiling linings".

147 As said in *Collins* at [77] it could not be said "the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach".

148 It follows that we are not satisfied leave to appeal should be granted and this aspect of Mr Stevenson's appeal fails.

Plumbing

149 Three defects were identified under this heading. They were the absence of basin overflow, rear terrace overflow and the issue of sewerage surcharge protection.

Basin overflow

150 This defect concerned the fact that the bathroom basin did not have an overflow feature and that because of the omission of a floor waste to accommodate such circumstances, there was a possibility of flooding. In this regard Mr McGill had said "the bathroom floor drain is … an integral

component of the bathrooms waterproofing system where a fixture overflow can occur", that there may be "internal waste water overflow into the level 2 bedroom that will prevent the use and habitation of the level 2 bedroom" and that recurring flooding "will eventually lead to decay of the wooden floor joists which support the second floor structure and the level one living ceiling linings": At [148] of the Tribunal reasons.

151 The Tribunal rejected this claim because "the absence of a basin overflow is not a defect in a major building element" and "the fact that the overflow of the basin may lead to flooding does not make the basin itself part of the waterproofing provided to the building": At [150]. Consequently, the Tribunal found the defect was not a major defect.

152 At AC [68] Mr Stevenson submitted that the Tribunal should not have rejected the evidence of Mr McGill. Mr Stevenson submitted that Mr McGill's evidence was unchallenged, there being an absence of evidence from Mr Dietrich which "was indicative of Ms Ashton's failure to satisfy her onus on this issue".

153 We do not accept this submission. While Mr Stevenson asserts there is a major failure to provide adequate waterproofing, including a floor waste, the evidence provided by Mr McGill, particularly the rectification work that is required, does not support such a conclusion.

154 In his first report dated 3 July 2017, item H19 found at AB 2 p 541, Mr McGill recorded the defect as follows:

> A basin fixture has been installed without an integral overflow in an area that is without a floor drain which fails to provide any protection to the property from damage attributable to fixture overflow.

155 As to the remedial work required, Mr McGill gave the following evidence in his report at AB 2 p 541:

> **Remedial Work Performance Objective(s):**
>
> 331 Provide a new hand basin with integral overflow in accordance with BCA Volume Two.
>
> **Specific Remedial Scope of work installation**
>
> **Requirements:**
>
> 332 Allow to remove the existing hand basin.

> 333 Allowed to supply and install a new hand basin that has an integral overflow.
>
> 334 Allow for all required modifications to existing drainage, water and tap ware.
>
> 335 allowed to reconnect tap ware and drainage.

156 While it can be accepted that the absence of an overflow drain for the basin may cause water to escape onto the floor of the ensuite, it is clear from Mr McGill's report that this is because of the absence of an overflow drain. Otherwise, it was not suggested that the ensuite was not waterproofed, the only deficiency alleged being a floor waste drain said to be missing (presumably to be installed through any existing waterproof membrane) to capture any overflow because of the inadequate or inappropriate installation of the existing basin. This is made clear in the second report of Mr McGill dated 1 November 2017: AB 2 p 689. There, at [28] and following, Mr McGill sought to deal with the issue of "Classification of Defects. At [38] Mr McGill said:

> Defect item H19 as outlined in 'the HM Report' relates to the omission of a floor waste within the level 2 ensuite bathroom. The omission of the floor waste where overflow from a bathroom basin fixture is permitted to occur means the bathroom membrane system is incomplete and unable to drain waste water overflow to the property's sewer drainage system. To this extent, the bathroom floor drain is in my opinion an integral component of the bathrooms waterproofing system where fixture overflow can occur. This item is in my opinion a 'major' defect on the basis it relates to the lack of waterproofing of the building which is a major element. The defect in the "major" building element will result in internal waste water overflow into the level two bedroom that will prevent the use and habitation of the level two bedroom. The recurrence of internal water entry from flooding will eventually lead to decay of the wooden floor joists which support the 2nd floor structure and the level one living ceiling linings.

157 While Mr McGill appears to attempt to characterise the defect as a "major defect", his evidence makes clear that the rectification work to the basin will correct the defect which he has identified, namely the absence of an overflow featured to the basin as installed. If this occurs, there is no suggestion that the premises will, by reason of a waterproofing defect, likely be rendered uninhabitable or liable to deterioration to the degree contemplated by s 18E of the HB Act as would constitute a major defect.

158 In short, the defect is in respect of the basin and its lack of an overflow. This can be corrected by replacing the basin and connecting the basin overflow to the existing drain. Consequently, it is not a defect in the existing waterproofing

system which has caused or is likely to cause "the inability to inhabit or use the building (or part of the building) for its intended purpose" or "the destruction of the building or any part of the building."

159 In these circumstances, this ground of challenge is rejected and, to the extent necessary, leave to appeal should be refused.

Rear terrace overflow

160 On this item Mr Stevenson submits that the Mr McGill "provided unchallenged evidence as to why the failure to install an 'overlaid surface water flow path" from the external enclosed areas on the rear terrace was an 'integral part' of the building's 'waterproofing systems'. This evidence should have been accepted, the only basis for the Tribunal reaching a different conclusion being dictionary definitions. The Tribunal's approach was erroneous.

161 In reply, Ms Ashton briefly submits that "storm water overflow in an external area does not come within the definition of a major element of a building".

