Civil and Administrative Tribunal

New South Wales

Case Name:	Robinson v Hindmarsh Construction Australia Pty Ltd
Medium Neutral Citation:	[2021] NSWCATAP 51
Hearing Date(s):	4 March 2021
Date of Orders:	9 March 2021
Decision Date:	9 March 2021
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President G Curtin SC, Senior Member
Decision:	1. Leave to appeal is refused and the appeal is dismissed. 2. Each party to bear his and its own costs of the appeal.
Catchwords:	BUILDING AND CONSTRUCTION - Home Building Act 1989 (NSW) - statutory warranty - proceedings for breach – relevance of contract – identification of contract to perform residential building work – relevance to statutory warranties APPEALS - procedural fairness - failure to give reasons - adequacy of reasons – evidence not referred to – whether evidence important or critical to resolving the particular issue – whether an inference could be drawn that the evidence was overlooked
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Home Building Act 1989 (NSW), s 18B, 18D
Cases Cited:	Choi v University of Technology Sydney [2020] NSWCATAP 18 Feng v OzWood (Australia) Pty Ltd [2020] NSWCATAP

	42 Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23 Leung v Alexakis [2018] NSWCATAP 11 Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd [2011] NSWCA 236 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110
Texts Cited:	Nil
Category:	Principal judgment
Parties:	David Robinson (Appellant) Hindmarsh Construction Australia Pty Ltd (First Respondent) B1 Epping Pty Ltd (Second Respondent)
Representation:	Counsel: S Tully (Appellant) R Thrift (First Respondent) Solicitors: Gilbert + Tobin (First Respondent) No appearance (Second Respondent)
File Number(s):	2020/00371237 (AP 20/52253)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	13 November 2020
Before:	N Vrabac, Senior Member
File Number(s):	HB 19/45285

REASONS FOR DECISION

1 This is an appeal by a homeowner from a decision of the Tribunal awarding him compensation for four defective items constructed by the respondent builder. The appellant homeowner contended that the amount of compensation awarded him in respect of two items was erroneous and should have been greater.

2 For the reasons given below we are of the opinion that the appeal should be dismissed.

Background

3 The appellant purchased an apartment off-the-plan from a developer in March 2015. The appellant and the developer entered into a contract in relation to that purchase.

4 On 18 December 2017 the developer entered into a contract with the respondent for the respondent to construct an apartment building consisting of 119 apartments. Included in the building contract as matters to be constructed by the respondent were internal fixtures and fittings in the apartments.

5 The work was completed in March 2018 and the appellant took possession of his apartment in April 2018.

6 The appellant complained of a number of alleged defects in the building work in the apartment he purchased. A number of those defects were resolved one way or the other. A number were not, and the appellant commenced proceedings in the Tribunal against the respondent and the developer.

7 For reasons which do not need to be repeated here the proceedings against the developer were dismissed although it appears no order to that effect was made. Rule 29(b) of the Civil and Administrative Tribunal Rules 2014 (NSW) requires all parties to proceedings before the Tribunal at first instance (at the hearing) to be parties to any appeal. As B1 was such a party and no formal order had been made dismissing the proceedings against it, we made an order joining it to the appeal and made an order dismissing the original application against it.

8 In the proceedings heard by the Tribunal the appellant complained of four defects. Only two of those defects are relevant to this appeal, namely a defect in the kitchen island benchtop and defects in the built-in wardrobe in the master bedroom.

9 Each party retained experts who provided reports tendered in evidence, and who met in a conclave prior to the hearing. Mr Nakhla was the appellant's expert, and Mr Love was the respondent's expert. Mr Love's report became Ex B in the proceedings.

10 A Scott Schedule was produced setting out each relevant item, the position of each expert in relation to each item and the experts' notes of the result of their discussion of each item from the conclave. The experts gave oral evidence and were cross-examined at the hearing.

