Civil and Administrative Tribunal

New South Wales

Case Name:	Agdiran v Owners Corporation SP83475
Medium Neutral Citation:	[2016] NSWCATAP 58
Hearing Date(s):	20 November 2015
Date of Orders:	8 March 2016
Decision Date:	8 March 2016
Jurisdiction:	Appeal Panel
Before:	P Callaghan SC, Principal Member K Rosser, Senior Member
Decision:	(1) The Appeal is dismissed. (2) The Application for leave to appeal is dismissed. (3) The order appealed from is affirmed. (4) The stay in respect of the order appealed from is terminated. (5) The proceedings are remitted to the Consumer and Commercial Division of this Tribunal for any extant issue as to the costs of the proceedings in that Division to be dealt with. (6) Any application by the Respondent for costs of the appeal is to be made with supporting submissions to be filed and served within 14 days of the publication of this decision and any submissions by the Appellant in response are to be filed and served within 14 days after service of the Appellant's application and submissions. Any such application will then be determined on the papers.
Catchwords:	APPEAL - residential strata title development – claim for breaches of warranties under Home Building Act – grounds covering adequacy of reasons, procedural fairness and sufficiency of evidence – appeal dismissed APPLICATION FOR LEAVE TO APPEAL – similar grounds – application dismissed
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Home Building Act 1989
Cases Cited:	Aceti v Burhan Pty Ltd [2015] NSWCATAP 55 Beale v GIO of NSW (1997) 48 NSWLR 430 Collins v Urban [2014] NSWCATAP 17

	Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management Marketing Pty Ltd (2013) 250 CLR 303 Gallow v Duflow [2014] NSWCATAP 115 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	Dorter & Sharkey, Building & Construction Contracts in Australia 2nd edn
Category:	Principal judgment
Parties:	Yusuf Agdiran (Appellant) Owners Corporation SP83475 (Respondent)
Representation:	Counsel: G Carolan - Appellant M J Dawson - Respondent Solicitors: Heard McEwan Legal - Appellant Maguire McInerney - Respondent
File Number(s):	AP 15/43328
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	7 July 2015
Before:	D Barnetson, General Member
File Number(s):	HB 14/27792

REASONS

Background

1 The Respondent, Owners Corporation SP83475 (the Owners Corporation), is the registered proprietor of the common property of a residential apartment complex comprising 3 lots at a property in West Wollongong (the property). The Appellant, Mr Yusuf Agdiran, as owner-builder (the Builder) carried out extensions and renovations on the existing improvements on the property in 2008 and 2009. The Builder then had a strata plan registered in respect of the property and sold the three apartments.

2 This is an appeal and an application for leave to appeal, against an order of the Consumer and Commercial Division of this Tribunal made on 19 June 2015 (written reasons in respect of which were published on 7 July 2015) that the Builder pay to the Owners Corporation $228,509.00 for breach of warranties under the Home Building Act 1989 (the appealed decision). For the reasons which follow, we have concluded that the appeal, and the application for leave to appeal, should be dismissed.

Subject Proceedings - Interlocutory

3 By application lodged in the Consumer and Commercial Division of this Tribunal on 28 May 2014, the Owners Corporation sought compensation from the Builder in respect of alleged breaches of the statutory warranties.

4 The following is a chronology of relevant events in the subject proceedings prior to the hearing on 19 June 2015:

> 22 July 2014 Directions hearing; parties appeared without legal representation; Owner Corporation's representatives included managing agent and building expert, Mr Andrew Connor; applicant was given leave to amend application to increase extent of claim; and proceedings were adjourned for a further directions hearing.
>
> 22 August 2014 Directions hearing; Builder was represented by a Solicitor; applicant's representatives included managing agent and Mr Connor; leave was granted for both parties to be legally represented; proceedings were adjourned to a further directions hearing pending a preliminary expert report to be provided on behalf of the Builder in response to Mr Connor's reports.
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> 20 October 2014 Directions hearing; both parties appeared without legal representation; Owners Corporation was assisted by managing agent and Mr Connor; Builder had received a preliminary report from a consultant and there was some agreement as to work that needed to be done by the Builder on the property; Builder informed Tribunal that he had anticipated being represented by a lawyer but the lawyer had not appeared; Owners Corporation was considering obtaining legal representation; Tribunal directed that by 1 December 2014 the Owners Corporation provide to the Builder and the Tribunal in person or by post copies of all documents on which it intends to rely, including a Scott Schedule, and that by 1 February 2015 the Builder provide the Owners Corporation and the Tribunal in person or by post a copy of all documents on which the Builder intends to rely; Tribunal noted that the parties were in settlement discussions and the proceedings were adjourned to a date to be fixed "early in the New Year, probably in February 2015".
>
> 16 February 2015 Proceedings had been listed for a three hour hearing that day; notice of that listing had been followed by application by the parties (including a letter signed by the Builder) to the Registry for an adjournment on account of the continuing performance of some rectification work and then advice by the Registry to the parties that the application had been refused and that the hearing listing stood; Mr Matthew Barnes, Solicitor, appeared for the Owners Corporation and there was no appearance by or on behalf of the Builder except that an interpreter was in attendance; Mr Barnes advised that none of the directions of 20 October 2014 had been complied with and he explained that there had been a partial settlement, that rectification work was currently taking place but was not completed, and that an adjournment of the hearing was sought; the adjournment was granted; directions were made that the Owners Corporation's evidence and Scott Schedule be served by 16 March 2015 and the Builder's evidence be served by 27 April

2015; and the matter was adjourned for hearing to a date to be fixed by the Registrar.

