Civil and Administrative Tribunal

New South Wales

Case Name:	OWNERS SP 92648 v BINAH CONSTRUCTIONS PL & ANOR
Medium Neutral Citation:	[2021] NSWCATAP 68
Hearing Date(s):	On the papers 12-14 March 2021
Date of Orders:	22 March 2021
Decision Date:	22 March 2021
Jurisdiction:	Appeal Panel
Before:	G K Burton SC, Senior Member
Decision:	(1) Leave to appeal is granted, to the extent that leave is required. (2) The appeal is allowed. (3) In substitution for Order 2 made by the Tribunal in HB 20/26227 on 16 November 2020, order that there be no order as to the costs of the proceedings in the Tribunal, including the costs of and incidental to the application to transfer the proceedings to the Supreme Court of NSW, except for the costs of any expert evidence filed in the Tribunal which is subsequently relied upon in the proceedings the costs of which shall be costs in the cause. (4) Order that the respondents pay three-quarters of the appellant's costs of the appeal on the ordinary basis as agreed or assessed.
Catchwords:	HOME BUILDING - whether costs order appropriate on consent transfer to Supreme Court - costs on appeal against primary costs order where a different order is made but not substantially that sought by appellant
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 60, 80, 81, Sch 4 cll 6, 12 Civil and Administrative Tribunal Rules 2014 (NSW),

rr 38, 38A
Design and Building Practitioners Act 2020 (NSW) Pt 4
Home Building Act 1989 (NSW) ss 3A, 3B, 3C, 18B, 18BA, 18C, 18D, 18E, 48A, 48K, 48L, 48MA

Cases Cited:

AAI Ltd t/as GIO v McGiffen (2016) 77 MVR 348, [2016] NSWCA 229
Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443, [2012] NSWCA 244
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
ASC v Australian Home Investments Ltd (1993) 44 FCR 194
ASIC v Rich [2003] NSWSC 297
Boensch v Pascoe [2010] NSWSC 1172
Brookfield Multiplex Ltd v Owners SP 61288 (2014) 254 CLR 185, [2014] HCA 36
CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578, [2000] FCA 1343
Collins v Urban [2014] NSWCATAP 17
Craig v South Australia (1995) 184 CLR 163, [1995] HCA 58
Eadie v Harvey [2017] NSWCATAP 201
Ericon Buildings PL v Owners SP 96597 [2020] NSWCATAP 265
House v The King (1936) 55 CLR 499, [1936] HCA 40
Jegatheeswaran v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 263, [2001] FCA 865
Knox v Bollen [2018] NSWCATAP 106
Mifsud v Campbell (1991) 21 NSWLR 725
Minister Immigration & Ethnic Affairs; ex parte Lai Quin (1997) 186 CLR 622
Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme (2003) 216 CLR 212
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, [2013] HCA 18
NSW Land and Housing Corp v Orr (2019) 100 NSWLR 578, [2019] NSWCA 231
One.Tel Ltd v Dep Commr of Taxation (2000) 101 FCR 548, [2000] FCA 270
Pholi v Wearne [2014] NSWCATAP 78
Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110
Prendergast v Western Murray Irrigation Ltd [2014]

	NSWCATAP 69 Rodger v De Gelder (2015) 71 MVR 514, [2015] NSWCA 211 Sanofi v Parke Davis PL [No 1] (1982) 149 CLR 147 Soulemezis v Dudley (Holdings) PL (1987) 10 NSWLR 247 (CA) Steffen v ANZ Banking Group Ltd [2009] NSWSC 883 Vickery v Owners SP 80412 [2020] NSWCA 284 Wainohu v NSW (2011) 243 CLR 181
Texts Cited:	None cited
Category:	Costs
Parties:	Owners SP 92648 (Appellant) Binah Constructions PL (First Respondent) Modern Property Developments PL (Second Respondent)
Representation:	Counsel: D Campbell, Solicitor (Appellant) M Irwin, Solicitor (First Respondent) A Power (Second Respondent) Solicitors: Bannermans Lawyers (Appellant) Vincent Young Lawyers (First Respondent) J S Mueller & Co Lawyers (Second Respondent)
File Number(s):	2020/00371236 (AP 21/52247)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Consumer and Commercial Division
Jurisdiction:	NSW Civil and Administrative Tribunal
Citation:	[2020] NSWCATCD
Date of Decision:	16 November 2020
Before:	L Wilson, Senior Member
File Number(s):	HB 20/26227

REASONS FOR DECISION

Factual and legal background to appeal

1 The appellant, who was the applicant in the proceedings appealed from (the primary proceedings), is the owners corporation (OC) for a strata scheme within the bounds of Liverpool City Council. On 10 July 2019 the appellant received a fire order from the Council that required replacement of combustible cladding.