162 The Tribunal dealt with this item in the reasons at [155] and following. At [155] the Tribunal recorded the evidence of Mr McGill in the following terms:

> 155 Mr McGill's evidence was as follows:
>
> "I consider the installation of a threshold and the ability for stormwater to overflow around the building and not enter into the building to be an integral part of any building's waterproofing systems. This is generally achieved by constructing internal finished floor levels 300ml higher than the surface water flood level that would be expected to occur during a 1 in 100 year average rainfall intensity with a 5 minute duration. …The absence of an overlaid surface water flow path from these external perimeter enclosed areas …means the external areas will pond with storm water until it reaches a depth where the internal water entry occurs."

163 Having considered the definition of waterproofing found in the Macquarie Dictionary, the Tribunal continued at [160]-[161]:

> 160 In my view the term "waterproofing" when used in the definition of "major element" in s 18E(4) means the mechanisms by which water coming into contact, by whatever means, with a building or building element is excluded from the building or building element. I do not consider that the term extends to mechanisms designed to control water so as to prevent it coming into contact with the building.
>
> 161 I am thus not persuaded that any of the "plumbing related" defects are defects in a major element of the building. Accordingly the applicant's claim in

> respect of those defects is brought outside the warranty period and the Tribunal does not have jurisdiction to hear and determine the applicant's claim in respect of those defects.

164 In his first report, at item H21 (AB2 p 545) Mr McGill says at paragraph 367:

> It is my opinion that to be done in a proper and workmanlike manner, and in line with good building practice, all surface drainage plumbing works shall achieve compliance with the Building Code of Australia and its reference to Australian Standard AS/NZS3500.3:2003 [National Plumbing and Drainage-Stormwater Drainage], and shall, be afforded stormwater overflow provisions to prevent internal water entry internally into habitable living areas within the building".

165 It is clear from the required work that the stormwater drainage system needed to be altered so as to prevent the pooling of stormwater. In this regard, in his first report item H21 at AB 2 p 544, Mr McGill described the defect as follows:

> The external rear terrace area is low lying in nature, is open to rainfall and is without overflow provision to discharge such rainfall inflow to atmosphere in the event of piping system failure or flow rates exceeding the stormwater systems hydraulic capacity.

166 Evidence of his investigations included (AB 2 p 544):

> 360 The external area ultimately collecting stormwater discharge from approximately 1200 m2, has such stormwater discharge directed to the Council's stormwater drainage system via a DN90 inground pipe. The stormwater is required to enter the inground drainage pipe via a grated trench drain that has been positioned at the threshold between the internal and external areas.
>
> 361 The threshold variance between the internal habitable area and the external courtyard area was similar with no evident freeboard provision afforded with a door sub sill or bund.
>
> 362 The elevation of the stormwater outlet great being almost equal to the internal finished floor level has omitted any freeboard provision afforded to the stormwater outlet which increases the probability of internal stormwater entry in the event of partial or complete stormwater drainage pipe obstruction given the absence of any overflow provision.
>
> 363 The external courtyard area is lower than the surrounding "Womera Reserve" to the east and is bounded by masonry walls and the building on all sides. There was no overflow pipe for this area identified.

167 Mr McGill refers to various Building Code of Australia and Australian Standard requirements and matters of non-compliance. Mr McGill then continues (at AB 2 p 546):

> **Current and future consequences of this defect:**
>
> 372 The absence of stormwater overflow provision that discharges to atmosphere from the rear terrace and the absence of a sealed bund at the

> access door to permit water ponding over the stormwater outlet grate will in (sic) water entry into the building. The extent of such water entry due to sub sill flashings is considered to be general building related and would need to be investigated further by a general building expert.

168 The defect was accepted by Mr Deitrich. The possibility of flooding from a rainwater and consequent water ingress into the house due to the "absence of a sealed bund" was also not in dispute.

169 In our view Tribunal was in error in concluding that the defects in the drain and sealed bund designed to keep rainwater from entering the house was not part of the waterproofing system and therefore not a major element. As with the roof structure, the design and purpose of the drainage and bund in the outdoor terrace area is to collect and control rainwater and (at least in part) prevent its entry into the premises

170 It is clear from the evidence that the defects were likely to cause the premises to become uninhabitable in consequence of flooding. The fact such a rain event has not yet occurred does not displace this conclusion. In these circumstances the appeal on this matter should be allowed and an award should be made for the relevant rectification costs.

171 As for the assessment of damages, the Tribunal's findings at [163] of the reasons for decision determined the reasonable rectification costs for the terrace overflow and sewer surcharge protection at $9197.50. It is not apparent how the costs were split between these two items. We will make directions for submissions on this aspect so we can finalise this matter. Having regard to the amount in issue, the parties might be able to agree this sum. Our directions will provide for this possibility.

Sewer surcharge protection

172 The Tribunal found that the sewer surcharge was not a defect in a major element of building. The Tribunal said at [152]-[153] of the reasons for decision:

> 152 Mr McGill described the defect as arising because the top of the overflow relief gully provided for the sewer drainage system is approximately 150ml higher than the finished tiled floor level in the bathroom at the front entry door to the property. That tiled floor incorporates a floor waste outlet which is the lowest fixture connected to the sewer drainage system. Without surcharge protection, Mr McGill stated that:

> "To permit external sewerage surcharge without impact to internal areas the sewer surcharge gully must be located 150ml lower in elevation than the lowest internal fixture, in this case the floor waste in the ground level bathroom."
>
> 153 Although sewer surcharge would clearly have a capacity to cause the inability to inhabit or use part of the building for its intended purpose, I am not persuaded that the issue with the sewer surcharge is a defect in a major element of the building. The sewer lines are not a load bearing component of the building nor do they constitute part of the waterproofing of the building.