Subject Proceedings - Hearing

5 The matter was initially set down for hearing on 22 May 2015 but was adjourned at the applicant's request on or about 27 April 2015. The hearing took place at Wollongong on 19 June 2015 (where the interlocutory hearings had also taken place). The applicant was represented by Counsel and the respondent appeared himself and an interpreter was in attendance. At the commencement, among other things:

(1) The Tribunal Member explained that she had two volumes of material from the Owners Corporation but she had nothing from the Builder;

(2) The Member inquired of the Builder how he was going to deal with his evidence. The Builder (apparently speaking on occasions through the interpreter and at other times by himself) said:

> "I have my warranty papers and for me that's sufficient. And I finish I got no home warranty left. Home warranty is for 6 year, has been 7 year and I got … no home warranty left. I don't know have this one warranty for, but the home warranty is only for 6 year and I sold this to 2008 and the home warranty has been finished…".

(3) The following discussion ensued involving the Member, the Builder and the interpreter:

> Member: No, no, no. This is your evidence. Are you going to present that paperwork to them? Have you given them a copy of the paperwork that you're flourishing there?
>
> Builder: Yeah yeah, we will have done a copy for them.
>
> Member: When did you send them a copy?
>
> Builder: The builder, he send me for finish the balcony.
>
> Member: Yeah, but have you sent them recently as your evidence? Have you send it recently as your evidence?
>
> Interpreter: When the property was sold, they left …
>
> Builder: They all – they both – they got builder inspection before they buy.
>
> Member: Okay.
>
> Builder: And they wanted a home warranty … I called them and he told me might it to end up in court but she didn't call us first to get a claim number. I don't know how it is home warranty but …
>
> Member: Well I'm not here to give you advice. They have made a claim against you, Mr Agdiran and that's what I propose to hear today.
>
> Builder: But I got no …
>
> Interpreter: Mr Agdiran …
>
> Builder: Yeah, finish.
>
> Member: …they will go first and they will present their case, which includes the two folders of evidence. When they are finished…

Builder: I don't even know why they are suing me for.

Member: When they are finished, you will have a chance to put your case calmly and concisely and show them any paperwork that you are flourishing and me as well. Then I will decide what the legal position is and whether they have been successful in their claim.

Builder: He says I've received – I have not received any recent information, I do not know why I'm here, I do not have…

Member: Mr Agdiran, this has been going on for almost 11 months, right and you are perfectly aware of what the situation is because it's come before the Tribunal on the 22nd of July, on 22nd of August last year, on the 20th of October last year and on the 16th of February this year.

Interpreter: I know as a matter regarding the balcony and that matter was heard and finalised as far as I'm aware.

Member: No it was not, no it was not. On the 22nd of the eighth, when your solicitor was present, the matter was then adjourned and basically then it's gone on from there. You were there – you were present on the 20th of October…

Interpreter: So what do they want from me?

(4) Counsel for the Owners Corporation referred to the two bundles of documents and explained that when service of them on the Builder was originally attempted, they had been returned to sender (although the Owners Corporation says they were subsequently served, at the Builder's new address). Counsel informed the hearing that the quantum of the Owners Corporation's claim was $207,736.00 plus Goods and Services Tax.

(5) Following more discussion between the Member and Counsel there was further discussion involving the Member, the Builder and the interpreter:

Member: Mr Agdiran, they're seeking an order for $207,736. And that's what I'll be deciding today. Okay? Because it's scheduled for a hearing today. Alright. I think probably the best way to start is to have Mr Connor come forward and present his evidence as you're largely relying on that, is my understanding.

Counsel: Yes. Mardella Basett has provided an Affidavit but it really is to four matters. She's available to be cross-examined if necessary, otherwise I tender or read that Affidavit. But certainly Mr Connor is the principal witness for evidence.

Member: Okay, so what I'm going to do, Mr Agdiran, is to get their expert witness, Mr Connor, to come up and give his evidence and he'll be referred to the reports that he has provided and he will be questioned and you will have a chance to ask him any questions about his evidence, if you wish.

Interpreter: As far as I'm aware, the matter that was to be heard today should not go ahead because the maximum should be $30,000. Because it exceeds that amount, I actually would prefer to go to court and be represented by a lawyer.

Member: No, this – in this jurisdiction for home building matters, it is within the jurisdiction. The $30,000 was the previous amount for what's called general division matters, which is small claims by consumers against traders, but not against builders. And you were granted leave – Mr Agdiran, Mr Agdiran, you were granted leave to have a solicitor and you could have

brought one today if you had wished. So you have exactly the same opportunities here as you would have in court.

Interpreter: Okay, as far as I was concerned, the matter was in regard to the balcony and I thought that was matter was finalised. And even if I ring, I would not get an answer in regard to what today's issue was about.

Builder: First time I see.

Member: When did you ring?

Interpreter: I rang on a few occasions and I've had no proper answer.