11 In relation to the kitchen island benchtop the Tribunal's findings were as follows (we have made some minor grammatical corrections):

> "48. The applicant's case is that the wall benchtop has a join in it which is poorly finished. The island benchtop is slightly discoloured and needs polishing to correct the deficiency. Estimate of the repair is $713.46.
>
> 49. The first respondent stated the discolouration in the island benchtop is due to wear and tear. The first respondent conceded that the join in the wall benchtop needs to be resealed and estimated the cost to be $112.20. The first respondent allowed to polish the island benchtop and repair the join in the wall benchtop, at $429.00, if found.
>
> 50. I allow the sum of $713.46 as estimated by the applicant because of the time calculated, tradesman for 1 day to execute the scope of works.
>
> 51. The applicant's application to replace both benchtops at the cost of $9,715.20 is dismissed. Firstly, the benchtop is not discoloured. It only requires a minor repair to the join. Secondly, I find the photographs tendered in Ex B, pp 6 and 18, do not show discolouration warranting replacement of the island benchtop. It is necessary also to point out, as stated in the Affidavit of Ms Goddard, the manufacturer's warranty states that small particle inclusions, blotches and irregular distribution of the aggregate does occur with engineered stone and it should not be considered imperfect or defective."

12 In relation to the wardrobe joinery the Tribunal's findings were as follows (we have made some minor grammatical and spelling corrections):

> "55. The applicant's claim is in the sum of $4,735.00. The contention is that the bedroom wardrobe must be removed and discarded. Only two doors are to be salvaged for reuse.
>
> 56. The first respondent's expert concedes that built in robes are defective with non-trade finishes only to internal cabinetry surfaces where excess and

> poorly patched cutouts/penetrations have occurred. The first respondent's expert Mr Love stated that these blemishes do not warrant replacement of cabinets as contended by the applicant. The defects, if found, could be repaired by removing and replacing two affected panels and fitting screw caps over smaller holes. He estimated reasonable cost of repair at $1,346.40.
>
> 57. I am not satisfied that master bedroom wardrobes need replacing because there are excessive and poorly finished screw holes, with the two doors to be salvaged. It seems to me from the photographs tendered in Ex B (sic) do not illustrate major defects which warrant total replacement of the carcass. I prefer the rectification scope identified by Mr Love."

13 The appellant's appeal is to the effect that the Tribunal erred in not finding that the kitchen island benchtop should have been replaced rather than sanded and polished, and in not finding that the whole carcass of the wardrobe should have been replaced rather than two carcass panels only.

Grounds of Appeal

14 The appellant's grounds of appeal were:

(1) The Tribunal erred in failing to consider the contract for sale of the apartment and other agreements concluded between the developer and the respondent.

(2) The Tribunal erred in failing to properly construe that contract and those agreements.

(3) The Tribunal erred in making findings in the absence of evidence, namely that:

(a) The discolouration of the benchtop was caused by small particle inclusions, blotches and irregular distribution of the aggregate (in the Tribunal's reasons at [51]).

(b) The benchtop was not discoloured.

(c) The wardrobe carcass was constructed in pieces (which would allow for the removal and replacement of two panels) rather than being constructed as one unit (which would not allow for the removal and replacement of two panels).

(4) The Tribunal's decision in relation to the wardrobe was not fair and equitable.

(5) The Tribunal's decision in relation to the benchtop was against the weight of evidence.

Consideration

15 There is a right of appeal on questions of law. Otherwise leave is required: s 80(2)(b): *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act). The grant of leave is regulated by Sch 4 cl 12(1) of the NCAT Act.

Grounds 1 and 2

16 It is convenient to consider these two grounds together.

17 The appellant's sole cause of action against the respondent was for breach of certain statutory warranties set out in s 18B of the *Home Building Act 1989* (NSW) ("HBA"). The appellant was entitled to the benefit of those warranties as against the respondent builder as a successor in title to the developer pursuant to s 18D(1) of the HBA.

18 Section 18B(1) says:

> **18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—
>
> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

19 Insofar as the appellant relies upon contracts and agreements other than the contract under which the respondent agreed to perform the residential building work, they are irrelevant to the s 18B warranties.

20 That is because the chapeau to s 18B(1) confines the section to "contract(s) to do residential building work", and it is the contract under which the work was actually done into which are implied the warranties referred to in s 18(1)(a)-(f) and which is the notional contract between the successor in title and the builder: *Owners Corporation Strata Plan 64757 v MJA Group Pty Ltd* [2011] NSWCA 236 per Young JA at [32]-[37], Allsop P and Macfarlan JA agreeing.

21 Section 18B(1) make relevant to the statutory warranties the plans and specifications set out in the building contract, and any terms relevant to the communication to the builder of any purpose or result the developer desired the work to achieve.

22 There was no error in construing the terms of the building contract. The Tribunal identified the work performed under the contract, the subject of the statutory warranties, and the manner in which the identified work did not meet the required standards.