2 The appellant OC was successor in title to the second respondent who it apparently sued as the developer. The first respondent was apparently sued as the builder.

3 The first respondent was notified of the cladding order on 13 February 2020. On 6 March 2020 the first respondent denied liability for the rectification works. There followed email communications.

4 On 17 June 2020 the appellant OC filed the primary proceedings in the Tribunal in order, as its costs submissions before the primary member and its submission on appeal put it, "to preserve its legal rights under the *Home Building Act 1989* (NSW)" (HBA).

5 For claims within its parameters, the HBA provides a special regime, in ss 18C and 18D, that enable the statutory warranties in s 18B to be directly enforced by a successor in title against a builder and a developer (as defined in HBA s 3A) if the requirements of those provisions are met. The relevant limitation provisions are found in HBA ss 18E and 48K(7) (with ss 3B and 3C as relevant for the commencement of time) for alleged breach of statutory warranty. The statutory warranties in ss 18B(1)(a) and (d) refer to due care and skill and due diligence, among other matters of warranty in s 18B(1).

6 The successor in title therefore does not need directly to rely upon the provisions, operative in this regard from 10 June 2020 but with specified retroactive effect, of the *Design and Building Practitioners Act 2020* (NSW) Pt 4 concerning changes to the general law on the duty of care owed to successors in title: *Brookfield Multiplex Ltd v Owners SP 61288* (2014) 254 CLR 185, [2014] HCA 36.

7 However, with the legislative change, a claim for alleged breach of duty (non-contractual) allegedly owed to a successor in title arguably fits within at least para (a) of the definition of "building claim" in HBA s 48A(1):

> "'building claim' means a claim for—
>
> (a) the payment of a specified sum of money, or
>
> (b) the supply of specified services, or
>
> (c) relief from payment of a specified sum of money, or
>
> (d) the delivery, return or replacement of specified goods or goods of a specified description, or
>
> (e) a combination of two or more of the remedies referred to in paragraphs (a)–(d),
>
> that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim."

8 Such a proceeding appears (absent any circumstances attracting ss 48K(3) or (4)) to fall within the time limit in s 48K(7) for Tribunal jurisdiction, which is shorter than the time limits available within Court jurisdiction. The time limit in s 48K(7) in limited circumstances may be longer than the jurisdictional time limit for a statutory warranty claim for non-major defects, depending on the length of the building works period, although that may unusual.

9 The appellant's submissions on appeal said that the appellant's claim was based on alleged breach of the statutory warranties and alleged breach of the duty of care. That basis of the appellant's claim would have been in the application before the primary member which was not before me.

10 HBA s 48K(1) provides that the Tribunal has jurisdiction to hear and determine any "building claim" brought before it in accordance with HBA Pt 3A in which "the amount claimed" does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations, which has not presently been done). In *Ericon Buildings PL v Owners SP 96597* [2020] NSWCATAP 265 at [26] the Appeal Panel, in the course of refusing leave to appeal a procedural order, came to the "preliminary view" that the Tribunal had power to make a work order that in terms of value of the work being ordered exceeded $500,000.

11 The *Ericon* appeal was heard on the same day (16 November 2020) as the primary decision under present appeal, and was not determined until 11 December 2020. The Appeal Panel's view, expressed "for completeness", in *Ericon* was based at [19]-[27] on the exclusion from the definition of "building claim" in HBA s 48A of the phrase "specified work" which appeared in the order-making power in HBA s 48O(1)(c)(i).

12 Accordingly, the Panel said, the form of relief (a work order) was not itself a building claim (even if it arose from a building claim) and therefore in itself was not subject to the jurisdictional cap if awarded, even if a money order arising from the building claim would be. It was pointed out that there was no general limit in CATA or elsewhere on the amounts recoverable in the Tribunal. (The NSWCA decision in *Vickery v Owners SP 80412* [2020] NSWCA 284 in respect of a monetary claim for breach of duty to maintain and repair by an owners corporation appears to be consistent with that view.)

