Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 - [2016] NSWCATAP 113

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:	**Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 [2016] NSWCATAP 113**
Hearing dates:	10 August 2015
Date of orders:	23 May 2016
Decision date:	23 May 2016
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member R Titterton, Senior Member
Decision:	(1) The appeal is allowed in part.

(2) Order 1 made by the Tribunal on 31 March 2015 is varied by substituting the amount of $112,900.49 in lieu of the amount of $316,212.99;

(3) The proceedings are remitted to the Consumer and Commercial Division of the Civil and Administrative Tribunal , as originally constituted, to re-determine the amount to be awarded in respect of item 24 recorded in the Schedule found in par [352] of the reasons for decision dated 31 March 2015 in accordance with these reasons and on the following terms:

(a) the area of the works in the tiled area is 223.2 m as recorded in the reasons for decision of the Consumer and Commercial Division of the Civil and Administrative Tribunal of 31 March 2015 at [258];

(b) the only issue for re-determination is the assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area;

(c) the assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area is to be determined:

(i) on the papers;

(ii) without a further hearing;

(iii) based on all relevant evidence originally before the Tribunal and not new evidence; and

(iv) subject to any directions which the Tribunal might consider appropriate, without further submissions.

(4) Subject to the following order, each party is to pay their own costs of the appeal.

(5) In the event either party contends that a different order for costs should be made, the following directions apply:

(a) any application for costs, including any evidence and submissions, must be filed and served within 14 days from the date of these reasons;

(b) any reply to any application for costs made pursuant to Order 5(a) must be filed and served within 28 days from the date of these reasons;

(c) any submissions in reply by the applicant for costs must be filed and served within 35 days from the date of these reasons;

(d) any submissions must include submissions on the issue of whether or not an order should be made dispensing with a hearing pursuant to s 50 (2) of the Civil and Administrative Tribunal Act 2013 .

(6) Save as provided above, the appeal is otherwise dismissed.

Catchwords:

Evidence – failure to consider, error of law
Construction of Deed – relevance of surrounding circumstances
Home Building Act 1989 – s 18D , prior enforcement
Betterment – circumstances when allowance should be made, onus of proof
Section 48MA – application to proceedings commenced prior to commencement of Home Building Amendment Act 2014

Legislation Cited:

Civil and Administrative Tribunal Act 2013
Home Building Act 1989
Home Building Amendment Act 2014
Strata Schemes (Freehold Development) Act 1973

Cases Cited:

Allianz v Waterbrook [2009] NSWCA 224
Australian Broadcasting Tribunal v Bond ("Bond Media case") [1990] HCA 33; (1990) 170 CLR 321
Beale v GIO of NSW (1997) 48 NSWLR 430
Bellgrove v Eldridge [1954] HCA 36, (1954) 90 CLR 613
Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2009] NSWSC 1302
Collins v Urban [2014] NSWCATAP 17
Codelfa Constructions Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337
Gagner Pty Ltd t/as Indochine Cafe v Canturi Corporation Pty Ltd [2009] NSWCA 413
Hyder Consulting (Australia) P/L v Wilh Wilhelmsen Agency P/L & Anr [2001] NSWCA 313
Kostas v HIA Insurance Services Pty Limited [2010] HCA 32
Mifsud v Campbell (1991) 21 NSWLR 725
Monteleone v AV Constructions Pty Ltd NSWCA 13 13 Dec 1989
NSW Land & Housing Corporation v Diab [2014] NSWCATAP 8
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35
Toll (FGGT) Pty Ltd (Formerly Finemores GCT Pty Ltd) v Alphapharm Pty Ltd and Ors (2004) HCA 52, 219 CLR 165
Tyco Australia Pty Ltd v Optus Networks Pty Ltd & Ors [2004] NSWCACA 333
Tzaneros Investments Pty Limited v Walker Group Constructions Pty Limited [2016] NSWSC 50

Texts Cited:

McGregor on Damages, 16th ed

Category:

Principal judgment

Parties:

Brodyn Pty Ltd (Appellant)
Owners Corporation – Strata Plan 73019

Representation:

Appearances:

Appellant: J Cameron- Solicitor
Respondent: P Bambagiotti- Counsel

Solicitors:

Appellant: Johninfo Lawyers Pty Ltd
Respondent: Grace Lawyers

File Number(s):

AP 15/31809

Publication restriction:

Unrestricted

Decision under appeal

Court or tribunal:
Civil and Administrative Tribunal
Jurisdiction:
Consumer and Commercial Division
Citation:
[2015] NSWCATAP 43
Date of Decision:
31 March 2015
Before:
D Goldstein, Senior Member
File Number(s):
HB 08/57503

Civil and Administrative Tribunal

REASONS FOR DECISION

1. In this matter the appellant Brodyn Pty Ltd (the builder) appeals from the decision of the Consumer and Commercial Division of the Tribunal (the Tribunal) dated 31 March 2014 (Decision). In the Decision, the Tribunal relevantly ordered the builder to pay Owners Corporation – Strata Plan 73019 (the owner) the sum of $316,212.99.

2. For the reasons that follow, the Appeal Panel has determined to allow the appeal in part, vary the money order made and remit an issue to the Tribunal for re-determination.

Background

1. The relevant background facts appear in the decision appealed from, namely:

    1. A contract was entered into on 23 June 2003 for the construction of premises (being part residential and part commercial premises), later to comprise the 17 lots being Strata Plan 73019 on registration. The contract was entered between the builder and the Titanium Group Pty Ltd (the developer), which company went into administration.

    2. Practical completion under the contract occurred in July 2004.

    3. The Strata Plan 73019 was registered on 17 August 2004. Pursuant to s 18 of the *Strata Schemes (Freehold Development) Act 1973* , the common property vested in the owner on that date.

    4. On 11 November 2005 a Deed of Release (the Deed) was entered into between the builder and the developer. The Deed provided:

        WHEREAS

        A. The [builder] pursuant to the Building Agreement dated 23rd June 2003, has made claims for payment in respect of the site at 175-183 Trafalgar Street, Stanmore "the Claims".

        B. The [developer] & [builder] deny liability to the other with regards to any claim relating to the said project.

        ....

        3 [The developer] agrees to pay [the builder] the sum of $ one dollar (inclusive of GST) within 7 days in full payment of all monies claimed by [the builder] in relations to the Claims.

        . . .

        5 In further consideration of the present herein contained [the builder and the developer] and each of them do hereby jointly and severally each by these presents release, remise and forever quit unto the other all and singular all manner of actions, adjudications, suits, causes of action, Proceedings, arbitration, debts, dues, judgments, costs and demands whatsoever both at law or in equity or arising under the provisions of any statute which either or both of them either alone or in conjunction with any other person from or corporation now have or could, would or might have but for these presents at any time or times have or have had upon or against the other by reason or on account or in any way connected with their business dealings.

        6 [The builder and the developer] each agree that the only obligation with regards to defects in the work shall be as defined under the Home Building Act and that the [The builder and the developer] shall maintain their own obligations under the Home Building Act 1989 and amendments.

The decision appealed from

1. At the hearing below, the owner submitted that it was entitled to the benefit of the statutory warranties that were implied into the contact by Part 2C of the *Home Building Act 1989* (the HB Act), in particular s 18D of the HB Act . Section 18D provides:

> 18D Extension of statutory warranties
>
> (1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.
>
> (1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.
>
> (1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.
>
> (2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

1. The builder submitted that, by operation of s 18D(2), the owner was not entitled to enforce the statutory warranties under s 18B. The basis of this submission was that the Deed had the effect that rights under statutory warranties in connection with certain deficiencies in work and materials had been enforced, so as to prevent the owner from maintaining a claim against the builder in connection with those same deficiencies in work and materials. This submission depended upon the proper construction of the Deed, particularly cll 5 and 6, and whether what occurred amounted to enforcement within the meaning of s 18(D)(2) of the HB Act .

2. The Tribunal found (at [36]) that s 18D of the Act operated to confer on the owner the right to enforce the statutory warranties contained in s 18B of the Act that the developer had as at 17 August 2004 (being the date the Strata Plan was registered) and that these rights were independent of and separate to the developer's rights to the statutory warranties: *Allianz v Waterbrook* [2009] NSWCA 224.