23 The appellant drew particular attention to cl 2.5(h) of the building contract. That clause required the respondent to:

> "… design the Works so that the Works when constructed will be structurally and aesthetically sound …"

24 This clause is irrelevant to the appeal. There was no allegation advanced before the Tribunal of any breach of any *design* obligation. The defects complained of resulted from construction or installation deficiencies, not any design deficiency.

25 More fundamentally perhaps, even if the Tribunal fell into the error alleged, the error did not lead to any adverse result for the appellant. That is because the Tribunal accepted there was a breach of the s 18B warranties in relation to the benchtop and wardrobe (and the contracts etc referred to were only potentially relevant to breach). The issue before the Tribunal was the reasonable cost of rectification of those defects taking into account the manner and extent to which the work and materials relevant to those two items departed from the standard set out in the warranties. The contractual terms referred to by the appellant were not relevant to the nature and extent of the defects for which the Tribunal awarded the appellant compensation.

26 We dismiss Grounds 1 and 2.

Ground 3 – The Benchtop

27 The appellant submitted that a proper reading of [48] and [51] of the Tribunal's reasons would lead one to the conclusion that the Tribunal found that the kitchen island benchtop was not discoloured. We disagree.

28 At [48] of its reasons (set out in full at [11]) above the Tribunal said:

> "The island benchtop is slightly discoloured and needs polishing to correct the deficiency."

29 The reference to "island" benchtop distinguishes that item from the "wall" benchtop referred to in the first sentence of [48], and clearly says that the island benchtop was discoloured. In awarding the sum of $713.46, the Tribunal clearly accepted this submission.

30 The appellant submitted that the damages awarded for rectification of benchtops, namely $713.46, was for the repair to the wall benchtop alone, no sum was awarded for the rectification of any defect in the island benchtop and this indicated the Tribunal had found there to be no defect (or discoloration) in the island benchtop.

31 This submission is incorrect. The sum of $713.46 comes from section 8.1 of Mr Nakhla's report, and is the sum provided by Mr Nakhla for rectifying two defects: the sanding and polishing of the kitchen island benchtop; and to repair the join in the wall benchtop referred to in the first sentence of [48] of the Tribunal's reasons.

32 At [51] of its reasons the Tribunal said:

> "Secondly, I find the photographs tendered in Ex B, pp 6 and 18, do not show discolouration warranting replacement of the island benchtop."

33 The appellant submitted this sentence, properly construed, amounted to a finding that the photographs referred to did not show any discolouration. We disagree. That submission ignores the words which follow the word "discoloration", namely "warranting replacement of the island benchtop". What the Tribunal was conveying was that there was discoloration to the island benchtop, but the extent and degree of the discoloration did not justify

replacement of the benchtop as opposed to providing for sanding and polishing. Again, this is clear from the amount awarded.

34 The appellant's next submission that there was no evidence to support the Tribunal's finding that the discolouration was caused by small particle inclusions, blotches and irregular distribution of the aggregate suffers from two flaws.

35 First, there was evidence, albeit of a general nature, in that there was evidence that the manufacturer of the benchtop said in its warranty that small particle inclusions, blotches and irregular distribution of the aggregate does occur with engineered stone (which this benchtop was made of) and it should not be considered imperfect or defective.

36 Second, it was not important in this case as to what caused the discoloration in that, even if the appellant's submission were correct, the complaint goes nowhere. That is because the Tribunal awarded the sum of money which the appellant's own expert opined should be awarded for the work which needed to be done to repair the discolouration, i.e. sanding and polishing the benchtop. Mr Love thought a lesser cost was reasonable, but the Tribunal found in favour of Mr Nakhla on this issue.

37 The appellant submitted that his expert had also opined that replacement of the benchtop was warranted if the sanding and polishing did not succeed in its intended purpose, and that the Tribunal should have awarded the sum for that replacement (being $9,715.20).

38 However, the Tribunal made a money order, and as such it was required to decide, once and for all, what sum should be awarded to pay for the reasonable cost of rectification. The appellant's expert did *not* opine that sanding and polishing the benchtop would probably *not* repair the defect, and thus replacement was needed. Rather, in considering those two options, Mr Nakhla determined sanding and polishing was the appropriate method of rectifying the defect.