13 There was no express consideration in *Ericon* of reliance upon the words "amount claimed" in s 48K(1) as a potential further ground for the conclusion.

14 HBA s 48L provides as follows:

> (1) This section applies if a person starts any proceedings in or before any court in respect of a building claim and the building claim is one that could be heard by the Tribunal under this Division.
>
> (2) If a defendant in proceedings to which this section applies makes an application for the proceedings to be transferred, the proceedings must be transferred to the Tribunal in accordance with the regulations and are to continue before the Tribunal as if they had been instituted there.
>
> (3) This section does not apply to matters arising under sections 15, 16 or 25 of the Building and Construction Industry Security of Payment Act 1999.
>
> (4) This section has effect despite clause 6 (Transfer of proceedings to courts or to other tribunals) of Schedule 4 to the Civil and Administrative Tribunal Act 2013.

15 HBA s 48MA provides that a court or tribunal determining a building claim " is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome". This is congruent with ordinary principles of contract law imported into construction contracts, where an owner's claim for monetary compensation requires the owner to act reasonably in relation to the claimed monetary loss in order for the claimed loss to be

recoverable: cp HBA s 18BA(1), (5). This includes giving the builder a reasonable opportunity to remediate or complete, or to minimise damages by remediating what the builder can and will do: cp HBA s 18BA(1), (3)(b), (5).

16 The primary decision recorded that at the first (and as it turned out only) directions hearing in the Tribunal on 25 September 2020, the OC and the first respondent builder wished to transfer the proceedings to the Supreme Court. The second respondent developer's views were not known as it did not then appear. In accord with directions made, each party filed submissions concerning transfer. There was, and to my knowledge has been, no explanation in evidence for the second respondent's absence, which meant the matter went beyond the directions hearing.

17 The primary decision was made on the papers on 16 November 2020. The transfer to the Supreme Court in Order 1 made that day was by consent under Sch 4 para 6(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (CATA).

18 The respondents sought, and the primary member awarded, costs against the OC. The OC said that the costs of the proceedings to and including transfer should be costs in the Supreme Court proceedings. The form of Order 2 for costs was that sought by the first respondent, being that the OC "pays the respondents' costs thrown away in dealing with the application in the Tribunal, such costs to be agreed or assessed".

19 The first respondent builder's submission before the primary member was that it was the first party to raise transfer, on two bases: the claim exceeded the Tribunal's limit of monetary jurisdiction and there was no indication that any excess was abandoned by the appellant; the Tribunal did not have power to award damages for breach of a duty of care.

20 There is no indication in the material before me as to the terms on which the defendants consented to the transfer, other than that the first respondent builder appeared to have raised the matter after it obtained an expert report. The fact that there was a consent transfer order but a costs contest indicates that the respondents' position on transfer application was not conditional on the

OC paying the respondents' costs. CATA Sch 4 para 6 empowers transfer by consent, on the application of a party or on the Tribunal's own motion.

21 The authorities provide that it is the case to make by a party who seeks to upset the usual order that each party pays its own costs on a compromise of proceedings without a determination on the merits. Otherwise, the application of the usual costs principles would involve the parties in the costs they have avoided by the consent resolution. A costs order on a consent resolution may be justified, for example, because a party has acted so unreasonably prior to or in the proceedings that the other party should obtain the costs of the proceedings that it was forced to pursue to obtain the relief ultimately obtained by compromise, or because, after sustained litigated contest, one party has effectively surrendered to the other, or because (in rare instances) the court or tribunal has confidence that one party almost certainly would have succeeded even though both acted reasonably: *Re Minister Immigration & Ethnic Affairs; ex parte Lai Quin* (1997) 186 CLR 622 at 624-625; *ASC v Australian Home Investments Ltd* (1993) 44 FCR 194 at 201; *One.Tel Ltd v Dep Commr of Taxation* (2000) 101 FCR 548, [2000] FCA 270 at 553 [6]; *ASIC v Rich* [2003] NSWSC 297; *Steffen v ANZ Banking Group Ltd* [2009] NSWSC 883 at [29], [32]-[38]; *Boensch v Pascoe* [2010] NSWSC 1172; *Knox v Bollen* [2018] NSWCATAP 106 at [45]-[46].

