Civil and Administrative Tribunal

New South Wales

Case Name:	Maygood Australia Pty Ltd v The Owners – Strata Plan No 85338
Medium Neutral Citation:	[2020] NSWCATAP 237
Hearing Date(s):	14 April 2020
Date of Orders:	16 November 2020
Decision Date:	16 November 2020
Jurisdiction:	Appeal Panel
Before:	G Blake AM SC, Senior Member D Robertson, Senior Member
Decision:	(1) Appeal allowed in part. (2) Vary Order 1 of the orders made on 16 December 2019 to read: "In application HB17/51531 the respondent is ordered to pay the applicant $66,581.51 within 28 days of the date of publication of the decision in AP20/01565". (3) Leave to appeal is refused. (4) The appeal is otherwise dismissed. (5) If there is to be any application for costs by either party then written submissions in support of such application are to be lodged with the Tribunal and served on the other side within 21 days, including submissions as to whether a hearing about costs can be dispensed with and any costs issues determined on the papers. Written submissions in response to any submissions from the other party are to be lodged with the Tribunal and served within 14 days thereafter.
Catchwords:	BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Building dispute – Tribunal powers – Whether the Tribunal had jurisdiction to determine an application which had been accepted despite the

	absence of an investigation by Fair Trading NSW or a direction by the President PRACTICE AND PROCEDURE – Whether it was an error of law for the Tribunal to refuse a party leave to amend its Points of Defence at the final hearing
Legislation Cited:	Building & Construction Industry Security of Payment Act 1999 (NSW) Civil and Administrative Tribunal Act 2013 (NSW), ss 28, 29, 39, 40, 59, 80, Sch 4, cl 12 Home Building Act 1989 (NSW), ss 18B, 18C, 48C, 48I, 48J, 48K Retail Leases Act 1994 (NSW), s 68 Strata Schemes Development Act 2015 (NSW), ss 4, 6 Strata Schemes (Freehold Development) Act 1973 (NSW), s 5 (repealed)
Cases Cited:	Aon Risk Services Australia Ltd v ANU [2009] HCA 27; (2009) 239 CLR 175 Bellingen Shire Council v Colavon Pty Ltd [2012] NSWCA 34; (2012) 188 LGERA 169 Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd [2010] NSWCA 190; (2010) 78 NSWLR 393 Collins v Urban [2014] NSWCATAP 17 David Grant & Co Pty Ltd v Westpac Banking Corporation [1995] HCA 43; (1995) 184 CLR 265 House v R [1936] HCA 40; (1936) 55 CLR 499 S & G Homes Pty Ltd t/as Pavilion Homes v Owen [2015] NSWCATAP 190 Siewa Pty Ltd v The Owners - Strata Plan No.35042 [2006] NSWSC 1157; (2006) 12 BPR 23,673 The Owners - Strata Plan No 35042 v Siewa Australia Pty Ltd [2007] NSWCA 272; |(2007) 13 BPR 24,789 The Owners - Strata Plan No.60182 v Bornzin [2019] NSWCATCD 30
Texts Cited:	NCAT Procedural Direction 5 Acceptance of Home Building Claims
Category:	Principal judgment
Parties:	Maygood Australia Pty Ltd (Appellant) The Owners – Strata Plan No 85338 (Respondent)

Representation:	Counsel: P Tomasetti SC with J Mack (Appellant) D Byrne (Respondent) Solicitors: DC Balog & Associates (Appellant) DEA Lawyers (Respondent)
File Number(s):	AP 20/01565
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	16 December 2019
Before:	C Paull, Senior Member
File Number(s):	HB 17/51531

REASONS FOR DECISION

1 1 The appellant, Maygood Pty Ltd (Maygood), appeals against a decision of the Tribunal dated 16 December 2019 by which it was ordered to pay the sum of $71,742.71 to the respondent, The Owners – Strata Plan No 85338 (the Owners), in respect of what was found to be defective building work carried out in breach of the statutory warranties arising pursuant to s 18B of the *Home Building Act 1989* (NSW) (HBA) in the construction of the building which became Strata Plan 85338.

2 Maygood was the developer of the strata plan rather than the builder, but it was not in dispute that, by virtue of s 18C of the HBA, which provides:

> **18C Warranties as to work by others**
>
> (1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were

> required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.
>
> (2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer,

3 the Owners were entitled to enforce the statutory warranties against Maygood as if Maygood had carried out the work under a contract with the Owners.

4 The judgment sum awarded by the Tribunal was made up of a number of amounts reflecting the Tribunal's findings on various alleged defects. Significant for the purposes of the present appeal were an amount of $23,718.38 assessed as the cost of rectification of fire dampers said to have been non-compliant with the requirements of the Building Code of Australia and the sum of $18,768 in respect of "drummy tiles" on the balcony of one of the lots in the scheme (lot 801).

5 The Tribunal awarded rectification costs in respect of seven other items amounting in total to $9,690. The Tribunal added 25% for builders' margin and a further 10% for GST to each of the above amounts.

6 The sum of $18,768 in respect of the tiles was calculated by reference to the amount paid by the Owners for rectification of the tiling, which had been carried out in 2017. The parties were agreed that it was not appropriate to add builders' margin to that sum and that in that respect, if Maygood did not succeed on other grounds of appeal challenging the whole of the judgment or the award of compensation in respect of the tiles, the amount of the judgment should be adjusted by the deduction of the 25% builders' margin and GST on that margin. The agreed adjustment was $5,161.

The Scope and Nature of Internal Appeals

7 By virtue of s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), internal appeals from decisions of the Tribunal may be made as of right on a question of law, and otherwise with leave of the Appeal Panel.

8 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal

Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice because:

> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

9 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> "… there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

10 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

11 In *Collins v Urban*, the Appeal Panel stated at [84(2)] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> "(a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,"

The Notice of Appeal

12 Maygood annexed to its Notice of Appeal an eight page document setting out at some length six grounds of appeal, and what were described as particulars of the six grounds. It is not necessary to set that document out in full. In written submissions the appellant summarised its grounds of appeal as follows:

(1) the Tribunal did not have jurisdiction to hear and determine the application because the Owners did not comply with the requirements of s 48J of the HBA;

(2) the Tribunal erred in law by refusing to permit Maygood to amend its pleading and rely on a second affidavit from its director (Mr Koo);

(3) the Tribunal made an error of law in finding that Maygood was liable to pay the cost of retiling the balcony when there was no evidence to support that finding;

(4) the Tribunal's finding that Maygood was liable to pay the cost of retiling the balcony was against the weight of evidence;

(5) the Tribunal erred in its calculation of compensation to be paid for the retiling of the balcony [as noted, this ground was conceded by the respondent];

(6) the Tribunal made an error on a question of law and/or alternatively made a finding against the weight of evidence in making an award of damages in respect of the fire dampers.