39 In his report Mr Nakhla said:

> "• I did also notice that there is a slight discolouration and visible texture difference in the surface of the island benchtop.
>
> …
>
> • **I believe the benchtop needs to be sanded and polished to remove this effect**.
>
> • **If** a sand and polish does not resolve the aesthetic issue then the benchtop will need to be replaced. If the island benchtop needs to be replaced, then so will the wall benchtop to ensure uniformity of colour/finish as the stone is ordered in batch slabs."
>
> (Our emphasis)

40 Shortly thereafter Mr Nakhla opined:

> "I propose the following method of rectification and estimate of costs to do so:

41 The "following method of rectification" was the sanding and polishing of the island benchtop (and repairing the join in the wall benchtop).

42 In the Scott Schedule, item 2, which concerned replacement of the benchtop, the conclave notes were ("SN" and "SJN" being references to Mr Nakhla and "DL" being a reference to Mr Love):

> "SN Comment.
>
> **This item is not pressed**. Only an alternative solution if the polishing of the stone fail to correct the issue.
>
> DL Comment:
>
> I do not foresee any circumstances where SJN's 'alternate repair', to replace the benchtop is required or reasonable."
>
> (Our emphasis)

43 Mr Nakhla did not say the sanding and polishing method would fail. Mr Love did not suggest the method would fail. Therefore, even if the Tribunal erred in finding what was the cause of the discoloration, the Tribunal was correct in not awarding a sum to replace the benchtop because, even taken at its highest, the appellant's expert evidence was that sanding and polishing was the preferred method of rectification and he was awarded the reasonable cost of having that done.

Ground 3 – The Wardrobe

44 The appellant contended that the Tribunal erred in finding, at least impliedly, that the wardrobe carcass was constructed in parts (which would allow for the subsequent removal and replacement of the two panels referred to by the

Tribunal at [56] of its reasons – see [11] above) rather than being constructed as one unit (which would not allow for the subsequent removal and replacement of two panels). The appellant submitted there was no evidence to support that finding.

45 We disagree.

46 First, there was evidence to support that finding. Mr Love gave the following oral evidence ("RT" being a reference to the respondent's counsel):

> "RT So, just by looking at photo 4, you were asked about whether or not it would be possible to remove or replace some of the panels only given the nature of the wardrobe. Are you able to tell by looking at that photo of the wardrobe if you don't have to answer that question any further?
>
> DL Not really no, they generally come with like a flat pack in pieces and pieces can be removed. I've not seen joinery where you can't do that."

47 Although general in nature, Mr Love's experience was that he'd never seen joinery where you could not remove and replace pieces when necessary, as opposed to build a replacement wardrobe. He had been in the industry for 25 years and had quality assured 500 apartments of similar design to the appellant's in the two years preceding his report. That evidence was therefore some evidence of the construction of this wardrobe and how the identified defects might be repaired.

48 Further, Mr Love had inspected the wardrobe and was not cross-examined to the effect that the wardrobe carcass was constructed in one piece, nor that it was not possible to remove and replace two panels.

49 Mr Nakhla did not opine on the construction of the carcass and did not opine that Mr Love's proposed rectification method was not physically possible because the carcass was of one piece.

50 It was the appellant who bore the onus of proof in the Tribunal at first instance, and if the carcass was alleged by the appellant to only being amenable to entire replacement because of how it was constructed, then that fact was for the appellant to prove. It did not lead any evidence to that effect and it failed to prove the fact now alleged.

51 We dismiss Ground 3.

Ground 4 - Not fair and equitable

52 The appellant contended that the Tribunal's decision in relation to the wardrobe was not fair and equitable, and sought leave to appeal on that ground.

53 The appellant submitted that it was not fair and equitable for the Tribunal to find that it was not satisfied that the wardrobe had major defects which warranted total replacement of the carcass, and by referring to photographs in Ex B (said to illustrate the point) whilst not referring to other evidence on the topic.