Member: Well your solicitor was given all the paperwork. We had a letter from them on…

Interpreter: My lawyer has actually – we've actually disengaged.

Member: That's fine, but at the same time that the correspondence was sent to you, they were acting for you. They have provided their details to the Tribunal and we sent the paperwork to them at one stage. Now I'm afraid if they didn't pass that on to you, that is not the Tribunal's problem and you need to address that with your solicitors.

Interpreter: Okay, after I disengaged with the solicitor, I've got no further information or knowledge about these matters after separation.

Member: Well you attended on the 20th of October, personally, last year and it became apparent then what the application is about. Directions were made and then you – it was heard again on the 16th of February when further directions were made and sent to you, not your solicitor. And all of that made it quite clear what the situation was.

Interpreter: I do not know about this. All I know is the balcony.

Member: That's unfortunate, it has been done in accordance with the directions of the Tribunal and proper procedure. You have been afforded every opportunity to prepare your response for about 11 months. You have singularly failed to do so and I am going to proceed with the evidence that I have, including anything that you want to say will taken into account.

Interpreter: I do not have any evidence in front of me to rely on, so…

Builder: I need a chance to get a lawyer.

Interpreter: …it would not be just…

Builder: I need more time.

Interpreter: …therefore I need some more time to engage a lawyer.

Member: No, I'm sorry Mr Agdiran, I am not adjourning the matter. I made that abundantly clear on the last occasion. You are free to get legal advice afterwards to explore your options, but we are not adjourning this hearing.

Interpreter: I don't have any money – I don't have any money to pay anyway.

Member: Pardon?

Interpreter: I don't have any money or funds to pay…

Member: Well that's a different issue, that is not my concern. I have simply got to decide whether there has been liability on your part, any defects that have been identified in the building.

(6) The Owners Corporation's expert was sworn in, and copies of his report, the Scott Schedule and the supporting documents were given to the Builder. The Member questioned the expert in respect of each of the items in the Scott Schedule and gave the Builder an opportunity to comment on, and ask questions about, each of the items as they were discussed. In the course of responding to those opportunities, the Builder complained on occasions about matters such as not feeling well and the need to see a doctor, suffering from dizziness, having poor English, wanting an appeal, and the certifier having given inappropriate certifications.

(7) Towards the end of the expert's evidence, the Builder said to the Member:

> I want to say something. I don't want to hear some no more, just I want – you do your decision and finish it.

The Member responded:

> I'm not going to do the decision without hearing the evidence … Mr Agdiran I'm going to listen to the evidence. I have a responsibility.

At the conclusion of the expert's evidence, this exchange occurred:

> Member: …Mr Agdiran, he didn't know any of the owners before they employed him to come and do this work for them, so he is not a friend or an acquaintance of them, though obviously he knows them now, but he had no personal knowledge of them before they employed him, which they did through their strata manager.
>
> Interpreter: If everything you say there is correct, let the land owners or whoever they are to sue the people that gave these false certificates.
>
> Builder: That's not my problem anymore. Finished seven years.
>
> Interpreter: Plus it's out of warranty as well, so I'm not…

(8) Reference was then made by Counsel to the affidavit of Ms Bassett. There followed discussion between the Member, the Builder (again on occasions through the interpreter) and Counsel concerning the duration of insurance and other time-related matters, concluding with this exchange:

> Member: So what it is, they're not suing you in relation to the insurance, they're not making an insurance claim, they're talking action against you personally as the owner builder or the builder. And under the Act, the *Home Building Act*, there is a warranty at the time of seven years from the date of completion which was when that certificate was issued in November 2009.
>
> Builder: It's six year, not seven year.
>
> Member: Well even if it's six, that's only five years because they made this claim 12 months ago and that's when the time ends, that's when you count it from and that's five years after you finished the building. So even if it's six years, they made the claim within time.
>
> Builder: This man has to prove it first for all the engineer, certifier, council, window suppliers. He has to prove they all done defect.
>
> Member: Alright.
>
> Builder: And he has to prove, he has to go, he has to see when to prove is all this are no good and that's why this has to be call in the chap, they can call to the certifier, they can call everyone, they can – for a business, we can't have them here, that's because they're…they have to be here and talk why they give all the certificate, why they done it, why they done it for me.

Member: Alright. Is there anything else you want to tell me?

Builder: Nothing else, I'm saying for you, I…

Member: Right.

Builder: Another hearing I can get…

(9) The Member, after a short break, delivered oral reasons and made the order now appealed against.

Appealed Decision

6 The written reasons published on 7 July 2015 conform to the oral reasons given at the conclusion of the hearing on 19 June 2015. Significant aspects of the appealed decision are:

(1) The interlocutory stages of the subject proceedings as outlined above were noted.

(2) As to the hearing on 19 June 2015, the Tribunal recorded that "The applicant had served its evidence in accordance with the previous directions but the respondent had not served any evidence", and that:

> 7. The respondent several times requested an adjournment and further time to prepare his evidence. He claimed that he did not know the nature of the claim and was not able to proceed. Having considered the chronology set out above, the Tribunal was satisfied that he had been provided ample opportunity to prepare his case and that the matter should not be adjourned.
>
> 8. The applicant provided two volumes of documents but in reaching its decision, the Tribunal has considered only that evidence which was actually referred to at the hearing. This was essentially the oral evidence of Andrew Connor, for the applicant, together with his written report and various certificates, which were tabled. The oral evidence of the respondent was considered as well.