22 The foregoing authorities include application of the principle to interlocutory steps that are the subject of a consent resolution, particularly if prior to consent they were conducted in an adversarial fashion.

23 There is no indication in the material before me as to the scope to which the foregoing authorities were raised with the primary member on the costs application. However, no objection has been taken to the raising of the matter by the appellant OC in the respondents' submissions on appeal. Those authorities expound the principles that ought to guide exercise of costs discretion in the circumstances of the primary application and this appeal.

Reasons for primary decision

24 The primary member gave detailed reasons for her costs decision, set out in the following paragraphs.

25 First, "unless the applicant submitted to the Tribunal's jurisdictional limit, the matter was always going to be transferred elsewhere." The primary member referred to quotations obtained by the OC "(and subsequently the report of the Builder's expert)" that showed the claim exceeded $500,000: "In the circumstances, that the applicant's own evidence showed quantum substantially exceeded the Tribunal's limit, it is difficult to see why the applicant commenced in the Tribunal at all".

26 It was not entirely clear from the primary reasons when the appellant had the quotation and when the first respondent had the expert report referred to and gave it to the appellant. In the appellant's submissions on appeal it appears that the quotation was obtained after filing as the OC "also filed, along with the home building application, a work order to the Tribunal". The builder's QS report was obtained after filing of the primary proceedings in the Tribunal.

27 Secondly, it was not known why proceedings were begun in the Tribunal when HBA rights could be preserved by commencement in any forum with jurisdiction.

28 Thirdly, the appellant could, and should, have commenced in the appropriate forum for the substantive determination of the proceedings: "It does not appear in this matter that the applicant lodged on 17 June and then subsequently obtained quantum evidence which made the amount claimed exceed $500,000, and it was unwilling to submit to jurisdiction".

29 Fourthly, even if only a work order was sought, there was doubt if a work order by the Tribunal could exceed $500,000 in value, but a work order alone was not sought "and any potential renewal for non-compliance with the work order made would be necessarily restrained by the jurisdictional limit".

30 Fifthly, the OC did not develop submissions opposing the respondents' submissions that the Tribunal did not have jurisdiction to award damages for breach of duty of care. Although the primary member pointed out that the authority (as it had then recently been overturned) on damages for breach of strata legislation was not apposite, it was then said that it was not for the Tribunal to argue the OC's claim and "it seems the applicant concedes the

Tribunal lacks the power to award damages for breaches of duty of care owed to a successor in title by the respondents".

31 Sixthly, "In all the circumstances it appears the [OC] lodged in the Tribunal knowing the proceedings would ultimately be transferred elsewhere. There appears no good explanation for having done this, as the applicant could have commenced directly in the Supreme Court of NSW and preserved its legal rights. Commencing in the Tribunal was an unnecessary additional step".

32 Finally, it was the first respondent builder who "apparently first raised the transfer question and forced the applicant to address it. This is also unsatisfactory and lends support to the cost application".

33 Since the claim exceeded $30,000 the Tribunal correctly found that the ordinary costs rules applied under para 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW), and that special circumstances did not need to be found under CATA s 60. The Tribunal also correctly found that it had jurisdiction to determine jurisdiction and transfer applications and to make associated costs orders. Neither of those matters was challenged on appeal.

34 It seems that all parties were legally represented during the primary Tribunal proceedings. Leave was granted to all parties to be legally represented in respect of the appeal.

Grounds of appeal

35 The appeal from the costs order was filed within time on 11 December 2020.

36 The notice of appeal identified the following as grounds of appeal, either as errors of law, or as errors of fact and law, or errors of fact, for which leave to appeal was sought:

(1) The Tribunal did not give adequate reasons.

(2) Tribunal erred in awarding costs against the appellant who consented to the first respondent's transfer application.

(3) The Tribunal erred in awarding costs to the second respondent who did no more than consent to the transfer.

(4) The Tribunal erred in the bases in its sixth reason set out above and in the assumption in its third reason that the appellant had obtained quantum evidence exceeding $500,000 before filing. This also did not

take into account the processes for an owners corporation to consider and decide to limit its claim to the jurisdictional cap.

(5) There was no basis for the finding that the claim should not have been brought in the Tribunal (this related to the fourth and fifth of the primary member's reasons).