173 Consequently, the Tribunal found the sewer lines "were not a load-bearing component of the building nor do they constitute part of the waterproofing of the building": see definition of "major element" in s 18E of the HB Act set out above.

174 Mr Stevenson submitted this conclusion was wrong, reliance being placed on his written submissions at AC [30]-[37] and [72]. While unclear, it would seem Mr Stevenson was relying upon this defect being a matter of waterproofing, there being no suggestion that the sewerage system was a load-bearing component of the building.

175 In part, the submissions relied on the Second Reading Speech on 6 May 2014 by which the concept of major defect was introduced into the HB Act. Mr Stevenson submitted that the concept of a major defect was introduced to expand, not restrict, the range of defects deemed worthy of the 6-year warranty period.

176 We do not accept these submissions.

177 It is clear from Mr McGill's first report, AB 2 p 542 item H20, that the defect relates to the sewerage drainage system and the fact that the "overflow relief gully" is too high. This meant, in the event of sewerage surcharge, sewerage could not discharge at this point. Rather, due to the levels of the various pipework, the sewerage system would backup and overflow inside the house.

178 The surcharge of the sewerage system that might result in flooding to a building because of the lack of overflow relief is neither a defect in an internal or external structural load-bearing element of the building nor is it a matter falling within the meaning of waterproofing. Rather, it is a defect in the sewer drainage system arising from the failure to prevent backflow of sewerage. Such a defect is not a major element as defined by s 18E of the HB Act.

179 Consequently, the Tribunal was correct in concluding this complaint was not a major defect within the meaning of s 18E of the HB Act and was therefore out of time.

180 This ground fails.

Cladding

181 The Tribunal made an award in favour of Mr Stevenson for cladding having found it was defective and part of the waterproofing system for the premises.

182 Ms Ashton submitted that there was:

> … no evidence of water ingress of any description. Not even evidence of a single droplet of moisture or a solitary spore of mould more than 4 years after the installation of the cladding, which had been in the elements during that period.

183 Ms Ashton said Mr Karsai evidence in cross examination supported her contention that there was no major defect. In this regard Ms Ashton said Mr Karsai conceded that:

(1) installation of the cladding could not be verified by his visual only inspection and that he could not say whether the defects would allow water ingress;

(2) he had not taken measurements of the cladding system (relevant to assessing the rectification costs);

(3) he was unable to determine from the single cladding sheet that had been removed by Mr McGill that what was observable was representative of the entire cladding system;

(4) condensation was not visible on Mr McGill's photographs;

(5) there was no evidence of dampness or water tracking in any way behind the cladding sheets;

(6) there was no evidence of dampness top the waterproofing material.

184 Otherwise, Mr Karsai relied on the stains in the ceiling plasterboard in the lounge- the same staining Mr Nisbett relied on concerning the defective balcony work. Mr Karsai's report did not include any photographs depicting damage and he had done no moisture readings of the stains and could not say how long they had been there.

185 Consequently Ms Ashton submitted "you would have to draw a very long bow to opine it would, in the future, cause one of the three serious consequences to

deem it a major defect", particularly having regard to the fact the "dwelling had been exposed to the elements for 4 years following completion".

186 Finally, Ms Ashton relied on passages from the Appeal Panel's reasons in the original appeal at AR [98]-[100] (although we note the Supreme Court rejected this reasoning process at [92] of the reasons, which we have set out above).

187 In essence, Ms Ashton challenges the Tribunal's finding of fact at [177] that the defects were likely to cause "deterioration and the structural failure of the internal timber wall framing".

188 This ground requires leave to appeal.

189 The competing views of the experts are summarised in the Tribunals reasons at [171]-[172]:

> 171 Mr Dietrich's evidence does not address the particular defects identified by Mr Karsai, merely commenting:
>
> > "I am of the opinion that the alleged defective cladding has been performing as intended and there is no manifestation of a failure of the current system and that it is not defective and it is fit for purpose".
>
> Mr Dietrich also stated that "any defects of the cladding and/or the sealants are a maintenance issue". I do not accept that evidence.
>
> 172 I am satisfied on the basis of the photographs and Mr Karsai's evidence that, contrary to good building practice and the manufacturer's recommendations, the cladding has been installed with a vapour impermeable backing or sarking which will promote condensation within the structure, that the cladding has been installed without the appropriate spacers (either the "proprietary top hats" or any alternative) between the sarking and the cladding which will result in moisture ingress through the sheeting joints and flashings; and that the installation relies inappropriately upon the provision of a sealant between the sarking and the rear of the fibre cement sheeting to weatherproof the joints. I accept Mr Karsai's evidence that these defects will inevitably in time lead to moisture penetration into the building.

190 Mr Dietrich, the expert for Ms Ashton, said there was no "manifestation of failure" and that the cladding "is not defective and fit for purpose". This was to be compared with the content of Mr Karsai's report, which as noted by the Tribunal in its reasons at [167], recorded the following:

> All of the sheeting, as installed on this property, fails to replicate the majority of the proprietary products mandatory components. In particular:
>
> > - The installed Weatherwrap Foil is vapour **im**permeable (as opposed to vapour permeable, as required by Hardies) which will promote condensation behind the Weatherwrap Foil (Weatherwrap product data sheet is appended);

- The omission of the proprietary top hats (and by default, the omission of the required drainage cavity);

- The omission of the window and corner flashings;

- The installation of the roof flashing in front of the Weatherwrap Foil; and

- The reliance of sealant between the Weatherwrap Foil and the rear of the sheeting to weatherproof the expressed joints.