(3) The reasons went on to state that:

> 10. The Tribunal is satisfied that the provisions of the Home Building Act apply, as the respondent undertook the work as an owner-builder; he gave oral evidence to this effect at the hearing.
>
> 11. The Tribunal is also satisfied that the application was made within the requisite time limits under the Act, based on the various documents provided and the oral evidence of the respondent.
>
> 12. The Tribunal was satisfied that the applicant's witness, Andrew Connor, is independent and qualified to give the evidence he did. It is also satisfied that he had complied with the Tribunal's Code of Conduct for Expert Witnesses. As a consequence, considerable weight was placed on his evidence, including his expert opinion, in considering and assessing the applicant's claims.
>
> 13. There are seventeen items listed in the applicant's Scott Schedule. And each was considered in turn at the hearing, with the respondent having an opportunity to give his evidence and submissions on each.

(4) The Tribunal expressed its conclusions thus:

14. The respondent did not have any independent expert evidence to refute the evidence of Mr Connor. The Tribunal is persuaded by the evidence from Mr Connor that these claims of breaches of warranty have been proven on the balance of probabilities. It notes that the respondent has claimed that he relied on the various certifications given by his contractors, being the certifier, the fire safety inspector and the engineer and surveyor. However, even if this is the case, the respondent is responsible to the applicant for the building work under the Home Building Act; his employees or contractors are not.

15. The Tribunal is satisfied that the work undertaken by the respondent, as set out in the Scott Schedule, is defective and that the respondent is liable for these defects as a breach of the statutory warranties.

16. The Tribunal is also satisfied that the cost of rectification set out in the Scott Schedule by Mr Connor is a reasonable assessment of the likely costs; the respondent has not provided any evidence refuting the figures.

(5) It was ordered that the respondent pay to the applicant $207,736.00 plus GST of 10%, a total of $228,509.00, payable in full on or before 17 July 2015. The decision on costs was adjourned, with directions made for the exchange of submissions.

Appeal and Application for Leave to Appeal

7 Shortly before the appeal hearing on 20 November 2015 there were lodged in the Registry various documents including transcripts of the directions hearing and the hearing in the subject proceedings, an affidavit from Mr Matthew Barnes, the Owner Corporation's solicitor detailing procedural aspects of the subject proceedings (the Barnes affidavit) and a Further Amended Notice of Appeal. The Further Amended Notice of Appeal specified the grounds of appeal thus:

(1) That the Tribunal erred in failing to provide adequate or any proper reasons for determining that the appellant was liable to the respondent in the sum of $228,509.

(2) That the Tribunal erred in failing to afford the appellant procedural fairness by failing to:

(a) consider whether the appellant had been served with the evidence relied upon by the respondent at the hearing, being the report of Mr Connor dated 16 March 2015;

(b) whether the appellant had been provided with notice of the directions made by the Tribunal on 15 February 2015;

(c) whether the appellant had been provided with notice of the date fixed for hearing;

(d) whether the appellant, on the assumption that he had been served with the report of Mr Connor, had been provided with an adequate opportunity to prepare any evidence in response;

(e) by refusing the appellant's applications for an adjournment in order to obtain legal representation and expert evidence in response to that of the respondent.

(3) That the Tribunal erred in finding that the cost of rectification of the defective building work was $228,509.00 in circumstances where there was no admissible evidence to establish the cost of the work;

(4) Alternative, the Tribunal erred in accepting that the cost of rectification of Items 7.9, 7.10 and 7.11 in the Scott Schedule was $110,000 in circumstances where there was no evidence to support that finding.

8 The grounds for the application for leave to appeal were expressed thus:

The decision of the Tribunal was not fair and equitable in circumstances where:

(a) the Tribunal did not afford the appellant an opportunity to obtain legal representation and evidence in reply to that of the respondent, in light of the magnitude and complexity of the claim, which only became apparent from the respondent's expert report dated 16 March 2015;

(b) in circumstances where the appellant clearly did not have an adequate understanding of the English language and was not able to appreciate the procedures and requirements for the hearing of the proceedings;

(c) in circumstances where there was doubt as to whether the appellant had been served with the evidence relied upon by the respondent;

(d) in circumstances where (assuming the evidence of the respondent had been served) the appellant had an inadequate opportunity to consider the expert evidence of the respondent and to prepare evidence in reply;

(e) in circumstances where the Tribunal Member did not give any or any adequate consideration to the evidence or submissions of the appellant in relation to whether he in fact had carried out work which formed part of the respondent's claim; and

(f) in circumstances where the Tribunal Member did not give any or any adequate consideration to whether the appellant was required to carry out certain work which formed part of the respondent's claim.

Submissions and Consideration - Appeal

9 Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (the NCAT Act) relevantly provides that an appeal may be made to an Appeal Panel against a decision such as the appealed decision as of right on any question of law or with leave of the Appeal Panel, on any other grounds.