3. In resolving the issue of whether there had been enforcement, the Tribunal considered the terms of the Deed. The Tribunal found that cl 5 was a mutual release of actions that the parties to the Deed had against each other. The clause was drafted in "*wide terms to catch all conceivable claims*" including claims "*arising under the provision of any statute*".

4. In relation to cl 6 of the Deed the Tribunal said:

> 47 In my view this clause is relevant in circumstances where the builder is taking the position that the deed referred to had the effect that rights under statutory warranties in connection with certain deficiencies in work and materials had been enforced, such that section 18D (2) of the Act prevents the owner in these proceedings from maintaining a claim against it in connection with those same deficiencies in work and materials.

48 In interpreting clause 6, I take it that the defects in work being referred to are defects in work carried out by the builder pursuant to the building contract between the developer and builder relating to the premises.

49 I also interpret clause 6 as being an exception to clause 5 which is a mutual release clause of very wide application. In my view clause 6 can have no other meaning or application other than as an exception to clause 5.

50 In addition I interpret clause 6 to be a recognition by the builder and developer that obligations regarding defects in work are as defined by the Act, and not disposed of by clause 5, and that they will retain their own obligations under the Act in connection with such defects.

51 In my view the effect of clause 6 of the Deed is that the parties agreed that the issue of defects in the work would be exempted from the general releases contained in clause 5 of the Deed. In particular and of importance, clause 6 is a recognition that the builder and developer would continue to be exposed to the obligations imposed on them by the Act in connection with defective work.

52 In its submissions the builder comments on clause 6. It states it is unclear what effect clause 6 has and that it may be referring to maintaining obligations in respect to defects not the subject of the architects notice. With respect, I disagree. There is no reason to cast such doubt on the meaning of clause 6. The clause is expressed in clear language. It relates to defects as understood in the way that I have referred to.

1. The Tribunal dismissed the builder's defence based on s 18D(2) of the HB Act stating:

59 For the builder to be successful, it must establish that the developer had enforced the statutory warranties by virtue of the deed of release dated 11 November 2005.

60 The fact that the owner obtained the statutory warranties on 17 August 2004 and at that time the developer had not enforced the statutory warranties in connection with the defects the subject of these proceedings does not in my view dispose of the builder's section 18D(2) defence.

61 Section 18D(2) of the Act is clearly enacted to protect a builder in the position referred to above from being liable on more than one occasion to different parties in relation to the same 'deficiency in work or materials'.

62 I interpret clauses 5 and 6 of the Deed of Release to operate as a release by the developer of its rights against the builder based, among other things as the scope of the release is wide, on a breach of the contract or a breach of the warranties contained in section 18B of the Act and a release by the builder of its rights against the developer for money allegedly owning for work carried out in the construction of the premises.

63 However as regards other parties who may have rights against either the builder or developer, clause 6 of the deed is clear in that the builder and developer maintained their own obligations under the Act.

> 64 In that regard I note that the builder faced obligations under section 18B to the successors in title who came within section 18D of the Act and the developer faced obligations under section 18B to the immediate successor in title under section 18C of the Act. Those obligations were not released, and in the context of section 18D (2) of the Act, were not enforced since the builder and developer acknowledged that their obligations under those sections remained intact.
>
> 65 The owner's case in these proceedings is under section 18D of the Act. Its rights to enforce the statutory warranties in relation to the alleged defects which form the basis of its case were not by reason of clause 6 released and have not been enforced.

1. Relevantly for the purposes of this appeal, the Tribunal also made findings as to the quantification of damages for a courtyard slab and tiling and as to quantification of the rate allowable for the waterproofing planter boxes and courtyard tiled areas. The builder alleges errors were made by the Tribunal in these matters. Relevant facts and findings from the reasons of the Tribunal will be set out below.

Amended Notice of Appeal and builder's submissions

1. By an Amended Notice of Appeal filed 4 June 2015, the builder raises six ground of appeal. These are:

    1. *Ground 1* The Tribunal erred in law in its interpretation of cll 5 and 6 of the Deed of settlement entered into between the builder and the developer.

    2. *Ground 2* The Tribunal erred in failing to consider the builder's alternative submission as to the effect of cl 5 and 6 of the Deed.