In my opinion, the above-mentioned changes and omissions will result in weatherproof failure of all of the installed sheeting, with inevitable moisture ingress through the sheeting joints and the missing (or incorrectly installed) flashings. It will also lead to condensation behind the Weatherwrap foil.

From my inspection of the site, there is evidence of moisture ingress along the ceiling under this wall.

In my experience, there will also be additional moisture in the timber framing system that supports this cladding (due to leakage and condensation) which will not yet have been telegraphed through to the internal finishes, but will result in the inevitable longer term degradation of the timber framing (due to rot).

191 Ms Ashton did not refer us to any evidence of Mr Dietrich to suggest he disputed:

(1) the non-compliance with the manufacturer's installation requirements;

(2) that an impermeable as opposed to a permeable Weatherwrap foil had been installed which would promote condensation; or

(3) that there were defects in the top hat and flashing installation and drainage system.

192 Whilst the cladding had only been removed in a small section, the evidence was sufficient for the Tribunal to conclude the defects in the cladding system were extensive. There was a mechanism for failure that was explained, being the build-up of condensation over time due to the incorrect installation of an impermeable foil barrier and evidence to show that the cladding system would permit the ingress of water over time. In the absence of the complete removal of the cladding and the impermeable barrier and in the absence of evidence to the contrary, the Tribunal was entitled to infer an incorrect instalment method and materials had been used throughout.

193 The Tribunal evaluated the competing evidence and accepted the "unequivocal" evidence of Mr Karsai that the "defects will lead to long term deterioration of the timber framing due to rot".

194 Accordingly we reject Ms Ashton's challenge.

Windows

195 In his Notice of Appeal, Mr Stevenson challenged the Tribunal's decision to reject this claim. However, it was not an issue identified for determination on remittal nor was it matters about which submission were made in the hearing before us.

196 In seeking leave to appeal, the Notice of Appeal stated the Tribunal failed to have regard to Mr Karsai's supplementary report of 1 November 2017 and the "photographs of moisture readings taken at various locations in the building. Mr Stevenson said that contrary to the Tribunal's findings, this evidence shows Mr Karsai's views were not speculative.

197 As this matter was not pursued on remittal, it is unnecessary to deal with it. However, for completeness we will make some brief observations

198 Contrary to Mr Stevenson's submission, it is clear that the Tribunal considered the November report at [187] of the reasons. The Tribunal's findings at [189], that the evidence of Mr Karsai was "speculative", is a comment in the context where no destructive testing was carried out and where Mr Deitrich had said the windows had been "sealed between the edge of the frame and the rendered reveals" as well as in the context of the evidence concerning the detection of moisture through moisture reading devices and the location of the affected areas: see [186] of the Tribunal's reasons.

199 It was for these reasons the Tribunal said at [190]:

> In the absence of specific details of Mr Karsai's moisture measurements I do not find Mr Karsai's evidence sufficient to persuade me the windows are leaking or that the window installation is defective.

200 The evidence shows the wall in which the windows were located was a single brick wall. Of this Mr Karsai said in his first report at AB 2 p 644:

> It should be noted that, as this appears to be the case, then the eastern wall of the original terrace construction is likely to be a solid "party wall" that is now exposed to the weather (ie not a party wall).
>
> I note that there are a number of areas of moisture damage to the interior finishes to this wall, and would highlight that, as a solid wall, any rectification of the moisture ingress will need to take into consideration this inherent construction.

201 While this evidence may have supported a view there was moisture ingress, it seems to us that it was open to the Tribunal to conclude that the evidence was not sufficient to show the windows were leaking or that there was a relevant defect in the installation of the windows, let alone a major defect within the meaning of the HB Act.

Damages

Tribunal's assessment of damages

202 Mr Stevenson challenges the Tribunal's findings regarding damages on three bases.

203 First, there is a general challenge to the manner in which the Tribunal went about the task of assessing damages. Mr Stevenson says the Tribunal did not give proper consideration or weight to the evidence of the quotations for undertaking rectification works which had been obtained by Mr Karsai and to other evidence before the Tribunal. Specifically, Mr Stevenson said:

(1) the Tribunal's finding at [89]-[90], that quotations had been prepared without a clear specification for the work, was inconsistent with and failed to have regard to the content of the quotations themselves and the drawings and documentation so referred;

(2) the quotations should have been afforded more weight as reliable evidence of the amounts of a builder would charge to undertake rectification work;

(3) the Tribunal erred in preferring Mr Dietrich evidence on quantum to that of Mr McGill;

(4) the Tribunal failed to have regard to the evidence of Mr Karsai that the site was a difficult site, bounded by a public park on the east and another terrace on the west. These matters affected access to the site, the need for scaffolding and should have been taken into account in making an assessment for preliminaries;

(5) the Tribunal failed to take account of the evidence regarding the need for Mr Stevenson to relocate to temporary accommodation.