10 We will deal first with the Builder's challenge in the first ground of appeal that "the Tribunal erred in failing to provide adequate or any proper reasons for determining that the Appellant was liable to the respondent in the sum of $228,000". The adequacy of reasons involves a question of law. Counsel for the Builder and for the Owners Corporation in their submissions referred to various authorities. Both referred, for example, to *Aceti v Burhan Pty Ltd* [2015] NSWCATAP 55, and we repeat what was said in that case at [22] to [27]:

22. In addition to general law obligations concerning the giving of reasons for decisions, s62 of the Act provides that:

(1) The Tribunal (including when constituted as an Appeal Panel) is to ensure that each party to proceedings is given notice of any decision that it makes in the proceedings.

(2) Any party may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not already been provided to the party. The statement must be provided within 28 days after the request is made.

(3) A written statement of reasons for the purposes of this section must set out the following:

> (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
>
> (b) the Tribunal's understanding of the applicable law,
>
> (c) the reasoning processes that lead the Tribunal to the conclusions it made,

23. The adequacy of reasons in the Tribunal decisions at first instance was considered in *Collins v Urban* [2014] NSWCATAP 17 at [43] to [64]. We note in particular what was said at [49]:

> "One reason why reasons are generally required, notwithstanding a provision such as s62, is that if reasons for decision are neither sought nor prepared and an appeal or application for leave to appeal is lodged, the findings of fact and legal reasoning of the decision maker at first instance would not be available to the appellate body by way of written reasons. In many instances not having findings of fact and legal reasoning explicitly available may render effectively worthless any appeal right because the appellant body does not have a statement of the findings of fact, the relevant law and explanation of how the law was applied to the facts as found, by the decision maker at first instance."

And at [53]:

> "The other basis upon which it has been held that reasons are generally required to be given was recently reiterated by the Court of Appeal in Keith v Gal [2013] NSWCA 339 (per Gleeson JA at [109] as being that failure to provide sufficient reasons promotes 'a sense of grievance' and denies 'both the fact and the appearance of justice having been done' thus working a miscarriage of justice, citing Mifsud v Campbell (1991) 21 NSWLR 725 at 729: Beale v Government Insurance of New South Wales (1997) 48 NSWLR 430 at 442 per Meagher JA…"

24. We also note in [57] guidance as to some aspects to be considered concerning the adequacy of reasons:

> the content and detail of the reasons for decisions to be provided will vary according to the nature of the jurisdiction which the body in question is exercising and the particular matter the subject of the decision;
>
> the administration of justice in this regard requires a pragmatic and functional approach to the obligations imposed upon decision makers at first instance;
>
> not only is the obligation not universal in nature, but it is variable in its content and whilst transparency in decision-making is an important value, it

> is not cost free, and may involve separate parameters of quantity and quality;
>
> 25. There is perhaps within [57] of the Collins decision a suggestion of a cautious and not overly critical approach to the review on appeal of the adequacy of reasons in a decision under appeal. Such an approach could be seen to be particularly apposite in the context of provisions in the Act concerning practice and procedure in this Tribunal, notable among which are:
>
> > S36(1) The "guiding principle" for this Act and the procedural rules in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
> >
> > S36(4) In addition, the practice of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.
> >
> > S38(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.
> >
> > S38(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
>
> 26. Such a cautious and not overly critical approach would also be consistent with the need to acknowledge the first instance work load in this Tribunal, particularly in the Consumer and Commercial Division, where the daily lists are regularly long, the available hearing times can be limited, and often the parties do not have legal assistance.
>
> 27. In *Beale v GIO of NSW* (1997) 48 NSWLR 430 at 443 Meagher JA spoke of three fundamental elements of a statement of reasons: first, there should be reference to relevant evidence; secondly, there should be set out any material findings of fact and any conclusions or ultimate findings of fact reached; and thirdly, there should be provided reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Treatment of those three fundamental elements should generally be, in our opinion, apparent within a decision of this Tribunal.

11 It is convenient to take the matters canvassed there as a starting point for our consideration of this ground of appeal.

12 In respect of the three fundamental elements of a statement of reasons spoken of in *Beale v GIO of NSW*, we assess that:

(1) Reference to relevant evidence. The relevant evidence before the Tribunal comprised the written and oral evidence of the applicant's expert in respect of the items complained of and the oral comments made by the respondent on those respective items. That material was referred to in the written reasons at [10] to [13], as set out above in this decision.

(2) Findings of fact and any conclusions or ultimate findings of fact raised. These were contained in the written reasons at [14] to [16], as set out above in this decision.

(3) Reasons for making the relevant findings of fact (and conclusions). These were contained within paragraphs of the written reasons, particularly [12], [13] and [14].

13 Counsel for the Builder in his submissions suggested, in effect, that a degree of generality within the expression of reasons demonstrates a relevant inadequacy in them. For example, he referred to pages 29 to 31 of the transcript of the hearing where items concerning protection including a retaining structure and drainage, between the property and an adjacent creek were dealt with during the evidence of the Owners Corporation's expert, in the course of which there was evidence by way of comment from time to time by the Builder. Those comments by the Builder were in particular to the effect that he had not done that work. We are not persuaded by that complaint by Counsel, for three basic reasons:

(1) In relation to the example cited by Counsel, continuing questions from the Member on that issue demonstrated an alertness by her to the Builder's concern and her wish for an explanation concerning it from the expert. That explanation was given and it related to conditions on the development imposed by the local Council and the Department of Natural Resources. The oral reasons given by the Member included some comments (at p.47) a paragraph which appear to cover this issue, and which were not repeated in the subsequent written reasons:

> I also note that the Respondent has said that this was a renovation work and that some of the work about which Mr Connor had issue was pre-existing and not part of the scope of works. However, I am persuaded by Mr Connor's reference to the original developmental application and the bushfire requirements and so forth the work in those 17 items is in fact part of what is required and which was covered by the warranties under the Act.