(6) To leave the costs order standing would discourage claims being brought in the Tribunal, would contravene the guiding principle in CATA s 36 and encourage respondents' transfer applications "on the basis that the first party who seeks a transfer was awarded costs".

(7) If leave was required, there was said to be a substantial miscarriage of justice "in circumstances where a judgment for a significant sum has been made against [the appellant] based upon incorrect information".

37 The notice of appeal sought that the primary order should be varied to make costs of the primary proceedings including the transfer costs in the Supreme Court claim costs in the cause. Additionally, the appellant claimed costs of the appeal.

Applicable legal principles

38 CATA s 80 provides as follows:

> "(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.
>
> Note. Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).
>
> (2) Any internal appeal may be made —
>
> (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
>
> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.
>
> (3) The Appeal Panel may —
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> (a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and
>
> (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances."

39 Clause 12 of Schedule 4 to CATA states:

> "An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

(a) the decision of the Tribunal under appeal was not fair and equitable, or

(b) the decision of the Tribunal under appeal was against the weight of evidence, or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with)."

40 A Division decision is a primary decision of the Consumer and Commercial Division. The primary decision here is such a decision.

41 CATA s 4(1) contains the following relevant definitions to the nature of the decision from which an appeal is brought:

> "ancillary decision of the Tribunal means a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including—
>
> (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and
>
> (b) a decision concerning the awarding of costs in proceedings."
>
> "'interlocutory decision' of the Tribunal means a decision made by the Tribunal under legislation concerning any of the following—
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> (a) the granting of a stay or adjournment,
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> (b) the prohibition or restriction of the disclosure, broadcast or publication of matters,
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> (c) the issue of a summons,
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> (d) the extension of time for any matter (including for the lodgment of an application or appeal),
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> (e) an evidential matter,
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> (f) the disqualification of any member,
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> (g) the joinder or misjoinder of a party to proceedings,
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> (h) the summary dismissal of proceedings,
>
> (h1) the granting of leave for a person to represent a party to proceedings,
>
> (i) any other interlocutory issue before the Tribunal."

42 In *Ericon Buildings PL v Owners SP 96597* [2020] NSWCATAP 265 at [26] the Appeal Panel, in the course of refusing leave to appeal a procedural order, focused at [9]-[10] on the required connection of an ancillary decision with a decision determining proceedings, not a decision which the party alleged should have been made to determine the proceedings. In that case, the orders

under appeal noted a consent to judgment that had not been accepted by the applicant and set a timetable for a foreshadowed transfer application on which the transfer could be contested on the basis there was a tender of the maximum amount of the Tribunal's jurisdiction. Those orders were found to be interlocutory in character and therefore to require leave to appeal under CATA s 80(2)(a). Leave to appeal was refused at [13]-[18] because no decision that was said to be in error had actually been made; "for completeness", the Panel expressed the view at [19]-[27] that the Tribunal would be entitled to take into account the possibility that the Tribunal's jurisdiction on a work order was not limited to a value of $500,000 and at [28]-[36] that there was no tender of the Tribunal's maximum jurisdiction of $500,000 by actual payment.

43 The *Ericon* characterisation is consistent with the orthodox test, implicit in the statutory definitions cited above, that an interlocutory decision does not finally determine the rights of the parties in respect of the relief claimed in the proceedings: see, eg, *Sanofi v Parke Davis PL [No 1]* (1982) 149 CLR 147 at 152.

44 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

45 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel enunciated the following as specifically included:

(1) whether the Tribunal provided adequate reasons;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

(7) whether there was no evidence to support a finding of fact; and

(8) whether the decision was legally unreasonable.

46 In relation to adequacy of reasons, it is essential to expose the reasons for resolving a point critical to the contest between the parties: *Soulemezis v Dudley (Holdings) PL* (1987) 10 NSWLR 247 (CA) at 259, 270-272, 280-281; *Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at [40]; *Wainohu v NSW* (2011) 243 CLR 181 at [58]; *NSW Land and Housing Corp v Orr* (2019) 100 NSWLR 578, [2019] NSWCA 231 at [65]-[77]; CATA s 62(3).