204 Secondly, Mr Stevenson submits that "it is not possible to reconcile clearly the Tribunal's finding at [143] that the reasonable cost of rectifying the roofing defects was $44,275 with its finding that Mr McGill's costings should be preferred to Mr Dietrich's. Consequently, the Tribunal should have awarded $54,405.12 for the roofing defects, it's assessment of how it arrived at the sum of $35,000 at [143] being unexplained.

205 Thirdly, Mr Stevenson says the Tribunal was in error in its assessment of the cost of rectifying the cladding defects. Here Mr Stevenson submits:

(1) the Tribunal preferred evidence of Mr Dietrich on the basis it provided "greater detail" but accepted and applied Mr Karsai's allowance of $8500 plus GST for scaffolding. Reference was made to the Tribunal reasons at [184];

(2) in doing so, the Tribunal had no regard to the evidence of quotations obtained by Mr Karsai in response to the tender for the rectification works. Reference was made to three quotations being $32,600, $33,417 and $47,058 (all inclusive of GST);

(3) these quotations "provided compelling evidence of what it would actually cost to engage a builder to undertake the remedial work on the cladding". They were "significantly higher than the cost determined by the Tribunal (excluding the allowance for scaffolding)". The Tribunal was aware of the quotations and while it took them into account in determining the reasonable cost of rectifying the roofing defects (at [42]), it fell into error by failing to do the same in respect of the cladding defects.

206 Reference was then made to a document entitled "Schedule 2-Schedule of Costs Claim versus Actual Costs of Rectification". This schedule referred to the "costs claimed compared to the actual costs incurred by Mr Stevenson on rectifying each defect or category of defects". The actual cost referred to the costs apparently incurred by Mr Stevenson in carrying out the rectification works and other works to his premises, the actual cost contained in the new evidence for which leave is sought. We will deal with the issue of leave below. However we note the amount said to be incurred for the cladding was $22,550, to which was to be added a contingency of 5%, a margin of 10% and GST of 10%. In addition, there is included in Schedule 2 an amount of preliminaries of $51,210, apparently for all the work said to be defective including in connection with the roof.

207 In relation to the first issue, in essence the complaint is that more weight should have been given to the quotations which had been prepared by three companies, namely Remedial Building Services Australia (Remedial), Polyseal Building & Remedial Services (Polyseal) and RM Watson Pty Ltd(RMW) (collectively the Quotations). The Quotations are found at AB 2 pp 672 and following.

208 This challenge raises a matter for which leave to appeal is required.

209 The Tribunal's approach in dealing with the Quotations is set out in its reasons concerning the assessment of damages in respect of the first-floor external balcony. The Tribunal had competing evidence concerning the cost to rectify this defect which is found to be a major defect entitling Mr Stevenson to an award of damages. As is evident from the reasons at [84]-[93], this evidence included:

(1) an assessment of rectification costs by Mr Nisbett (Mr Stevenson's expert) of $8324.50 before margin and GST: At [84]. This assessment was made prior to the preparation of the Quotations;

(2) an assessment by Mr Dietrich (Ms Ashton's expert) of $6442.26 before margin and GST: at [86]; and

(3) the Quotations.

210 For this item, the Quotations provided the following costing (inclusive of GST):

(1) Remedial – $18,000.00

(2) Polyseal – $16,335.00

(3) RMW – $19,283.00.

211 The Tribunal rejected the Quotations for the purpose of assessing damages for the balcony defect because they were prepared before a detailed scope of work had been provided by Mr Karsai. It did so despite Mr Nisbett giving evidence that "the lowest tender price is fair and reasonable considering the 3 builders have inspected the property" and that Mr Nisbett said he considered "the tender is to be reflective of a fair and reasonable market quote for a job such as this": At [89]-[90].

212 The Tribunal said at [91]:

> I consider that a quotation prepared without a clear set of specifications cannot be relied upon as a fair indication of the cost of carrying out the work.

213 The Tribunal then preferred the evidence of Mr Nisbett save that an allowance for builders margin of 20% was allowed plus GST. Mr Nisbett had asserted a margin of 30% should apply to these types of works (AB 2 p 498). However, the Tribunal had other evidence before it where Mr McGill had considered a margin of 15% was appropriate and Mr Dietrich had said a margin of 20% was appropriate. Consequently, the Tribunal awarded an amount of $8324.50, plus a margin of 20%, plus GST making a total of $10,987.68.

214 None of the Quotations provided a breakdown of the costings, including in respect of applicable builder's margin or how those prices were arrived at. The person who prepared these quotations did not give evidence in the proceedings.

215 Each of the parties' experts, including Mssrs Nisbett, McGill, Karsai and Deitrich, provided a breakdown of quantities by reference to the scope of work required and provided rates for labour and material. The experts dealt with various aspects of the work relevant to their instructions and experience. No suggestion is made in this challenge that the experts incorrectly assessed the work involved.

216 The Tribunal was required to make an assessment as to the reasonable cost where it had competing evidence. In the absence of any detail in the Quotations as to quantities and rates the Tribunal was entitled to review the expert evidence and form an opinion as to the reasonable cost.

217 The Tribunal undertook this process and clearly weighed up the competing evidence. In doing so, in our view the Tribunal was entitled to give little or no weight to the quotations which provided no basis for them to be assessed against the detail costings prepared by each of the experts.