(2) The appealed decision, we repeat, stated at [13]:

> There are seventeen items listed in the applicant's Scott Schedule. And each was considered in turn at the hearing, with the respondent having an opportunity to give his evidence and submissions on each.

The circumstances of the subject proceedings, particularly with them being under the the NCAT Act and being set down for disposition in a three hour special fixture hearing in Wollongong, did not require as a matter of law that separate reasons should have been given in respect of each of the 17 items in the Scott Schedule.

(3) The findings in the appealed decision were not (as Counsel for the Builder submitted they were) "bald conclusionary statements" as discussed in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [64] and [65], as in the appealed decision, the Member did explain why she made the relevant findings. The Member explained particularly, at [12] and [14] in the appealed decision, that she was satisfied that Mr Connor was "independent and qualified", that his evidence otherwise complied with requirements for expert evidence, that the Builder "did not have any independent evidence to refute the evidence of Mr Connor" and that the Builder claimed that he relied on certifications of others. It was in the context of those findings that the Member expressed herself to be persuaded to make the relevant conclusions or ultimate findings.

14 Accordingly, we find that the first ground of appeal has not been made out.

15 The second ground of appeal alleges that the Tribunal erred in failing to afford the Builder procedural fairness by failing in five respects, the first four of which deal

with matters concerning notice in respect of the hearing and the fifth of which relates to the Member's refusal to give the Builder an adjournment to obtain legal representation and expert evidence. We will commence with the first four of those allegations.

16 The first of those four allegations is that the Tribunal failed to consider whether the Appellant had been served with a report dated 16 March 2015 by Mr Connor. This report was contained within the Owners Corporation's 2 volumes of material referred to at the hearing on 19 June 2015. As we have noted above Counsel for the Owners Corporation pointed out to the hearing that what was apparently a first attempt to serve copies of those two volumes on the Builder had failed. We take it that Counsel (who also appeared at the appeal hearing) was also indicating to the Tribunal that service of that material on the Builder was later effected. Any query that may arise in this respect has been removed by the Barnes affidavit which was received in evidence at the appeal hearing (s80(3)(b) of the NCAT Act). Mr Barnes deposes that he first served the material with a letter dated 16 March 2015 posted to the respondent at an address in Coniston NSW 2500 but the letter and material were returned as being undelivered; that he thereupon ascertained from the Tribunal Registry that they had the Builder's address recorded as in Fernhill NSW 2519; that he then posted a letter dated 19 March 2015, with the material enclosed, to the Builder at that Fernhill address and that it was not returned as undelivered. The Barnes affidavit also attaches copies of numerous notices and letters forwarded by the Tribunal Registry, from July 2014 onwards, to the Builder at the Fernhill address and there is apparently no suggestion that any of these were returned as undelivered. We are satisfied that the material was effectively served on the Builder. We see no merit in this complaint by the Builder.

17 The next two of those four allegations assert that there were failures to consider whether the Builder had been provided with notice of the directions made on 16 February 2015 or of the date fixed for hearing. Other considerations apart, the last complaint seems to an extent to be baseless as the Builder actually attended at the appeal hearing on 19 June 2015. Within the attachments to the Barnes affidavit are copies of letters from the Tribunal Registry sent to the Builder at his Fernhill address, dated 16 February 2015, setting out in detail the orders made on 16 February and concluding: "a separate notice of the new hearing date will be sent to you in the near future"; and dated 31 March 2015 advising that on 16 February 2015 the Tribunal Member had directed that the matter be scheduled for a 3 hour hearing, seeking advice of his unavailable dated in May, June and July 2015 and advising if he did not provide unavailable dates by 8 April 2015, it would be assumed he did not have any dates that are unsuitable and the date for hearing

would be set. The attachments also included a Notice of Hearing (similarly addressed to the Builder at Fernhill) dated 15 April 2015 in these terms:

> The application has been listed before the Tribunal and you are required to appear at:
>
> Location: NSW Civil & Administrative Tribunal, Level 3, 43 Burelli Street, Wollongong NSW 2500
>
> Date and Time: Friday 22nd May 2015 at 1.15 PM (AEST)
>
> Please arrive at least 15 minutes before the start of the hearing.
>
> It is important that you are on time as the Tribunal may decide the matter in your absence.
>
> The decision made will be binding on you.
>
> The hearing will be sound recorded.

18 That notice was followed by a letter dated 27 April 2015 from the Registry to the Builder (at the Fernhill address) advising that the hearing on 22 May 2015 had been adjourned for the reason that the Owners Corporation was unavailable on that date, that there was no need to attend on that date and that written confirmation of the new hearing date would be sent to him shortly. A notice dated 30 April 2015 was forwarded by the Registry to the Builder (at Fernhill) advising:

> The application has been listed before the Tribunal and you are required to appear at:
>
> Location: NSW Civil & Administrative Tribunal, Level 3, 43 Burelli Street, Wollongong NSW 2500
>
> Date and Time: Friday 19th June 2015 at 1.15 PM (AEST)
>
> Please arrive at least 15 minutes before the start of the hearing.
>
> It is important that you are on time as the Tribunal may decide the matter in your absence.
>
> The decision made will be binding on you.
>
> The hearing will be sound recorded.