    3. *Ground 3* The Tribunal erred in law in its quantification of damages for the courtyard slab and the tiling in concluding that there was no costing evidence offered by the builder's expert, when such evidence had been tendered.

    4. *Ground 4* The Tribunal erred in its quantification of the rate allowable for the waterproofing planter boxes and courtyard tiled areas by providing the owner a betterment to what finish the contract provided for.

    5. *Ground 5* The Tribunal erred in allowing $28,746.63 for GST, in that the claim had been abandoned by the owner. This ground was conceded by the owner in its Reply to Appeal and during the course of the appeal hearing.

    6. *Ground 6* The Tribunal erred in failing to have regard to s 48MA of the HB Act , by not considering the appropriateness of making a work order against the builder, in lieu of an order for the payment of a sum of money.

1. Each of the grounds is amplified in the builder's amended written submissions.

Ground 1

1. The builder submits that the Tribunal's interpretation of cll 5 and 6 of the Deed was not reasonably open to it, and that by reason of the matters leading up to the execution of the Deed,

the builder had been relieved of any obligation in regards to known defects, as a consequence of those defect works being removed from the contract pursuant to the determination of the architect. Accordingly, the builder submits that it had no defects to maintain.

2. The builder submits that on a proper construction of cl 6, the defects obligations that were intended to survive the operation of the Deed were not third party defect obligations, but rather defects which were not part of the subject matter of the parties' dispute leading up to the Deed.

3. The builder submits that the Tribunal's findings at [62] and [63] are predicated on an interpretation of cll 5 and 6 that the parties intended to settle defects (whether or not in dispute at the time), but sought to ensure that the parties remained liable to third parties for all defects. In summary, the builder submits (submissions at [46]):

> The following matters would weigh against the Tribunal member's interpretation being correct:
>
> 1. There is no apparent intent in the deed to depart from the presumption that the parties to the deed are prescribing their own obligations and liabilities to each other.
>
> 2. Both the developer and builder have the exact same scope of liability to non-parties in respect of defects. It is difficult to see how the clause as interpreted would be enforced by either party.
>
> 3. There is no clear expression of intent in that clause 6 is intended for the sole benefit of third parties (even when read in light of clause 5). The clause is stated generally as the parties maintaining their own obligations.
>
> 4. Only a non-party could potentially benefit from that interpretation, but it is not clear from the deed how that benefit is envisioned, or indeed, enforced.
>
> 5. The clause is not enforceable by third parties. A construction which presumes the clause is for the benefit of a third party but does not provided that third party any rights to enforce the clause should be avoided.
>
> 6. A construction which is inconsistent with another clause ought to be avoided. If Clause 6 is to encompass all and any liability for breach of statutory warranties (a finding made by the Tribunal member at para 62 and 63 of the judgment), it is inconsistent with clause 5 which releases that liability.
>
> 7. It ignores the substance of the matters the parties negotiated and settled between them.
>
> 8. The only defects for which liability to third parties was to remain were defects "*not part of the subject matter of the parties dispute between the parties leading up to the Deed*". That is the parties settled their disputes about known defects but not unknown defects.

Ground 2

1. The builder submits that the Tribunal failed to consider a critical sequence of events leading up to the execution of the Deed; that is, immediately prior to the entry of the parties into the Deed, the builder was not liable to the developer for the scheduled defects as the developer had elected to take over these works. The builder submits that this is essential to understanding the objective purposes of cll 5 and 6 of the Deed.

2. In summary, for the reasons set out at [56] to [60] of its amended submissions, an adjustment had the effect of reducing the contract price, and removing the stated defects from the contract. As a consequence, those obligations then fell outside the contracted scope of works.

3. The builder submits that the ability of parties to take works away by agreement (or otherwise) results in the person who was previously obligated to perform those works being released from those obligations: *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302. The builder also submits this argument, which the builder says was originally put to the Tribunal, was not addressed by the Tribunal in its reasons.

4. Finally, the builder says that the defects to which the claim relates were the subject of prior enforcement and therefore s 18D precluded the owner from recovery. Alternatively, the Tribunal failed to analyse the competing expert evidence on this issue which remains undetermined.