218 The reasons reflect that the Tribunal considered the evidence of all experts, including that of Mr McGill. Its approach does not demonstrate error and its failure to prefer Mr McGill's evidence to that of Mr Deitrich is not shown to give rise to any, or any substantial injustice warranting the grant of leave. Indeed, the Tribunal's preference of the evidence of Mr Deitrich to that of Mr McGill on some occasions and Mr McGill on other occasions demonstrates a weighting of all evidence with which the Tribunal had to contend: see [93] of the Tribunal decisions where the Tribunal preferred Mr Deitrich's assessment of builders margin and at [162] where the Tribunal preferred Mr McGill's assessment of the plumbing related defects. On the issue of the Tribunal failing to allow preliminaries, these were estimated on the basis that all defects were to be completed as part of a package of works. As [184] the Tribunal made clear, an allowance was in fact made for scaffolding, being one of the items said not to have been accounted for in determining preliminaries. Otherwise, we were not

referred to any evidence that suggested there were costs additional to those allowed for in respect of the particular defect rectification work allowed by the Tribunal that would not otherwise be covered by the builder's margin which the Tribunal allowed for overhead, general supervision and profit.

219 This challenge fails.

220 Finally, as to the claim in respect of alternative accommodation, we were not referred to any evidence that would demonstrate the limited defects found to be major defects would require vacation of the premises in order to rectify them. The evidence of Mr Karsai (AB 2 p 682-683) related to a scope of work to rectify all defects claimed by Mr Stevenson. He did not refer to the limited defects found by the Tribunal or provide evidence about whether those defects could be rectified in stages or in a way to avoid the need to vacate the premises. In any event, we were not referred to any evidence of the quantum of loss.

221 Consequently we do not accept this claim.

222 It follows from the above that we are not satisfied Mr Stevenson may have suffered a substantial miscarriage of justice because the assessment of damages was against the weight of evidence or was not just an equitable. This ground fails and leave should be refused

223 In relation to the second issue, it is unnecessary to resolve this matter because of our conclusion that the Tribunal was not in error regarding the roof defects.

224 In relation to the third issue, this challenge also requires leave to appeal, the challenge being to the Tribunal's assessment of competing evidence.

225 For the reasons set out on issue 1 regarding the weight given to the Quotations, in our view no error is shown in the Tribunal assessing damages in connection with the cost of rectifying the defective cladding.

226 The Tribunal had evidence from Mr Stevenson's expert, Mr Karsai, concerning his estimate of the cost of rectifying the cladding. This is found at AB 2 p 644. These costs, totalling $23,200.00 (excluding GST and scaffolding) were as follows:

(1) Labour – $18,000.00

(2) protection of building finishes – included in labour

(3) Removal and reinstallation of windows and doors (to allow flashing installation) – included in labour

(4) New building wrap, top-hats, sheeting and flashings (materials only) – $3500

(5) Internal repairs and repainting – $800

(6) waste disposal – $500

(7) HBCF insurance – $400

227 The competing evidence was from Ms Ashton's expert, Mr Dietrich who assessed the costs at $19,981.90 (excluding GST and scaffolding). The amount assessed by Mr Dietrich including GST was $21,980.09.

228 At [183] the Tribunal said:

> Mr Dietrich's calculations provide more detail than Mr Karsai's, in particular Mr Dietrich made estimates of the labour involved in various elements of the task, whereas Mr Karsai simply made an allowance of $18,000. Mr Karsai and Mr Dietrich allowed similar figures for materials and waste disposal and other associated issues.

229 Consequently, the Tribunal preferred the calculations of Mr Dietrich. In addition, the Tribunal allowed an amount of $8500 plus GST, a total of $9350, for scaffolding because Mr Dietrich had not made a relevant provision and the Tribunal found scaffolding was necessary to carry out the works required to repair the defects in the cladding. The total amount awarded was $31,330.09: At [184].

230 Again, as stated above, the Tribunal was required to assess the reasonable cost to rectify the defective cladding. It considered all the evidence in circumstances where no information had been provided from the companies which had given the Quotations as to how the amounts contained in the Quotations were calculated. Where there is competing evidence and in the absence of any detail costings in respect of the Quotations, it seems to us little or no weight should be afforded to the gross sums contained in those documents in assessing the reasonable cost of repairing the defective cladding.

231 Leave to appeal should be refused and this ground of challenge fails.

New Evidence

232 The final matter to consider in connection with damages is Mr Stevenson's application to rely on new evidence being the actual cost to him of carrying out the rectification works. This evidence includes his statement dated 7 February 2022 which attaches various documents including a tender provided by Mirtillo Constructions Pty Ltd (Mirtillo) dated 19 November 2018.

233 Mr Stevenson says in his statement that he entered a contract with Mirtillo on 10 February 2019. The contract price was $384,480.81. The work included, but was not limited to, rectification of the defects the subject of these proceedings. In addition, Mr Stevenson refers to work done by two other companies, Technical Inner Sight and Patrick Arthur Plumbing being items of work in the scope originally tendered by Mirtillo.

234 In his submissions in chief, Mr Stevenson says the Tribunal made errors in its findings on quantum and that the Appeal Panel should "determine afresh the issue of quantum on remittal". Consequently, leave is sought to rely on the new evidence.

235 This submission appears to be based on the proposition that the Appeal Panel should decide to deal with the appeal by way of a new hearing as permitted under s 80(3) of the NCAT Act, rather than make a decision based on the evidence provided to the Tribunal at first instance.