47 A failure to deal with evidence may also in the appropriate circumstances be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence. It is generally not mandatory to consider particular evidence: *Rodger v De Gelder* (2015) 71 MVR 514, [2015] NSWCA 211 at [86]; *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443, [2012] NSWCA 244 at [15] per Basten JA (McColl and Macfarlan JJA agreeing). However, by s 38(6)(a) of the CATA, the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings." This obligation includes an obligation to have regard to material which has been disclosed to the Tribunal and which is relevant to the facts in issue, at least where that material is of some significance. Further, at common law, where a decision-maker ignores evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker, this is an error of law because the reasons are thereby rendered inadequate: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62]-[63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61]-[62].

48 The "no evidence" ground must identify that there is no, or substantially inadequate, evidence to support a "critical" or an "ultimate" fact in order to constitute a jurisdictional error (a form of error of law): *AAI Ltd t/as GIO v McGiffen* (2016) 77 MVR 34, [2016] NSWCA 229 at [81]; *Jegatheeswaran v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 263, [2001] FCA 865 at [52]-[56].

49 Legal unreasonableness can be concluded if the Panel comes to the view that no reasonable tribunal could have reached the primary decision on the material before it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [2013] HCA 18 at 364 [68]. A failure properly to exercise a statutory discretion may be legally unreasonable if, upon the facts, the result is unreasonable or plainly unjust: *Li* at 367 [76]. There is an analogy with the principle in *House v The King* (1936) 55 CLR 499, [1936] HCA 40 at 505 that an appellate court may infer that there has been a failure properly to exercise a discretion "if upon the facts [the result] is unreasonable or plainly unjust" and with legal unreasonableness as a ground of judicial review: *Li* at 367 [76].

50 Turning to errors of fact, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, an Appeal Panel stated at [76]–[79] and [84(2)] as follows:

> "74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) 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.
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> 75 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > 1 If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
> >
> > 2 The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where 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 - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].
>
> …
>
> 78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial

> miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
>
> 79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].
>
> 84 The general principles derived from these cases can be summarised as follows: …
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> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
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> (a) issues of principle;
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> (b) questions of public importance or matters of administration or policy which might have general application; or
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> (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;
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> (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."

51 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice within cl 12 of Sch 4 to the CATA, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]). The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

52 In appellate review of the exercise of a discretion as to costs, as with other discretionary decisions, a reviewing court or tribunal must be cognisant that reasonable minds may differ on the correct exercise of discretion from alternatives all of which are within a range of reason. Unless the factors identified in *House v The King* (1936) 55 CLR 499, [1936] HCA 40 at 505 are satisfied, the fact that the reviewing court or tribunal may have chosen a

different alternative is not sufficient to upset the exercise of discretion. Those factors were stated as follows:

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

Error of law

53 The present appeal was against only the costs order made on 16 November 2020, not the consent transfer order. In some jurisdictions an appeal against costs alone would require leave: see *Supreme Court Act 1970* (NSW) s 101(2)(c).

54 In my view the effect of CATA s 80(2) with the definition of "ancillary decision" set out above mean that this appeal is brought as of right in respect of an alleged error of law.

55 There is no reference in the primary member's reasons to the principles, set out above, governing departure from the usual position on consent resolution, or their application to the facts.

56 Further, although there is statement of matters which might have been part of a reasoning process that justified departure from the usual position on consent resolution, there is no reasoning process exhibiting why those statements do justify such departure.

57 Even if the principles and matters were not raised expressly before the primary member, they constitute the legal basis on which the exercise of costs discretion in this context must be conducted. Without statement of such basis and without reference to it in the reasoning process, in my view there arises an error of law, at least in terms of the adequacy of reasons on the principles set out earlier, and arguably in not stating and applying the correct legal principle.

58 If in fact the correct legal principle was not expressly expounded to the primary member, so there was no explicit occasion to provide reasons that applied that principle to the facts so as to justify the conclusion that was reached, the correct legal principle has been raised on appeal and, without objection, the adequacy of the reasoning process from it has also been raised. In those circumstances, and without criticism of the primary member, these matters of law must be dealt with.

59 In my view, the foregoing errors in themselves justify upholding the appeal.

60 If I am wrong on the foregoing, particularly because it is later found that the matters were not raised before the primary member and cannot now be raised, then in my view the primary member erred in law in taking into account in the primary costs decision irrelevant considerations.