13 As will be apparent from the above Maygood seeks leave to appeal in respect of both the finding that it was liable to reimburse the owners for the cost of replacing the tiles and in respect of the finding that it was liable to the owners for the cost of rectifying the fire dampers.

14 It will be convenient to deal with each of the grounds of appeal in turn.

15 The parties provided to the Appeal Panel a joint tender bundle for Appeal Panel which included: the parties' submissions on the appeal including Maygood's reply submissions; the parties' final submissions at first instance; a transcript of the hearing at first instance; and other evidence from the hearing at first instance which was not included in the Court Book prepared for the first instance hearing.

16 The parties also provided the Appeal Panel with three volumes of the Court Book tendered at the hearing at first instance.

17 Maygood also relied upon NCAT Procedural Direction 5 "Acceptance of Home Building Claims".

Ground 1 – section 48J of the Home Building Act

18 Section 48J of the HBA, which is in Part 3A, provides:

> **48J Certain applications to be rejected**

> The principal registrar of the Tribunal must reject any application to the Tribunal for the determination of a building claim unless—
>
> > (a) the principal registrar is satisfied that the subject-matter of the building claim has been investigated under Division 2, or
> >
> > (b) the President of the Tribunal directs that the building claim be accepted without such an investigation having been made.

19 It was not in issue between the parties that there had been no investigation by Fair Trading NSW under Division 2 of Part 3A of the HBA and that the President had not directed that the building claim could be accepted without an investigation having been made.

20 Maygood referred to NCAT Procedural Direction 5 "Acceptance of Home Building Claims", by which the President has directed that claims falling into nine specified categories should be accepted even if the Principal Registrar is not satisfied that the subject matter of the claim has been investigated under Division 2 of Part 3A of the HBA. It is not in dispute that the Owners' claim against Maygood does not fall into any of the nine categories.

21 Division 2 of Part 3A of the HBA is headed "Dealing with a Building Dispute". It contains sections 48B to 48F.

22 Section 48C relevantly provides:

> **48C Notification of building dispute**
>
> (1) Any person may notify the Secretary, in such manner as the Secretary may approve, that the person has a dispute with—
>
> > (a) the holder of a contractor licence with respect to residential building work or specialist work done by the contractor, or
> >
> > (b) a kit home supplier with respect to the supply of a kit home by that person.
>
> (1A) A contractor may notify the Secretary, in such manner as the Secretary may approve, that the contractor has a dispute with a person with respect to residential building work or specialist work done by the contractor, not being a dispute with another contractor. The regulations may impose restrictions on the disputes that can be notified under this subsection.

23 There is no specific provision in Division 2 of Part 3A of the HBA for the notification or the investigation by "the Secretary" (defined in Schedule 1 of the HBA as the Commissioner for Fair Trading) of a dispute between a developer and its immediate successor in title, to which it is liable pursuant to s 18C of the HBA in respect of breach of statutory warranties by its contractor. The question

whether s 18C had the effect that a dispute between the Owners and Maygood as developer fell within the terms of s 48C(1)(a) was not the subject of submissions before us.

24 For present purposes it is sufficient to note that there is room for argument as to whether s 48C was applicable in the circumstances of this case.

25 For reasons which we set out below we do not consider it necessary to resolve this issue.

26 In *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190 (*S & G Homes*), at [66], an Appeal Panel of this Tribunal held that "Section 48J of the Home Building Act is not a pre-condition to the Tribunal's jurisdiction to determine home building claims".

27 Maygood sought to distinguish *S & G Homes* on the basis that that case involved the question whether the Tribunal had power to make consent orders pursuant to s 59 of the NCAT Act.

28 In dealing with that submission it is necessary to consider what *S & G Homes* did decide.

29 Section 59 of the NCAT provides:

> **59 Powers when proceedings settled**
>
> (1) The Tribunal may, in any proceedings, make such orders (including an order dismissing the application or appeal that is the subject of the proceedings) as it thinks fit to give effect to any agreed settlement reached by the parties in the proceedings if—
>
> (a) the terms of the agreed settlement are in writing, signed by or on behalf of the parties and lodged with the Tribunal, and
>
> (b) the Tribunal is satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms that are consistent with the terms of the agreed settlement.
>
> (2) The Tribunal may dismiss the application or appeal that is the subject of the proceedings if it is not satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms consistent with the terms of the agreed settlement.

30 It is clear that, if the Tribunal did not have jurisdiction to determine the claim the subject of the consent orders "it could not have been satisfied that it would have had the power to make a decision in terms of the agreed settlement".

31 One ground on which it was submitted in *S & G Homes* that the Tribunal did not have jurisdiction was that there had not been compliance with the requirements of s 48J.

32 In *S & G Homes* at [49] to [54] the Appeal Panel contrasted the terms of s 48J with the requirements of s 48K of the HBA which specifically provides, in sub-sections (3), (4), (6), (7) and (8), that "the Tribunal does not have jurisdiction" in respect of various classes of building claim after the specified time periods.

33 The contrast between the provisions of s 48K and 48J is stark. As the Appeal Panel held in *S & G Homes*, if the Tribunal does not have jurisdiction by reason of failure to comply with a time limit imposed by s 48K, the Tribunal cannot make orders by consent.