54 The appellant's written submission on this topic were as follows:

> "24. In his report, the appellant's expert, Mr Nakhla, considered that the joinery in the master bedroom required replacement due to excessive holes in the carcass of the cupboards: Report dated 16 January 2020, p 8, [6.4].
>
> 25. The evidence available to the tribunal was that Hindmarsh had consistently accepted that a defect existed in the built-in wardrobe: Fair Trading letter dated 2 October 2019, pl; Affidavit of K Goddard, 12 March 2020, [26] (on 27 September 2019) and [32] (on 8 November 2019), [37]; Email dated 27 September 2019 from Hindmarsh to Fair Trading in Affidavit, Exhibit KG 1, p220. Hindmarsh had been previously been willing to replace all of the wardrobe unit including its carcass: Affidavit of K Goddard, 12 March 2020, [32]; Exhibit KGl, p 219.
>
> 26. Furthermore, Hindmarsh had been informed by its expert, Mr Love, that the bedroom built-in wardrobe was defective and that a poor attempt to fix the problem had previously been made: Inspection notes by Hindmarsh dated 25 September 2019. That expert had recommended partial or complete replacement in order to resolve the problem: Tyrells letter dated 21 November 2019. In his individual expert report, Mr Love accepted that there were blemishes visible within the master bedroom built-in wardrobe, being visible penetrations and unsealed nail holes, but that the blemishes could be repaired by removing and replacing two affected panels and fitting screw caps over smaller holes: Expert report dated 12 March 2020, Table 2.2, [6].
>
> 27. The tribunal only relied on photographs tendered in the appellant's expert report (reasons for decision at [57]) and failed to have regard to the other evidence before it before it made its decision with respect to the wardrobe joinery issue. That evidence included Hindmarsh's prior stated position with respect to rectifying the wardrobe issue, such that a fair and equitable solution would have been to recognise the defect and wholly replace the wardrobe.

55 In part, this submission appears to be an adequacy of reasons point in that it was submitted that it could be inferred that the Tribunal, in not referring to the evidence identified, had overlooked that evidence, and that the evidence was important or critical to the proper determination of the matter at hand.

56 This type of point was explained by McColl JA, with whom Ipp JA and Bryson AJA agreed, in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62] as follows:

> "In *Beale* (at 443) Meagher JA referred to the requirement that a judge should refer to evidence which is **important or critical** to the proper determination of the matter as the first of the three fundamental elements of a statement of reasons. While his Honour explained that **it was unnecessary to refer to the relevant evidence in detail**, especially in circumstances where it is clear that the evidence has been considered, he added that where such evidence was not referred to by the trial judge, **an appellate court may infer** that the trial judge overlooked the evidence or failed to give consideration to it, referring to *North Sydney Council v Ligon* 302; see also *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82; (2002) 54 NSWLR 333 at [150] per Spigelman CJ (Mason P and Grove J agreeing). Meagher JA added that '[w]here conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.'"
>
> (Our emphasis)

57 We do not agree the evidence identified was important or critical to the proper determination of the factual matter as to how many panels required replacement. There was never an issue that there were defects in the carcass, the question was the extent of those defects, the appropriate rectification method and the reasonable cost of rectification. True it is that the respondent had offered to replace the whole carcass, but the documents identified by the appellant do not, on a close reading, amount to an admission of fact that more than two panels were affected by defects requiring replacement.

58 The inspection notes referred to suffer from the same deficiency. In any event, the Tribunal had before it two experts who had both inspected the work and gave the evidence they did. The evidence of Mr Love, supported by reasonably contemporaneous photographs, was the weightier evidence to that of an inspection note made by a person who did not give any testimonial or oral evidence at the hearing.

59 In addition, the appellant did not make any submissions on the existence and weight to be given to that inspection note in closing submissions to the Tribunal. In those circumstances the Tribunal did not err in not referring to the inspection note in its reasons, and we would not infer that the Tribunal overlooked it, as it was only mentioned in opening submissions. The lack of any reference to it later in the proceedings is rather an indication that no-one at

the hearing considered it to be important or critical evidence to the resolution of the dispute as to the extent of the damage to the carcass. This is understandable given two experts who had both inspected the carcass gave evidence at the hearing.

60 The last item of evidence identified by the appellant was an earlier letter by Mr Love to the respondent dated 21 November 2019 in which he said:

> "Built in Robes are defective with non-trade finishes only to internal cabinetry surfaces where excess and poorly patched cutouts/penetrations have occurred. While these areas could be further patched and repaired a more suitable resolution may be complete or partial replacement of affected panels."

61 That evidence does not assist the respondent. The presence of defects was never in doubt, the question was the extent of the defects and the extent of the work required for rectification. On that latter matter, all Mr Love said in his letter was that "complete or partial replacement" was a better solution than further patching. Replacement of two panels, being Mr Love's final opinion, was not inconsistent with his letter, and vice versa. Therefore this letter was neither important or critical to the relevant issue.

62 Further, the decision made could not be said to be unfair or inequitable having regard to the evidence to which we have referred.