61 In this respect, the fourth reason given for awarding costs - the uncertainty of the Tribunal's jurisdiction over work orders with a value exceeding $500,000 and any renewal application for a money order - was not a relevant consideration supporting the conclusion in the first three grounds that it was a certainty that the matter would be transferred and the proceedings should have been commenced where they would be substantively determined. That jurisdictional matter appropriately could have been argued in the Tribunal and only a work order pressed at the time of any such argument.

62 The same applies to the fifth reason. The primary member acknowledged that the OC opposed the builder's contention that the Tribunal lacked jurisdiction to award damages for breach of duty of care, and pointed to the lack of clarity as to the support for the builder's jurisdictional argument in a decision on jurisdiction to award damages for breach of an owner's corporation's duty to maintain and repair under the strata schemes management legislation. The primary member then inferred, from the absence of jurisdictional argument being detailed on a transfer application, that there was a concession by the OC that the Tribunal lacked jurisdiction. Reference has been made earlier in these reasons to the arguable basis for jurisdiction for the damages claim for breach of duty of care that the OC pressed against the builder. That jurisdictional matter could have been argued in the Tribunal at the appropriate time.

63 Without the support of the fourth and fifth grounds, it was not inevitable that the proceedings would be transferred and should have been commenced elsewhere. It also became irrelevant whether or not the OC knew from a quotation or the builder's quantum evidence that the claim was likely to exceed $500,000 in monetary value. It further became irrelevant that the OC had not immediately shown willingness "to submit to jurisdiction". The arguable matters just discussed undermined the conclusion that "there appears no good explanation" for starting in the Tribunal and that so commencing was "an unnecessary additional step". The arguable matters also undermined the conclusion that it was the builder who forced the OC to face the issue which was "unsatisfactory".

64 Accordingly, in my view the appeal should succeed because the primary decision needs to be set aside for containing errors of law.

Leave to appeal

65 If the foregoing matters contain other than errors of law (eg, mixed errors of law and fact) and require leave to appeal, in my view that leave should be granted and the appeal allowed.

66 As best as can be discerned from the material available on appeal, the primary member had before her: no clear evidence that the OC was doing other than seeking to file a claim and maintain at the appropriate time jurisdiction on several bases; evidence that the claim for a money order could exceed $500,000; the need to file proceedings to preserve time limits for any forum in which the substantive claim was heard; a consent after consideration of all parties to transfer which avoided the jurisdictional arguments.

67 It seems to me against the weight of that limited evidence to award costs of the transfer to any parties. The weight of the evidence inferred a rational resolution which was not inevitable at time of initiating the proceedings in what is, under the HBA, the preferred forum if available to resolve building claims.

68 I come to the foregoing conclusion without taking into account the usual position on costs for a consent resolution. Taking that into account only reinforces the conclusion as there was insufficient weight in the available evidence to upset it.

69 For the same reasons the award of costs was not fair and equitable and that conclusion is only reinforced by taking into account the usual position on costs for a consent resolution.

70 There is clearly at the least a significant possibility of a different outcome if the available material had been considered from the perspective I have set out. Again, that is only reinforced by the usual position on costs for a consent resolution. The different outcome was clearly raised by the OC, being that costs should be in the cause.

71 Finally, there is ground for leave because what I have identified as errors were central to the decision, reasonably clear and work an injustice if not corrected. It is also appropriate to make clear the need properly to justify departure from the usual position on costs for a consent resolution.

72 In coming to this conclusion I do not accept the respondents' submission to the effect that this will encourage applicants to file proceedings without proper consideration of quantum and forum and without expert reports as indicated in the Consumer and Commercial Division guidelines. There will be occasions when urgency requires filing to preserve the right of claim. Leaving that aside in the present case, the initial indications in terms of quotation or even expert reports do not necessarily, or in building cases usually, reflect what the final position will be in the evidence despite the guidelines, particularly in cases of some complexity where directions hearings will be required. The initial material also will not necessarily in such cases determine whether a debate will be engaged on matters of jurisdiction, particularly where the scope of jurisdiction on matters such as work orders and duty of care to subsequent owners is not clear.

Appropriate relief on appeal

73 CATA s 81 provides as follows:

> "(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,

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

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

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

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

74 In my view it would be contrary to the guiding principle in CATA s 36 and the objective in CATA s 3(d) not to set aside the costs order appealed against and not to determine the question of costs at first instance. To do otherwise would require the parties, where the matters have already been transferred to the Supreme Court, to return to the Tribunal to argue a costs order. There is no indication from either party in the papers on which this appeal is being determined as to further evidence which if tendered would make a sufficient difference to justify the additional time and cost of remission.