34 In paragraphs [55] to [66] the Appeal Panel considered whether the requirements of s 48J limited the jurisdiction of the Tribunal:

> "55. We now turn to consider whether s 48J of the *Home Building Act* relates to the power of the Tribunal. According to the builder, there is no evidence that the claim has been investigated by the Commissioner of Fair Trading pursuant to s 48D and no written report as required by s 48D(2) of the Act. In those circumstances the builder submitted that the Tribunal has no jurisdiction to hear it and therefore no power to make consent orders under s 59 of the NCAT Act. The owner submitted that compliance by the principal registrar with s 48J does not affect the Tribunal's jurisdiction.
>
> 56. There are no appellate decisions of which we are aware interpreting the words "must reject any application" in s 48J of the *Home Building Act*. There are two inconsistent first instance decisions. In 2005 the Consumer, Trader and Tenancy Tribunal (the predecessor to the Consumer and Commercial Division) held that s 48J of the *Home Building Act* relates to the Tribunal's *jurisdiction* to hear and determine 'building claims': *Napper v Miracle Handyman Services (Home Building)* [2007] NSWCTTT 87 at [14]. In 2015 the Tribunal described non-compliance with s 48J as a "procedural irregularity" which could be cured by a grant of leave under s 48J or by an investigation under Division 2: *Lavery v Dimension Tilers Pty Ltd* [2015] NSWCATCD 59 (14 April 2015) at [10].
>
> 57. Provisions relating to compulsory pre-lodgement processes are directed to ensuring that as many claims as possible are resolved before proceedings are commenced in the Tribunal. As well as the *Home Building Act*, three other statutes which give NCAT jurisdiction provide for compulsory pre-lodgement processes. The relevant provisions are found in the: *Retail Leases Act* 1994 (NSW), s 68(1), *Strata Schemes Management Act* 1996 (NSW), s 125 and *Community Land Management Act* 1989 (NSW), s 64.
>
> 58. Section 68(1) of the *Retail Leases Act* provides that certain retail tenancy disputes:

> " … may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under this Part has failed to resolve the dispute or matter or the court is otherwise satisfied that mediation under this Part is unlikely to resolve the dispute or matter."

59. In *Fordham Laboratories Pty Limited v Sor* [2011] NSWSC 706 Price J held at [43] that the requirement to mediate "is not a condition precedent to the commencement of proceedings, but the court may not proceed to hear and determine the dispute unless satisfied that mediation is unlikely to resolve the dispute."

60. Other civil statutes which provide for damages encourage or require pre-lodgement investigation, conciliation or mediation. Relevant phrases include "cannot be commenced," "cannot commence court proceedings," "may not be the subject matter of proceedings" and "is not entitled to commence court proceedings."

61. The builder relied on several decisions interpreting s 262 of the now repealed *Workers Compensation Act 1987* (NSW) and s 108 of the *Motor Accident Compensation Act 1999* (NSW): *Nassim Attileh v State Rail Authority of New South Wales* [2005] NSWCA 64 at [29]; *Baker v Rothmans of Pall Mall (Australia) Ltd* (1999) NSWCCR 374; and *Emad Trolley Pty Ltd v Shigar* [2003] NSWCA 231 at [44] and [73]. The homeowner sought to distinguish these decisions on the basis that s 48J does not prevent a person from commencing proceedings. It merely obliges the Registrar to reject any application to the Tribunal for the determination of a building claim unless the claim has been investigated or the President directs that the building claim be accepted without an investigation.

62. Neither party drew our attention to the High Court's decision in *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364. That decision is relevant and authoritative. The provision in issue was s 151C(1) of the *Workers Compensation Act* 1987:

> A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation until 6 months have elapsed since notice of the injury was given to the employer.

63. The plaintiff was injured in the course of his employment with the defendant. In contravention of s 151C(1) the plaintiff commenced proceedings in the District Court less than two months after giving notice of injury to the defendant. The defendant made an offer of compromise but notified the plaintiff that it wished to withdraw the offer and relied on s 151C. The plaintiff accepted the offer. The defendant then applied to the District Court for leave to withdraw the offer and for an order that the proceedings be dismissed. The District Court held that the proceedings were a nullity for want of jurisdiction. The plaintiff appealed to the Court of Appeal.

64. Mason P (with whom Sheller JA and Beazley JA agreed) held at [34] and [35] that although s 151C(1) is a condition precedent of a procedural nature that must be satisfied before the commencement of proceedings, proceedings commenced in contravention of that provision are not a nullity.

65. The High Court affirmed the Court of Appeal's decision but for slightly different reasons. Rather than being a nullity, proceedings commenced in

> contravention of s 151C engage the jurisdiction and procedural rules of the court but are vulnerable to an application by the defendant to strike out the initiating process. At 376 [36] the High Court said that s 151C should not be read as if it is a pre-condition to the court's jurisdiction to determine claims for damages based on work injuries.
>
> 66. Like s 151C of the *Workers Compensation Act* and s 68(1) of the *Retail Leases Act,* s 48J of the *Home Building Act* is not a pre-condition to the Tribunal's jurisdiction to determine home building claims. The Tribunal's discretion in s 59(1)(b) will not miscarry if it fails to be satisfied that s 48J has been complied with before making a consent order."

35 We agree with the reasoning of the Appeal Panel in *S & G Homes*. As we have noted above, s 48J does not state that the Tribunal does not have jurisdiction to determine a claim unless there has been an investigation or the President has made a direction.

36 The words of a statute should be construed in their context. The context of s 48J includes the contrasting and specific provisions of s 48K, where the statute uses explicit words to deny the Tribunal jurisdiction. There is no reason to conclude that, where the Tribunal does not use specific words denying the Tribunal jurisdiction, the Tribunal is nevertheless intended not to have jurisdiction.

37 Maygood pointed to the provisions of s 68 of the *Retail Leases Act 1994* (NSW) which provides that a retail tenancy dispute "may not be the subject of proceedings before any court" unless the Registrar has certified in writing that mediation has failed to resolve the dispute or the court is otherwise satisfied that mediation was unlikely to resolve the dispute. Section 68(4) states "This section does not operate to affect the validity of any decision made by a court".

38 We acknowledge that a provision in those terms would have put the issue beyond doubt, but we do not consider that the fact that specific provision is made in a different statute in a different context, in a section which does not contain wording similar to that in s 48J, should control the interpretation of s 48J.

39 It must be recognised that the terms of s 48J are addressed to the Principal Registrar. The requirement is that the Principal Registrar reject an application "unless satisfied". It would not be appropriate that the Tribunal should be

required to investigate whether the Principal Registrar had been relevantly satisfied in disputed cases.

40 Maygood also submitted that the requirements of s 48J were a "jurisdictional requirement" which was required to be satisfied before the Tribunal could exercise jurisdiction in the proceedings.