19 Those letters and notice would have been on the Tribunal file which the Member had on 19 June 2015. On this evidence, we reject these complaints by the Appellant.

20 The fourth of those allegations concerning hearing notice suggests that the Builder had not been given an adequate opportunity to prepare any evidence in response to Mr Connor's reports (assuming that the Builder had been served with those reports). It suffices to point out first that, as detailed in the Subject Proceedings – Interlocutory section of this decision, Mr Connor had obviously been involved from the outset of the proceedings on behalf of the Owners Corporation and that by 20 October 2014 the Builder had obtained and served a preliminary report from a consultant responding to Mr Connor's material (as it was then constituted), and

secondly, that, as detailed in paragraph 16 of this decision above, the Builder was served with all the material from Mr Connor by shortly after 19 March 2015, nearly 3 months before the hearing. Those circumstances sufficiently demonstrate that there is no justification for this suggestion and we reject it.

21 The fifth and final one of these allegations complains that there was an inappropriate refusal to grant an adjournment to the Builder. That application was dealt with in [7] of the appealed decision as detailed in paragraph 6(2) of this decision above. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management Marketing Pty Ltd* (2013) 250 CLR 303 at [51] the High Court said:

> In Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. The decision in Aon Risk Services Australia Ltd v Australian National University was concerned with the Court Procedures Rules 2006 (ACT) as they applied to amendments to pleadings. However, the decision confirmed as correct an approach to interlocutory proceedings which has regard to the wider objects of the administration of justice.

22 In this regard it is also appropriate to take into account the provisions of the NCAT Act as noted in *Aceti v Burhan Pty Ltd* at [26] set out above in paragraph 10 of this decision, particularly ss36(1) and 36(4). Against the background of such considerations, the interlocutory history of the matter set out above detailed in this decision particularly in [4] and [16] to [18] was such that it was not inappropriate for the Tribunal to have refused the Builder's application for adjournment (as was explained in the appealed decision at [7] as set out in [6] of this decision above). In these circumstances, we see no error of principle in the decision by the Tribunal to refuse the applicant's application for adjournment. This fifth allegation of failure to afford the Appellant procedural fairness also fails.

23 The second ground of appeal therefore fails.

24 The third and fourth grounds of appeal allege that in respect of some parts of the cost of rectification found by the Tribunal, there was no evidence or no admissible evidence. As was confirmed in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13] in item 7, whether there was no evidence to support a finding of fact would constitute a question of law. The Builder's complaints in this regard centre on Mr Connor's reliance within his report on costings estimates by Mr Russell Hayes, a builder, particularly in respect of the protection and drainage work between the property and an adjacent creek, as referred to in paragraph 13 above.

The Appellant points out that, unlike as had been done in respect of Mr Connor, Mr Hayes' opinions were not supported by evidence of Mr Hayes' expertise and adherence to Expert Witness Code of Conduct (as generally required by the Tribunal's Procedural Direction 3 Expert Witnesses). Clearly enough, it seems to us, Mr Connor accepted and adopted the reasonableness of Mr Hayes' costings for the purposes of his own assessments and conclusions, even if he might not have explicitly explained that in his reports. We see no sufficient evidentiary deficiency in this regard. Nor, contrary to submissions on behalf of the Builder, do we see any relevant deficiency in the expression of some of those costs as provisional figures; provisional sums (and prime cost sums) are a regular feature of estimating building construction costs (for example, *Dorter & Sharkey, Building and Construction Contracts in Australia* 2nd edn at [5.100]) and their inclusion in Mr Connor's estimates of rectification costs and the Tribunal's acceptance of those estimates as reasonable, do not give rise to any appellable error. We therefore conclude that the third and fourth grounds of appeal have not been made out either.

Application for Leave to Appeal

25 While, in our opinion, there is no demonstrated error involving a question of law, the Appellant's application for leave to appeal has to be considered. Clause 12(1) of Schedule 4 of the NCAT Act provides that an application for leave to appeal from a decision of the Consumer and Commercial Division of this Tribunal, such as this, may be granted:

> …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).

26 In *Collins v Urban* [2014] NSWCATAP 17 at [80] an Appeal Panel (including the President and a Deputy President) of this Tribunal, by way of summary of relevant general principles, after a review of a number of cases, said that:

> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact …
>
> (2) 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 …

27 The fairness and equitability of the appealed decision are challenged on six grounds (the leave grounds) in the Further Amended Notice of Appeal set out above in paragraph 7 of this decision. The first leave ground (allegedly not affording the Builder an opportunity to obtain legal representation and evidence in reply to the Owners Corporation's evidence) substantially repeats the fourth and fifth allegations made by the Builder in respect of its second ground of appeal. For the reasons we have given above in this decision in dealing with those allegations in respect of the second ground of appeal we confirm that we see no substance in the first leave ground.