236 In our view we should not adopt such an approach. The parties were provided with an opportunity to place evidence before the Tribunal at first instance as to the cost to rectify the alleged defects. The Tribunal assessed that evidence and made appropriate awards. Thereafter, the original appeal was heard by the Appeal Panel on 5 December 2018. An appeal was made to the Supreme Court which has remitted the proceedings for determination by the present Appeal Panel. These proceedings have had a long history. There is now no reason to recommence the hearing process in respect of the assessment of damages generally.

237 Further, the Tribunal in the original proceedings was required to assess damages on a once and for all basis. Where the rectification work had not in fact been carried out, the Tribunal was required to determine the estimated

reasonable cost to complete the work in question. Once this occurred, there is no entitlement on a party to return to the Tribunal to have damages reassessed based on the actual cost.

238 Accordingly, the application to adduce new evidence fails.

Section 48MA- Failure to make a work order

239 Ms Ashton says that the Tribunal erred in failing to make a work order.

240 Section 48MA of the HB Act provides:

> **48MA Rectification of defective work is preferred outcome in proceedings**
>
> A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the responsible party) is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

241 The operation of that section was considered in *Leung v Alexakis* [2018] NSWCATAP 11. That case, as with the present case, dealt with a dispute between a homeowner/successor in title and an owner-builder.

242 Ms Ashton submitted that the Tribunal rejected the making of a work order because it will cost more money. Ms Ashton said she "can rectify defects themselves, without having to cover the cost of an alternative builder including, significantly, an alternative builder's margin".

243 Ms Ashton also says that, despite her appeal, Mr Stevenson has proceeded to rectify the works in question. When asked by the Appeal Panel what orders it should make it an error is established, we were referred to costings which had been prepared by Ms Ashton's expert, Mr Dietrich.

244 The Tribunal dealt with the question of whether it should make a work order at [199]-[207]. The Tribunal identified that the preferred outcome was a work order, the parties accepting that s 48MA applies in circumstances where a claim is made against an owner-builder.

245 Having set out the submissions of the parties and having referred to the decision in *Leung* the Tribunal concluded at [206]-[207]:

> 206 I would consider the appointment of an independent certifier almost essential in any case where a work order is made against an owner-builder.

> 207 I am persuaded that it would not be appropriate to make an order pursuant to s 48O requiring [Ms Ashton] to engage contractors to carry out the rectification of the defects for which I have found [Ms Ashton] responsible. Although I accept that sufficiently detailed specifications for the carrying out of work are available, I am not persuaded that [Mr Ashton] would be able to achieve the performance of the work at less cost or more conveniently than the applicant. Indeed, by reason of the need to provide for independent certification of the work, it is likely to be more expensive to make a work order. Moreover, the applicant is apparently occupying the premises. It will be inconvenient to impose the respondent as a further point of contact between the applicant and any builder retained to carry out the rectification work.

246 We do not agree with the statement of the Tribunal at [206] that "the appointment of an independent certifier [is] almost essential in any case where a work order is made against an owner-builder". The person that will undertake the works, that person's qualifications, the nature and extent of the work and its complexity and the requirements for certification in accordance with any development approval are all issues which might inform the Tribunal as to the proper order which should be made.

247 As to the Tribunal's conclusion that Ms Ashton could not complete the works for a lesser cost, the Tribunal did not refer to any evidence upon which this conclusion was based.

248 On the other hand, it is clear from the evidence that Mr Stevenson was occupying the house. Also, there has been significant disputation concerning the nature and extent of the work required to rectify the dispute, Ms Ashton maintaining that the defects found by the Tribunal did not exist or did not require rectification or that she was not otherwise liable.

249 The reasons given by the Tribunal disclose some errors in the approach taken in assessing whether or not a work order should be made. However, in the present case we are not satisfied that the ultimate decision of the Tribunal was incorrect. Our reasons are as follows:

(1) Unlike the position in *Leung*, Ms Ashton did not provide evidence about how she proposed to carry out the rectification work, the timeframe for doing so and the tradespeople she would engage to carry out that work;

(2) The evidence in the case shows that Ms Ashton had contracted with various people. However there was no evidence to suggest these contractors were ready, willing or able to return to the site. To the contrary, we were informed there is an unresolved dispute with a third party contractor, it being unclear whether that contractor carried out the

particular works for which Ms Ashton has been found liable. This contractor was not called as a witness and did not give evidence in the proceedings;

(3) Mr Stevenson is in occupation of the premises. No evidence has been provided as to whether he will need to vacate the premises if Ms Ashton was to arrange for the rectification work to be carried out. If the premises need to be vacated, no evidence has been provided about what arrangements need to be made in respect of any disruption to his use and occupation of the premises.

250 Otherwise, where a work order is not made, the assessment of damages involves determining the reasonable cost of the works necessary to bring the defective works into compliance with the statutory warranties. In this regard, no submission made by Ms Ashton that Mr Stevenson failed to mitigate his loss by not permitting her to return to arrange her own contractors to carry out rectification work, such a submission being unavailable as she had denied liability throughout. Rather, her challenge was limited to the failure of the Tribunal to make a work order.

251 Lastly, we note Mr Stevenson carried out the rectification work and further renovations in 2019. No order was originally sought from the Appeal Panel to prevent rectification work being carried out pending determination of the appeal. Rather, Ms Ashton's primary position in the appeal has been that she has no liability in respect of the work.