41 Maygood relied upon the decision of the Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; (2010) 78 NSWLR 393 (*Chase Oyster Bar*), submitting that the requirement of investigation or a Presidential direction was a jurisdictional fact. Maygood relied in particular on the judgment of Justice McDougall at [164]-[166]:

> "164 A "jurisdictional fact" is, in general terms, "a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question" (*Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at 139[43]).
>
> 165 Spigelman CJ pointed out in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63–64[37] that "[t]he parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality)". As his Honour said at 64[38], those two features "are two inter-related elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense". The interrelationship arose because essentiality may often suggest objectivity.
>
> 166 Whether something is a jurisdictional fact is ascertained by a process of construction, undertaken in the usual way. The court will have regard to the full statutory context and to the object that the legislation seeks to achieve. One asks, in essence, whether the legislature intended that the presence or absence of the factual condition should invalidate an attempted exercise of power: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–391[93] (McHugh, Gummow, Kirby and Hayne JJ)."

42 We do not accept that compliance with the requirements of s 48J is a pre-condition to the exercise of jurisdiction by the Tribunal.

43 The jurisdiction of the Tribunal is enlivened by the filing of an application. The jurisdiction of the Tribunal is conferred and defined by the NCAT Act. Sections 28, 29, 39 and 40 provide:

> **28 Jurisdiction of Tribunal generally**
>
> (1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction—

(a) the general jurisdiction of the Tribunal,

(b) the administrative review jurisdiction of the Tribunal,

(c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),

(d) the enforcement jurisdiction of the Tribunal.

(3) Subject to this Act and enabling legislation, the Tribunal has jurisdiction in respect of matters arising before or after the establishment of the Tribunal.

29 General jurisdiction

(1) The Tribunal has general jurisdiction over a matter if—

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

Note. The general jurisdiction of the Tribunal includes (but is not limited to) functions conferred on the Tribunal by enabling legislation to review or otherwise re-examine decisions of persons or bodies other than in connection with the exercise of the Tribunal's administrative review jurisdiction.

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction—

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

(3) A general decision of the Tribunal is a decision of the Tribunal determining a matter over which it has general jurisdiction.

(4) A general application is an application made to the Tribunal for a general decision.

(5) Nothing in this section permits general jurisdiction to be conferred on the Tribunal by a statutory rule unless the conferral of jurisdiction by such means is expressly authorised by another Act.

39 What constitutes an application

For the purposes of this Act, an application to the Tribunal includes a complaint, referral or other mechanism (however expressed) by means of which enabling legislation provides for a matter to be brought to the attention of the Tribunal for a decision.

40 Making of applications and appeals

> An application or appeal to the Tribunal is to be made in the time and manner prescribed by enabling legislation or the procedural rules.

44 Sections 48I(1) and 48K(1) of the HBA confer jurisdiction upon the Tribunal with respect to "building claims". Those sections provide:

> **48I Application for determination of building claim**
>
> (1) Any person may apply to the Tribunal for the determination of a building claim.

and

> **48K Jurisdiction of Tribunal in relation to building claims**
>
> (1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations).

45 The jurisdiction of the Consumer and Commercial Division of the Tribunal over matters arising under the HBA is within the general jurisdiction of the Tribunal. An application made to the Tribunal for a decision in respect of such a matter is a general application under s 29(4) of the NCAT Act.

46 If the Principal Registrar had rejected the application filed by the Owners, the Tribunal would have had no jurisdiction because there would have been no application before it. However, in our view, the Principal Registrar not having rejected the Owners' application, there was an application before the Tribunal and the Tribunal had jurisdiction to determine it.

47 Maygood further submitted that the terms of s 48J were similar to the words used in the *Building & Construction Industry Security of Payment Act 1999* (NSW) which was addressed in *Chase Oyster Bar*. That Act provided that an adjudication application "cannot be made" unless notice had been given within a specified time frame. We do not agree that that wording is similar to the wording of s 48J.

48 As Spigelman CJ held in *Chase Oyster Bar*, at [41], citing Gummow J in *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; (1995) 184 CLR 265 at 277: "It is impossible to identify the functional utility of the words – 'cannot be made' – if (they do) not mean what (they) say". By contrast, the requirement that the Principal Registrar "must reject" an application does not mean that an application not rejected has no effect.

49 As McDougall J stated in *Chase Oyster Bar* at [186], it is necessary to have regard to the "full statutory context".

50 As noted above, that context includes s 48K which, in clearly stating that the Tribunal does not have jurisdiction to determine matters not commenced in accordance with the requirements of that section, suggests that the failure to comply with s 48J, which does not contain that form of wording, does not deprive the Tribunal of jurisdiction.

51 We are of the view that the failure to comply with s 48J did not deprive the Tribunal of jurisdiction and Ground 1 of the Grounds of Appeal must fail.

Ground 2 – the refusal of leave to amend and rely upon further evidence

Ground 2 - Submissions

52 The amendment which Maygood sought to make by the amended pleading upon which it was refused leave to rely, was to the effect that the balcony tiles, which were said to have been "drummy" and which the Owners had replaced, were not common property and that therefore the Tribunal had no jurisdiction to award compensation to the Owners in respect of any defect in the tiles.

53 Prior to the hearing the parties had filed Points of Claim and Points of Defence. The Owners' original Points of Claim, filed on 1 December 2017, concurrently with its application, pleaded in paragraph 18 that "some of the residential building work associated with the construction of the Building performed by Panax [the original builder] pursuant to the Construction Contract is defective (the Defects)" and particularised the Defects as including but not being limited to the defective items identified in two reports which were attached to the Points of Claim.

54 Maygood filed Points of Defence on 29 August 2018, which simply denied paragraph 18.

55 The Owners filed Amended Points of Claim on 25 March 2019. The amendment added to the particulars to paragraph 18 the defective items identified in a further report prepared by one of the experts who had prepared the reports attached to the original Points of Claim.

56 The proposed Amended Points of Defence relevantly sought to amend paragraph 18 to read:

> "In relation to paragraph 18 [Maygood]:
>
> (a) Denies that it is liable;
>
> (b) …
>
> (c) says the Scott Schedule items 4, 5 and 6 are not part of common property."

57 Maygood sought to file the proposed Amended Points of Defence at the commencement of the hearing on 24 June 2019. The Amended Points of Defence had been served on the Owners' solicitors on the afternoon of 21 June, being the Friday before the hearing commenced on Monday, 24 June. Parts of the proposed amendment to paragraph 18 were allowed but, critically, Maygood was refused leave to rely upon that part of the proposed amended paragraph 18 which alleged that Scott Schedule items 3, 4 and 5 (which included the drummy tiles) were not common property.

58 In refusing Maygood leave to rely upon that part of the Amended Points of Defence, the Tribunal gave oral reasons, which are set out in the transcript of the hearing which has been provided to the Appeal Panel [24 June 2019 pages 64 to 66].