75 I accordingly shall determine the primary costs order on the material before me and substitute that for the current primary Order 2.

76 In my view the matters that have been described as the fourth and fifth primary reasons above are insufficient to justify a departure from the usual position for costs in respect of a consent order and no other sufficient basis independent of those reasons has been put forward, including the other primary reasons that have been described above.

77 The appellant also sought a departure from the usual position for costs in respect of a consent order. Again, no sufficient basis for that departure in general terms has been demonstrated. The transfer application and associated costs was the subject of the consent order. No ongoing utility in the transferred proceedings of the filed originating application itself and any steps taken in relation to that filed application has been demonstrated apart from any expert report which is subsequently relied upon in the proceedings. Otherwise, the Supreme Court will no doubt require that such a matter proceed on distinct

pleadings and be the subject of distinct evidence and will make orders for such matters.

78 Accordingly, the substituted primary costs order will be to the effect of no costs order for matters that have occurred within the Tribunal except for the costs of any expert evidence filed in the Tribunal which is subsequently relied upon in the proceedings. The costs of such evidence should be costs in the cause.

Costs of appeal

79 As already said, leave to all parties to be legally represented in the appeal proceedings was granted, on 22 December 2020.

80 Rule 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW) applies the same costs rules as applied in the Division when there is a departure under the Division rules (such as under rule 38) from CATA s 60.

81 The starting point for exercise of costs discretion on the usual principles is that costs follow the event. “The event” is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct issues on which the party seeking relief did not succeed, that may be taken into account in the exercise of costs discretion. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: *Johnson t/as One Tree Constructions v Lukeman* [2017] NSWCATAP 45 at [25]-[29]; applied in *Oppidan Homes PL v Yang* [2017] NSWCATAP 67.

82 I consider that the outcome and reasons in *Johnson* and *Oppidan* do not qualify the application of orthodox principles for exercise of costs discretion in the present circumstances. The exercise of discretion in *Johnson* was in relation to the costs on appeal only: *Johnson* at [4]. The clear mixed outcome on appeal grounds meant that the original decision was maintained in a central respect but the original claim was otherwise to be the subject of a re-hearing. The outcome in *Oppidan* reflected the outcome of the primary hearing which involved claims by both parties.

83 Here the appellant OC needed to pursue this appeal to obtain relief from the burden of an adverse costs order. However, the relief that it sought at first instance was a departure from the usual position on a consent order which I have found not to be justified except as to expert evidence that is subsequently relied upon in the proceedings. In my view there should be a discount for only partial success and the respondents should be ordered to pay three-quarters of the appellant's costs of the appeal.

84 In my view the partial costs that are ordered should be on the ordinary basis as agreed or assessed. No party has sought the opportunity to tender material or made submissions that justify an award of costs on the indemnity basis as agreed or assessed, in whole or part.

85 For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered. The principles are explored in *Latoudis v Casey* (1990) 170 CLR 534, *Oshlack v Richmond River Council* (1998) 193 CLR 72 and in this Tribunal in *Thompson v Chapman* [2016] NSWCATAP 6 and *Bonita v Shen* [2016] NSWCATAP 159, citing earlier consistent authority. The principles have resonance with at least some of the "special circumstances" in CATA s 63 that are required to justify a costs order when rule 38A does not apply.

86 On the appeal, each party pursued, as was their right, their view of the appropriate order as to the costs at first instance as put forward on an open basis to the Tribunal at first instance. Each party co-operated with the Tribunal. There was no indication of any significant misconduct.

Orders

87 The orders that I accordingly make are as follows:

(1) Leave to appeal is granted, to the extent that leave is required.

(2) The appeal is allowed.

(3) In substitution for Order 2 made by the Tribunal in HB 20/26227 on 16 November 2020, order that there be no order as to the costs of the proceedings in the Tribunal, including the costs of and incidental to the application to transfer the proceedings to the Supreme Court of NSW, except for the costs of any expert evidence filed in the Tribunal which is

subsequently relied upon in the proceedings the costs of which shall be costs in the cause.

(4) Order that the respondents pay three-quarters of the appellant's costs of the appeal on the ordinary basis as agreed or assessed.

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