252 In these circumstances, the challenge to the Tribunal's failure to make a work order fails.

Consideration of Costs Appeal

253 In determining the proceedings at first instance, the Tribunal made directions for the filing and service of submissions on costs.

254 On 26 July 2018, the Appeal Panel in the original appeal proceedings (AP 18/31090) stayed these orders pending determination of the appeal.

255 Notwithstanding the stay made by the Appeal Panel, Mr Stevenson made submissions on costs. Ms Ashton did not. Thereafter, the Tribunal proceeded to determine the issue of cost. On 14 August 2018 the Tribunal made the following order :

> The respondent is to pay the applicant's costs of the proceedings, excluding the cost of preparation of the submissions on costs filed on 12 July 2018, as agreed or assessed.

256 Ms Ashton filed the Notice of Appeal in respect of that costs order on 30 October 2019. The appeal was filed out of time and an extension of time is sought.

257 The Costs Appeal was filed after the original appeal proceedings were determine in favour of Ms Ashton (that decision subsequently overturned by the Supreme Court) but before the Court heard and determined the appeal from the original appeal proceedings. The extension of time to appeal was sought because Ms Ashton said:

(1) she was successful in the original appeal proceedings;

(2) the original costs order "was made ultra vires"; and

(3) the Appeal Panel in the original appeal proceedings misapprehended her submissions, did not deal with the costs of the proceedings at first instance and only made costs orders in respect of the appeals.

258 On the last aspect, Ms Ashton referred to [13]-[14] of the Appeal Costs Reasons where the Appeal Panel said:

> 13. The Tribunal at first instance apparently made a cost order in favour of the Owner, see paragraph 13 of the Owner's Cost Application. If either party was dissatisfied with the cost decision at first instance they could have sought leave to appeal from that decision. The Appeal Panel does not consider that it should, at this stage, interfere with the initial costs order.
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> 14. The Appeal Panel is only considering the costs of the Appeal and not the costs of the first instance proceedings.

259 In light of the stay, it is clear the Tribunal was in error in determining the costs and that its decision was made in circumstances where Ms Ashton was not afforded an opportunity to be heard. Further, in light of Ms Ashton's (then) success before the Appeal Panel in the original appeal proceedings, the original costs order in relation to the proceedings at first instance was something the Appeal Panel could have dealt with at the time it dealt with costs of the appeal.

260 Mr Stevenson raised no objection to an extension of time or the orders sought. In any event, it seems to us that in light of:

(1) the history of these proceedings,

(2) the fact the Appeal Panel had stayed the orders for filing and service of submissions in the proceedings at first instance, and

(3) the fact the Costs Appeal was lodged within 28 days of the Appeal Panel decided not to deal with this aspect,

that time should be extended and the original costs order should be set aside.

261 Further, for the reasons set out above, we have decided to allow the Costs Appeal. In doing so, we should afford the parties an opportunity to make submission concerning costs of the proceedings at first instance and what orders should now be made. These submissions should deal with the question of whether any cost order should be made in light of the issues raised and the relative success of each party. The submissions should also deal with the issue of whether an order should be made under s 50(2) of the NCAT Act dispensing with a hearing.

Costs of the appeals

262 We will make orders to permit the parties to make submissions about costs of the appeal.

263 The submissions should also deal with the success of each party in their respective appeals and the issue of whether an order should be made under s 50(2) of the NCAT Act dispensing with a hearing.

Orders

264 The Appeal Panel makes the following orders:

(1) In appeal AP 19/5551 (Stevenson Appeal), leave to appeal is granted in respect of the decision concerning the rear terrace drainage defect.

(2) Unless otherwise agreed, the rectification costs for the rear terrace drainage defect will be assessed by the Appeal Panel following receipt of further submissions on quantum from the parties and final orders made in respect of this item.

(3) Save as provided above, leave to appeal is refused and the appeal is dismissed.

(4) In appeal AP 20/13241 (Ashton Appeal), leave to appeal is refused and the appeal is dismissed.

(5) In respect of appeal AP 19/48919 (Ashton Costs Appeal), the time to file the Notice of Appeal is extended to 30 October 2020, the appeal is allowed and the costs order made 14 August 2018 is set aside.

(6) In respect of the assessment of damages under order 2, the following directions are made:

(a) On or before 27 November 2020, the parties are to advise the Appeal Panel of any agreement regarding damages, in which case an order will be made for the agreed amount;

(b) On or before 27 November 2020 Mr Stevenson is to file and serve any submissions and other documents concerning the assessment of the reasonable costs of rectifying the rear terrace drainage defect;

(c) On or before 11 December 2020, Ms Ashton is to file and serve any submissions and documents in reply;

(d) On or before 18 December 2020 Mr Stevenson is to file and serve any submissions in response.

(e) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing.

(7) In respect of costs of the proceedings at first instance and of the appeal, the following directions are made:

(a) On or before 27 November 2020 Mr Stevenson is to file and serve any submissions and other documents in respect of any application for costs he wishes to make (Stevenson costs application);

(b) On or before 11 December 2020, Ms Ashton is to file and serve any submissions and documents in reply to the Stevenson costs application and any submissions and documents in support of any application for costs she wishes to make (Ashton costs application);

(c) On or before 18 December 2020 Mr Stevenson is to file and serve any submissions in response to either the Stevenson costs application or the Ashton costs application.

(d) On or before 23 December 2020, Ms Ashton is to file and serve any submissions in response in relation to the Ashton costs application.

(e) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing.

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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