59 The Tribunal referred to the three month period which had elapsed since the filing of the Amended Points of Claim and the fact that the proposed paragraph 18(c) raised an issue which had "been on the table since Day One". The Tribunal noted that the parties had been represented since the commencement of the proceedings by legal representatives and that the issue was a matter that it would have been appropriate to have raised well before the hearing. The Tribunal noted that the hearing commencing on 24 June 2019 was the second occasion on which the matter had been listed for hearing, the first occasion in November 2018 having been vacated.

60 Maygood submitted that the refusal of the amendment involved an error of law. Maygood submitted that the Tribunal was not a forum where the rules of strict pleading apply. Maygood submitted that, with or without the amendment, it would have been open for Maygood to argue, on the basis of its original denial of paragraph 18 of the Points of Claim, that the balcony tiles did not form part

of the common property. Maygood submitted that an onus lay upon the Owners to establish that the balcony tiles form part of the common property and that it was not for Maygood to disprove it. Maygood submitted that the effect of the Tribunal's refusal to allow the amendment in relation to the tiles was to penalise Maygood for providing greater clarity in pleading its defence.

61 Maygood submitted that this refusal was both procedurally unfair and contrary to the stated objective of the NCAT Act to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.

62 Maygood further submitted that, by refusing the amendment, the Tribunal prevented any enquiry as to whether it had jurisdiction to determine the claim in respect of the tiles. Maygood submitted that it was necessary for the Tribunal to satisfy itself it had jurisdiction to award the compensation sought. Maygood submitted "if the statute was not engaged, the Tribunal had no power to order Maygood to pay compensation as claimed".

63 Maygood did not submit that the Tribunal made an error, independently of the refusal of leave to rely upon the Amended Points of Defence, in refusing Maygood leave to rely upon the further affidavit of Mr Koo.

64 We note that the Tribunal appeared to accept that the issue raised by Maygood's proposed defence was an issue of jurisdiction. Maygood submitted that "by imposing a strict requirement of 'pleading' the Tribunal assumed to itself jurisdiction it did not enjoy". Maygood also submitted that "it is almost axiomatic the tiles on a private balcony are not part of the common property in a strata plan".

65 In response, the Owners relied upon the High Court decision in *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27; (2009) 239 CLR 175 at [111]-[113] where the High Court stated:

> "111 An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the

> statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> 112 A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.
>
> 113 In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings." [Footnotes omitted]

66 The Owners noted that the proposed amended pleading was served very shortly before the hearing and also noted that "the issues with the tiles were the subject of multiple reports commissioned by the Owners" and that reports commissioned by Maygood also addressed the issues with the balcony tiling. The Owners also noted that Maygood had offered no explanation for the delay in seeking to file the proposed Amended Points of Defence.

67 In response to the submission that the Tribunal is not a court of strict pleading, the Owners referred to the decision of Beazley JA (with whom Whealy JA and Sackville AJA agreed) in the Court of Appeal in *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34; (2012) 188 LGERA 169 at [33]:

> "For my own part, I am also unimpressed by the submission that because the issues raised by s 43A involve the determination of legal questions, the respondent could not be prejudiced. A party to litigation is entitled to know the case it has to meet: see *White v Overland* [2001] FCA 1333. Just as costs are no longer the panacea for any prejudice arising from a late amendment, ambush is not an acceptable or accepted feature of modern litigation. The reasons for this are various. At the most basic level, a party is entitled to have legal advice as to the issues that are to be litigated. In particular, a party is entitled to have legal advice as to whether and how it is able to resist any claim that is to be made. If a party is not able to overcome a defence, its legal advisers have an obligation not to pursue the litigation: see the *Legal Profession Act* 2004, s 347. A party who pursues a claim without merit may have adverse costs orders made against it: see the *Civil Procedure Act*, s 56(5). It may have been that s 43A did apply. In this case, there may have been an available claim against the RTA: see the discussion as to the *Roads Act* 1993, s 87 below. A party is also entitled to advice as to what steps are to be taken, including the gathering of evidence, to meet any claim that is to be made. In my opinion, raising the s 43A defence after the evidence had concluded in the second trial involved a classic ambush and the respondent

was denied any adequate opportunity to receive advice so as to consider its position."

68 The Owners also referred to a decision of a Senior Member of the Tribunal in *The Owners Strata Plan No 60182 v Bornzin* [2019] NSWCATCD 30 (*Bornzin*) where, at [77], the Tribunal stated: "Ambush is not an acceptable feature of modern litigation and a party is entitled to know the case it has to meet."

69 The Owners also submitted, in reliance upon ss 4 and 6 *Strata Schemes Development Act 2015* (NSW) (SSDA), the decision of the Court of Appeal in *The Owners Strata Plan No 35042 v Siewa Australia Pty Ltd* [2007] NSWCA 272; (2007) 13 BPR 24,789 at [24], and the decision of Brereton J at first instance in that matter (*Siewa Pty Ltd v The Owners Strata Plan No 35042* [2006] NSWSC 1157; (2006) 12 BPR 23,673), that the boundary of the lot in question was the upper surface of the tiles and that, in consequence, the tiles were common property.

70 Section 6 of the SSDA provides:

> **6 Boundaries of lot**
>
> (1) For the purposes of this Act, the boundaries of a lot shown on a floor plan are—
>
> (a) except as provided by paragraph (b)—
>
> (i) for a vertical boundary in which the base of a wall corresponds substantially with a base line—the inner surface of the wall, and
>
> (ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot—the upper surface of the floor and the under surface of the ceiling, or
>
> (b) the boundaries described on the floor plan relating to the lot, in the way prescribed by the regulations, by reference to a wall, floor or ceiling in a building to which the plan relates or to common infrastructure within the building.
>
> (2) In this section—
>
> ***base line***—see paragraph (a) of the definition of floor plan in section 4 (1).

71 Section 4(1) of the SSDA relevantly defines "common property", "floor plan" and "lot" as follows:

> ***common property***, in relation to a strata scheme or a proposed strata scheme, means any part of a parcel that is not comprised in a lot (including any common infrastructure that is not part of a lot).
>
> ***floor plan*** means a plan that—

(a) defines by lines (each a ***base line***) the base of the vertical boundaries of each cubic space forming the whole of a proposed lot, or the whole of a part of a proposed lot, to which the plan relates, and

(b) shows—

(i) the floor area of each proposed lot, and

(ii) if a proposed lot has more than one part—the floor area of each part together with the aggregate of the floor areas of the parts, and

(c) if a proposed lot or part of a proposed lot is superimposed on another proposed lot or part—shows the separate base lines of the proposed lots or parts, by reference to floors or levels, in the order in which the superimposition occurs.

lot, in relation to a strata scheme, means one or more cubic spaces shown as a lot on a ***floor plan*** relating to the scheme, ….