28 The second leave ground involves complaints that the Appellant had such an inadequate understanding of the English language that he had an inadequate appreciation of the procedures and requirements for the hearing of the subject proceedings. When regard is had to considerations such as that the Builder had undertaken development of the property by extensions and renovations and strata subdivision, that he had had legal representation for a time during the subject proceedings but had evidently chosen not to continue with that representation, that he had obtained a preliminary report to respond to Mr Connor's evidence, that he had done some rectification work on the property around early 2015 and that he had the assistance of an interpreter at least for the purposes of the adjourned hearing on 16 February 2015 and the hearing on 19 June 2015, we cannot see sufficient merit in this leave ground.

29 The third leave ground again questions whether the Builder had been provided with the date fixed for hearing. In paragraph 17 of this decision we have deal with the complaint in respect of the third and fourth allegations within the second ground of appeal. We confirm that we reject this complaint.

30 The fourth leave ground again questions whether the Builder had an adequate opportunity to consider and respond to Mr Connor's evidence. In [18] of this decision we have considered and rejected this complaint in respect of the fourth allegation within the second ground of appeal and we similarly reject it here.

31 The fifth and sixth leave grounds repeat the complaints about no or no adequate consideration of whether certain of the allegedly defective work had in fact been the responsibility of the Builder. We have dealt with such complaints in [13] of this decision, and as we did there, we reject them here.

32 Thus we find none of the leave grounds to be established. We add that there were aspects of the hearing other than those referred to in the leave grounds on which the Builder apparently seeks to rely also: first, a report by Mr George Zakos, an expert building consultant, dated 20 October 2015 responding to Mr Connor's report, and secondly, what may be termed a somewhat investigative technique which the Member had adopted in respect of Mr Connor's oral evidence.

33 Mr Zakos' report was among the papers lodged on behalf of the Builder for the appeal hearing. We do not understand that there is any suggestion that such a report would not have been reasonably available to the Builder at the hearing of the subject proceedings. While that report may significantly challenge the evidence of Mr Connor, the fact alone of the report's existence now, does not bring it within Clause 12(1) of Schedule 4 of the NCAT Act which we have quoted above. We are not satisfied that this involves any reason to grant leave to appeal.

34 Despite the presence of Counsel for the Owners Corporation at the hearing, the Member herself did the questioning of Mr Connor. At the same time, she regularly gave the Builder opportunities to comment on Mr Connor's answers. Counsel for the Builder complains that this procedure involved a failure to explain to the Builder that he could cross-examine Mr Connor and relies in particular on *Gallow v Duflow* [2014] NSWCATAP 115 and s38(5)(b) of the NCAT Act which provides:

> The Tribunal is to take such measures as are reasonably practicable:
>
> (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
>
> (b) if requested to do so – to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
>
> (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

35 In *Gallow v Duflow*, an appeal was upheld in a case involving a proprietor's claim against a contractor in respect of faults in a residential swimming pool. Both parties had been without legal representation at the hearing in the Consumer and Commercial Division. The applicant proprietor had tendered a report by an expert but the expert did not attend to give evidence. The Tribunal had found the report to be persuasive. The Appeal Panel at [36] said:

> In the circumstances of this case, the rules of natural justice required the Tribunal to explain to the appellant that he had a right to question the respondent's witnesses, and to give him some explanation of "what the process was and why it

was important" (Williams v NSW Land and Housing Corporation [2012] NSWSC 1022 at [47]). If the Tribunal had done this, the appellant would then have had an opportunity to consider whether to request that those witnesses be made available for cross examination, and whether to request an adjournment so that this could occur.

36 In the present case, the Owners Corporation's expert was called to give oral evidence and as we have already explained the Tribunal regularly gave the Builder opportunities to comment on Mr Connor's answers. Those comments were received by Mr Connor and he dealt with them. The present case is thus quite different from *Gallow v Duflow*. The investigative questioning of Mr Connor adopted by the Member was, in our opinion, efficient, thorough and fair, in the circumstances. We are not persuaded that the complaint on behalf of the Builder involves any reason to grant leave to appeal.

37 We are not persuaded that the appealed decision was not fair and equitable or that the Appellant may have suffered a substantial miscarriage of justice on that or any other account.

Conclusions and Orders

38 As we have explained above, each of the Appeal and Application for leave to appeal should be dismissed.

39 It appears that the issue of costs of the subject proceedings has not been dealt with in the Consumer and Commercial Division and the proceedings should be remitted for that to occur.

40 The issue of costs in respect of the appeal was not the subject of developed submissions and the opportunity should be given to the Owners Corporation to prosecute any such application.

41 There is a continuing stay in respect of the order appealed from and that should be terminated.

42 The Appeal Panel therefore orders:

(1) The Appeal is dismissed.

(2) The Application for leave to appeal is dismissed.

(3) The order appealed from is affirmed.

(4) The stay in respect of the order appealed from is terminated.

(5) The proceedings are remitted to the Consumer and Commercial Division of this Tribunal for any extant issue as to the costs of the proceedings in that Division to be dealt with.

(6) Any application by the Respondent for costs of the appeal is to be made with supporting submissions to be filed and served within 14 days of the publication of this decision and any submissions by the Appellant in

response are to be filed and served within 14 days after service of the Appellant's application and submissions. Any such application will then be determined on the papers.

****

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