63 We refuse leave and dismiss Ground 4.

Ground 5 - Against the weight of evidence

64 The appellant's final ground was, subject to the grant of leave to appeal, that the Tribunal's decision in relation to the benchtop was against the weight of evidence.

65 The appellant's contention was encapsulated in its following written submissions:

> "32 The tribunal considered that polishing the kitchen benchtop would be a sufficient remedy (reasons for decision at [50]). The tribunal did not consider what should occur if that solution proved ineffective and failed to consider relevant evidence - being Inspection notes dated 25 September 2019 produced by Hindmarsh- before making its decision. These notes indicated that there had been a previous attempt to polish the kitchen benchtop and that polishing required heavy machinery. Hindmarsh's expert had himself predicted that hand polishing would be unsuccessful. The appellant's expert, Mr Nakhla, had also envisaged that hand polishing may prove ineffective for resolving the aesthetic issues and that complete replacement of the kitchen benchtop may

> be required: Report, 16 January 2020, p 10. The tribunal's conclusion as to the preferred solution was accordingly contrary to the evidence of two experts. Given the apparent evidentiary trend, the tribunal ought to have concluded that the benchtop was affected by discolouration and then identified the appropriate remedy given that condition.
>
> 33. The appellant seeks to hold Hindmarsh to its obligations, preferably with an appropriately-formulated work order under s 48O(l)(c)(i) of the Home Building Act 1989 (NSW). He considers that their relationship has not broken down, and that Hindmarsh ought to be required to undertake the necessary rectification work using quality products and high standards of workmanship."

66 Although a work order is preferable (s 48MA of the HBA), the Tribunal was, in the exercise of its discretion, entitled to make a money order instead – *Leung v Alexakis* [2018] NSWCATAP 11 at [139]; *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [19]-[32].

67 Although the appellant expressed a preference for a work order at [33] of his submissions quoted at [63] above, he did not appeal from the Tribunal's exercise of discretion in favour of the money order (nor advance any submissions in support of any such ground). Accordingly, we would not be minded to change the Tribunal's money order into a work order, let alone the work order contended for. Further, as the builder indicated it did not wish to return to site to carry out rectification work, we do not see any error in the exercise of discretion in any event.

68 As the Tribunal had decided on a money order as the appropriate form of relief it could not "consider what should occur if (the sanding and polishing) solution proved ineffective" (as the appellant submitted at [32] of his submissions) because a money order is a once and for all remedy.

69 As for the submission that the Tribunal failed to consider the inspection notes, again this seems in part to be an adequacy of reasons point (see [54]-[58] above).

70 Even putting that aside, there was no cross-examination of Mr Love to the effect of the submission now made, and the appellant's own expert opined that sanding and polishing was appropriate. In these circumstances, where the Tribunal accepted the evidence of the appellant's expert as to rectification method (a method accepted by the respondent's expert) and as to the

reasonable costs to do so, it could not be said the decisions was against the weight of evidence.

71 We refuse leave and dismiss Ground 5.

Conclusion

72 As we have dismissed all grounds of appeal we order that leave to appeal be refused and the appeal otherwise be dismissed.

Costs

73 We invited and received oral submissions on costs in the event either party succeeded / failed. We were told there were no offers of settlement, or other relevant factual matters of which we were not already aware, to take into consideration on costs.

74 The amount in issue on the appeal was in the order of $10,000 and thus the respondent needed to persuade us that special circumstances warranting an award of costs existed and that it was appropriate for us to exercise our discretion to make a costs order per s 60 of the NCAT Act. This was so because even though the original proceedings were subject to r 38 of the Rules, that rule applying to this appeal by reason or r 38A, due to the amount in issue in the appeal r 38 does not operate to displace s 60.

75 The respondent's submission boiled down to one that the appellant's appeal was hopeless and doomed to fail. We do not agree with that submission, at least to the point of accepting that the appellant's appeal was so weak, and the respondent's defence of the appeal so strong as to justify an order for costs in this jurisdiction where the underlying principle for cases involving sums of this magnitude is that each party is ordinarily to bear its own costs – see *Feng v OzWood (Australia) Pty Ltd* [2020] NSWCATAP 42 at [8] and *Choi v University of Technology Sydney* [2020] NSWCATAP 18 at [41].

76 In our opinion that relative strengths and weakness of each party's case does not give rise to circumstances out of the ordinary in the relevant sense, nor out of the ordinary in a way which would warrant an award of costs.

77 We order that each party is to pay his and its own costs of the appeal.

****

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