72 In *Siewa Pty Ltd v The Owners Strata Plan No 35042* [2006] NSWSC 1157; (2006) 12 BPR 23,673, an issue arose whether the waterproof membrane on a patio was common property. The relevant strata plan had been registered under the *Strata Schemes (Freehold Development) Act* 1973 (NSW), the predecessor to the SSDA. Section 5 of that Act was in similar terms to s 6 of the SSDA.

73 Brereton J held, at [16] – [18]:

"16 Mr Sirtes submitted that the membrane was not common property. On the strata plan, the patio bears an annotation in the following terms:

> Denotes terrace limited in height to 2.5 above the upper surface of the concrete floor thereof except where covered.

17 Although Mr Young, for Seiwa, at first submitted that the words "except where covered" referred to a cover on the concrete floor, I prefer the construction advanced by Mr Sirtes, that those words refer to a cover of some part of the cubic space above the patio, such as a roof or awning. The effect of the annotation is to describe the upper boundary of part of the relevant cubic space, by reference to a floor. It does not describe the lower boundary. Accordingly, as the floor joins vertical boundaries of the relevant cubic space, the lower boundary of the lot is, pursuant to s 5(2)(a)(ii), the upper surface of the floor.

18 The evidence of Mr Azuma establishes that the tiles (and therefore, necessarily, the membrane, which is under the tiles) had been affixed prior to the date of registration of the strata plan. In those circumstances, the upper surface of the floor was the top of the tiles. The tiles were not themselves within the cubic space and thus do not form part of the lot. As common property is comprised of those parts of an allotment which are not within an individual lot, the tiles, and more particularly the membrane underneath them, were part of the common property."

74 His Honour's decision was upheld in the Court of Appeal (*The Owners Strata Plan No 35042 v Siewa Australia Pty Ltd* [2007] NSWCA 272; (2007) 13 BPR 24,789), where Tobias JA (with whom Giles and Basten JJA agreed) held at [23] – [24]:

> "23 It was further submitted that although the purpose of the notation was to define the upper horizontal boundary of the relevant cubic space as being 2.5 metres above the upper surface of the concrete floor, it did so by reference to the lower horizontal boundary describing it as the "upper surface of the concrete floor". Accordingly, the horizontal boundary between the common property and Lot 14 was the upper surface of the concrete slab thus excluding the membrane, the repair of which was therefore the responsibility of the respondent.
>
> 24 Although at first sight the submissions of the appellant seemed to have merit, further consideration of the relevant statutory provisions has convinced me that they should be rejected and that the primary judge was correct in finding that the notation sought only to describe the upper horizontal boundary of the cubic space the base of which was the terrace, and not the lower horizontal boundary which was defined in accordance with the provisions of s 5(2)(a)(ii) as the upper surface of the floor of the terrace which was conceded to be the upper surface of the tiles."

Ground 2 - Consideration

75 The decision of the Member to refuse Maygood leave to rely upon the Amended Points of Defence was a discretionary decision which is subject to appellate review only on the bases outlined by the High Court in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504:

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

76 We do not accept Maygood's submission that it did not need to amend its Points of Defence. Maygood having filed Points of Defence, the Owners (and the Tribunal) were entitled to proceed on the basis that the Points of Defence identified the issues which Maygood intended to raise. Had Maygood not sought to file an Amended Points of Defence, the Tribunal might have (and in

our view should have) refused to permit Maygood to rely upon an assertion that the tiles on the balconies were not common property.

77 That assertion was one that would otherwise have taken the Owners by surprise and should have been explicitly raised in advance. We agree with the statement of Senior Member Sarginson in *Bornzin* that "ambush is not an acceptable feature of modern litigation and a party is entitled to know the case it has to meet".

78 Despite the Tribunal's apparent acceptance that the issue went to the jurisdiction of the Tribunal, if the term "jurisdiction" is use in the sense of "authority to decide", we do not agree. In our view the issue did not go to the jurisdiction of the Tribunal to determine the Owners' claim to compensation for the cost of rectification of tiles. The issue was whether Maygood was liable to the Owners for that cost. The Tribunal clearly had jurisdiction to determine whether Maygood was liable to the Owners. One element in reaching the conclusion that Maygood was liable to the Owners for the cost of rectifying the tiles would, if the issue had been raised at an appropriate time, have been whether the tiles were common property. If the tiles had been found not to have been common property, Maygood would not have been liable to the Owners for the cost of rectification. However, the Tribunal would not have been deprived of jurisdiction to consider the claim.

79 We do not consider it necessary to determine whether the balcony tiles were in fact common property. In the absence of specific notation on the strata plan, by virtue of s 6(a)(ii) of the SSDA, the tiles would constitute common property.

80 The only potentially relevant notation on the strata plan is:

> "The stratum of planters, terraces and balconies, where not covered, is limited to 2.5 metres above the upper surface of their respective concrete floors. Waterproofing membrane covering these floors is common property."

81 The evidence before us did not indicate whether that notation was applicable to the areas the subject of the complaints of drummy tiles. On one view, if there was a roof or ceiling above the balcony, then the notation would not apply. Even if the notation did apply, it is not immediately apparent that the statement that the waterproofing membrane is common property necessarily has the effect that the tiling, which is presumably above the waterproofing membrane,

is not. Although the notation considered in the *Seiwa* decisions was different and those decisions rested on the terms of the previous legislation, the passages we have set out above are consistent with the tiles being common property.

82 The resolution of the issues surrounding whether the tiles were common property would involve factual investigations which the Tribunal was not required to undertake, as the issue had not been appropriately raised by Maygood.

83 Accordingly Ground 2 of the Grounds of Appeal must fail.

Grounds 3 and 4 – liability for the cost of re-tiling the balcony

Grounds 3 and 4 – Submissions

84 The issue raised by Grounds 3 and 4 centres upon the question of who carried out the tiling work which the Tribunal accepted was defective and had been replaced by the Owners in 2017. The Owners' case before the Tribunal was that the defective tiling work had been carried out by the original builder (for whom Maygood was responsible), by Maygood itself, or by an intervening contractor engaged by Maygood (again someone for whom Maygood was responsible).

85 It appears that by August 2012 the original building contractor had become insolvent.

86 Maygood maintained before the Tribunal that the work had been carried out by the then occupant of the lot and not by the builder, Maygood, or a contractor retained by Maygood, and that therefore Maygood was not liable to the Owners for the rectification of that work.

87 Maygood pointed to the evidence of Mr Koo, a director of Maygood, to the effect that he had been informed by Mr Nicholas, the then owner of lot 801, that he had "had the whole balcony tiling ripped out" and that he had "used spare tiles in the basement storeroom and glued the tile back onto the new waterproofing". Mr Nicholas did not give evidence.

88 In determining that the tiles had been replaced by Maygood or by a contractor retained by Maygood, the Tribunal relied upon two contemporaneous emails

dated 2 August and 17 August 2012, exchanged between Mr Nicholas, Mr Koo and Mr Koo's wife (who also did not give evidence).

89 The email dated 2 August 2012 was from Mrs Koo to Mr Nicholas. In that email Mrs Koo stated: "We will do the balcony tiles for you. The tiles are on order waiting for availability".

90 The email dated 17 August 2012 apparently attached a photograph of efflorescence on the balcony and stated "FYI just to give you some idea of part of the condition of balcony of 801. I am not sure when you are planning to do repairs but I can do after 3 September for that month as I have people staying etc". The Tribunal found that that email "read as if the developer was responsible for the tiling".

91 The Tribunal further noted that "It is implausible that an occupant would take on the responsibility in costs to rectify a matter that is not his responsibility".

92 In cross-examination Mr Koo was asked about the emails of 2 August and 17 August 2012. Mr Koo acknowledged that, in the email of 17 August 2012, Mr Nicholas was referring to Maygood doing repairs but suggested that the email of 2 August 2012 was "not a definite promise of re-doing the tiles because we don't know what happened to the tiles". In response to the question "I want to suggest to you that any work that was done to the tiles on the balcony was done by Maygood?" Mr Koo responded "No definitely not. I deny that. That cannot be the truth because we didn't do the tiles. The whole building has so many balconies, so many terraces and none of the tiles has got the problem."

93 The Tribunal concluded that the Owners had established an entitlement to recover the cost of replacing the tiles from Maygood.

94 Maygood submits that there was no evidence for the Member's finding that Maygood was responsible for the tiles which had replaced the original tiles and alternatively submits that the conclusion that Maygood was responsible for the tiles was against the weight of evidence.

95 The Owners submitted that Mr Koo's evidence of his conversation with Mr Nicholas was hearsay and, although received in evidence, should not be given any weight.

Ground 3 - Consideration

96 It is clear in our view that there was evidence from which the Member could reach the conclusion that the tiles which were replaced by the Owners had been laid by a contractor retained by Maygood. The photograph which was apparently attached to the email of 17 August 2012 shows substantial efflorescence on the balcony tiles. It does not appear to be in dispute that the tiles were replaced at some time in 2012. The issue was whether that had been done by Maygood or a contractor retained by Maygood or whether Mr Nicholas, the former owner, had been responsible for the replacement of the tiles.

97 The emails of 2 and 17 August 2012 were contemporaneous evidence which indicated that Maygood had acknowledged responsibility for rectifying the issue with the tiling on the balcony of lot 801. There was no direct evidence that the tiles had been replaced by Mr Nicholas or by any other person not contracted to do the task by Maygood.

98 In those circumstances, the Tribunal was entitled to draw the inference that Maygood had retained a contractor to undertake the replacement of the tiles. It cannot be said that there was no evidence to support the Tribunal's conclusion that Maygood was responsible for the replacement of the tiles.

99 Ground 3 must be rejected.

Ground 4 – Consideration

100 To be granted leave to appeal on the basis that the Tribunal's conclusion was against the weight of evidence, Maygood must establish that it may have sustained a substantial miscarriage of justice, that is a real prospect of a different result. We are not persuaded that the Member's conclusion was against the weight of evidence or that Maygood may have suffered a substantial miscarriage of justice.

101 There was no direct evidence to the effect that Maygood was not responsible for the replacement of the tiles. Mr Koo did not give evidence that he had personal knowledge to that effect. The only evidence in his affidavit was the hearsay statement that Mr Nicholas had told him he had replaced the tiles himself. The Tribunal did not find that evidence persuasive or reliable.

102 Mr Tomasetti SC, who appeared for Maygood, submitted that, in circumstances where it was not put to Mr Koo that he was not telling the truth, the Tribunal ought to have accepted his evidence. We do not agree. The issue was not whether Mr Koo was telling the truth but whether his evidence was in all the circumstances reliable and persuasive.

103 In light of the evidence of the emails and, in the absence of direct evidence that Maygood had not undertaken the replacement of the tiles or engaged a contractor to undertake the replacement of the tiles, we are not persuaded that Maygood has established that it may have suffered a substantial miscarriage of justice and accordingly we refuse leave to appeal against the finding that Maygood was liable for the replacement of the tiles.

104 Ground 4 must be dismissed.

Ground 5

105 As noted above, the Owners concede the arithmetical error the subject of Ground 5 which related to the calculation of damages in respect of the replacement of the tiles, and the orders of the Tribunal will be varied to correct that error.

Ground 6 – fire dampers

Ground 6 - Submissions

106 The Tribunal awarded the Owners compensation in the amount of $23,718 (plus margin and GST) in respect of the rectification of fire dampers. There were agreed to be 36 fire dampers across the strata scheme.

107 This issue was the subject of expert evidence from both sides. The Owners relied upon evidence from Mr Jones, that the dampers were defective, in particular that a “break away joint” had not been fitted. Maygood relied upon an expert report from Mr Wynne-Jones. In a joint report, which was in evidence before the Tribunal, the two experts had agreed that the “fire dampers do not comply with AS1982.2-1990 fire damper installation and manufacturers installation instructions.”

108 The experts agreed that a fire engineer should be engaged to develop a “Performance Solution” which would include as a “main principle” “installing

straps where no breakaway joint has been fitted so that the duct work is adequately supported."

109 In reliance upon the joint report the Tribunal found that Maygood was liable for the rectification of the fire dampers and that the method of rectification proposed by Mr Wynne-Jones was reasonable and necessary.

110 In quantifying the cost of rectification of the fire dampers, the Tribunal accepted the evidence of Mr Zakos, the Owners' quantity surveyor, in relation to the cost of rectification. We note that the figure of $23,718.38 which the Tribunal awarded is not actually the amount estimated by Mr Zakos, which was $28,200. However, the Owners have not sought to appeal or dispute the Tribunal's quantification.

111 Mr Zakos' calculation was based upon a cost for installing straps and fire sealant around the fire dampers, upgrading the dampers in accordance with the Performance Solution and installing a panel, at $700 per location, plus $2,500 for a fire engineer and $500 for "upgrade schedule".

112 Maygood submitted that the Tribunal had proceeded upon an erroneous basis, that is that the evidence established that there were 36 instances of missing breakaway joints. Maygood submitted that the evidence disclosed that Mr Jones had inspected only seven of the thirty-five apartments and that Mr Wynne-Jones could not recall precisely how many he had inspected but thought he had also examined around seven units.

113 Maygood noted that at paragraph [101] of the decision the Tribunal stated:

> "One of the main issues of difference concerned the installation of 'breakaway' joints. The joint report now recommends installation 'where no breakaway joint has been fitted'. Thus the installation proposed will only apply if the breakaway joint is found to be absent."

114 Maygood submits that in light of that conclusion the Tribunal erred in awarding compensation calculated upon the cost of rectification of 36 dampers in circumstances where only seven units had been inspected.

115 Mr Jones' evidence was that he was satisfied on the basis of the inspection of seven units that the problem with the fire dampers was "systemic", that is that it existed in all the fire dampers. Maygood submits that in circumstances where

the experts had inspected only seven units, the Owners could not have satisfied the onus of proof that all 36 dampers were missing breakaway joints.

116 Maygood also submitted that, although Mr Wynne-Jones had agreed in the joint report that the fire dampers do not comply with the Building Code of Australia, he had given oral evidence during the hearing that he had observed that there was a breakaway joint in at least one of the fire damper installations. Maygood submitted that, in those circumstances, the Tribunal's award of compensation calculated by reference to the cost of rectification of 36 dampers was an error of law and against the weight of evidence.

117 The Owners submitted that the evidence before the Tribunal established the absence of breakaway joints on the seven dampers inspected by the experts and that that was sufficient to establish that the defect was systemic and existed in all 36 fire dampers.

118 The Owners submitted that Mr Jones' evidence was that there were no breakaway joints in the seven dampers he inspected. In fact, although Mr Jones stated in respect of five units that there was no breakaway joint, in respect of two units he stated that he could not locate a breakaway joint. We do not regard that difference in expression as inconsistent with the Owners' submission.

119 The Owners disputed that Mr Jones had identified a breakaway joint in one unit during the course of the hearing. The Owners submitted that any evidence given by Mr Wynne-Jones in that regard had been based upon a photograph, the provenance of which was not identified and which was not ultimately tendered in evidence.

120 In reply Maygood submitted that the onus lay upon the Owners to establish that there were no breakaway joints in any of the 36 dampers, and that if there was no evidence to establish the absence of breakaway joints in 29 of the dampers the Owners had failed to satisfy the onus of proof. Maygood referred to Mr Wynne-Jones' evidence in respect of the fire dampers in three units where Mr Wynne-Jones had stated "I disagree that no breakaway joint has been provided."

121 We note that this submission truncates Mr Wynne-Jones' evidence in a potentially misleading fashion, in that in each case Mr Wynne-Jones' comments continue in the following terms, or words to similar effect, "as the joints and strap arrangements shown … is likely to provide sufficient support to ensure the fire damper remains in the wall in the event of fire".

Ground 6 - Consideration

122 We do not consider that there was an error of law in the Tribunal's conclusion regarding liability for the fire dampers or the quantification of the cost of rectification.

123 Mr Jones stated that in his view, having inspected one fifth of the total number of fire dampers, he was satisfied that the issue was "systemic', that is that the issue existed throughout the building. That was evidence upon which the Tribunal was entitled to act. The extrapolation of a conclusion from an examination of a sample of substantially similar items is a common method of analysis and, although there will be circumstances where such extrapolation is not appropriate, Maygood did not identify any logical reason or evidence to suggest why that process was not appropriate in this case.

124 Maygood's submission was that the extrapolation to all 36 units of a conclusion based upon the inspection of seven units, was an impermissible process of reasoning. We disagree.

125 In our view there was clearly evidence upon which the Tribunal could rely in reaching its conclusion.

126 To the extent Maygood seeks leave to appeal on the basis that the Member's conclusion was against the weight of evidence, we are not persuaded that Maygood has established that it may have suffered a substantial miscarriage of justice such as to warrant the grant of leave to appeal.

127 In their joint report the experts had agreed that the dampers were defective. Insofar as Maygood relies upon the proposition that Mr Wynne-Jones in his report did not agree that there were no breakaway joints provided, we are of the view that the entirety of the relevant comments suggest that Mr Wynne-Jones had not concluded that there were in fact breakaway joints but rather

that the manner in which the damper had been installed meant that a breakaway joint was not necessary. That conclusion in Mr Wynne-Jones' initial report must be taken to have been qualified by his subsequent agreement that the dampers were defective.

128 We accept the Owners' submission that the oral evidence of Mr Wynne-Jones, upon which Maygood relies as constituting a contradiction by Mr Wynne-Jones of the conclusions in the joint report, is not unequivocal, and we do not consider that the issues raised by Maygood in relation to that evidence are sufficient to justify the conclusion that the Tribunal's findings were against the weight of evidence or to justify the grant of leave to appeal on that basis.

129 Accordingly Ground 6 must fail.

Conclusion

130 The result of the foregoing is that all grounds of appeal other than Ground 5 have failed. The orders of the Tribunal should stand, save insofar as the amount awarded by the Tribunal below will be reduced, as the Owners concede is appropriate, by the amount of $5,161.

131 Our orders will be:

(1) Appeal allowed in part.

(2) Vary Order 1 of the orders made on 16 December 2019 to read: "In application HB17/51531 the respondent is ordered to pay the applicant $66,581.51 within 28 days of the date of publication of the decision in AP20/01565".

(3) Leave to appeal is refused.

(4) The appeal is otherwise dismissed.

(5) If there is to be any application for costs by either party then written submissions in support of such application are to be lodged with the Tribunal and served on the other side within 21 days, including submissions as to whether a hearing about costs can be dispensed with and any costs issues determined on the papers. Written submissions in response to any submissions from the other party are to be lodged with the Tribunal and served within 14 days thereafter.

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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