Ground 3

1. The builder submits that the Tribunal erred in finding at [258] that the only evidence of the cost of rectifying the failure to waterproof was that the expert evidence of Mr Roberts tendered by the owner. The builder submits that the Tribunal erred in that it overlooked the evidence of its expert Mr Taylor.

2. The difference in quantum calculated by the two experts is approximately $120,000 plus 8% for overheads and profit and 15% for supervision. The builder submits that is an amount of $160,570.90.

Ground 4

1. The builder submits that the adoption of the owner's expert's costing resulted in a betterment to the owner in that the preferred costing for the rectification method exceeded the specification provided for in the contract. The builder submits that the damages assessed allowed for a two layer sheet membrane system, whereas the contract specification expressed a lessor standard. In support of this submission the builder relies on the principles enunciated in *Bellgrove v Eldridge* [1954] HCA 36, (1954) 90 CLR 613.

Ground 5

1. As noted above, the owner conceded this ground in its Reply and at the hearing.

Ground 6

1. Here the builder relies on s 48MA of the HB Act which provides;

> 48MA Rectification of defective work is preferred outcome in proceedings

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

1. The builder submits that while the proceedings were commenced before the insertion of s 48MA into the HB Act, as the proceedings were determined subsequent to that insertion, s 48MA applies. The builder submits that there is no analysis in the reasons for decision of whether a rectification order is appropriate, and whether this was the preferred outcome. The builder submits that, if successful on this point, the Appeal Panel should order the builder to undertake the rectification works.

2. The builder also addresses the owner's submissions on this issue in its amended submissions. The owner submits in its Reply that s 48MA was introduced into the HB Act by the *Home Building Amendment Act 2014* (the HB Act 2014), which took effect on 15 January 2015. Part 20 of Sch 4 to the HB Act, cl 121(2)(a) provides that amendments arising from the HB Act 2014 do not apply to proceedings commenced before those amendments. The builder submits that the transitional provision in Sch 4, Pt 20, cl 121 is directed to amendments which affect the substantive rights and obligations to existing proceedings. It submits that the nature and intent of that transitional provision is not intended to apply to amendments regarding the procedural rules of the Tribunal, in particular the exercise of the Tribunal's judgment in existing proceedings according to those procedural rules.

Amended Reply to Appeal, Notice of Contention and Owner's submissions

1. The owner's response to the builder's six grounds of appeal can be summarised as follows:

    1. *Ground 1* The owner submits that there was no error in the Tribunal's interpretation or construction of cll 5 and 6 of the Deed, and the construction reached by the Tribunal was open to it.

    2. *Ground 2* The owner submits that the Tribunal's findings and conclusions were open to it and that there was no error in the findings.

    3. *Ground 3* The owner submits that there was no error in the Tribunal's analysis or approach to the evidence; that the Tribunal's assessment of the evidence was finding of fact, not a question of law and that, in any event, the builder's submission as to the evidence is wrong as its expert's evidence was presented on a limited basis – that of the replacement of the drummy tiling alone – and not to the scope accepted by the Tribunal.

    4. *Ground 4* The owner submits that there was no error in the Tribunal's assessment or approach, and that the builder gave no evidence of betterment.

    5. *Ground 5* The owner concedes that this ground should succeed, and the Tribunal's award should be reduced by the amount of the GST, namely $28,746.63.

6. *Ground 6* The owner submits that this ground of appeal is misconceived, in that s 48MA was introduced into the HB Act by the *Home Building Amendment Act 2014* (the HB Act 2014) and is not retrospective for the reasons set out above.

Notice of Contention

1. The owner submits that it supports the orders of the Tribunal save for one issue. The owner supports the Tribunal's finding at [66] of its reasons that the builder's s 18D(2) defence should be dismissed, but for reasons other than those stated by the Tribunal. In this respect the owner submits:

> The finding at para [60] involves an error of law in the construction of sec 18D(2) of the *Home Building Act 1989* (HBA).
>
> The Tribunal held that an enforcement of the Statutory Warranties by the developer (as predecessor in title to the Owners Corporation), that occurs after the creation of the Statutory Warranties held by the Owners Corporation could be relevant for the purposes of sec 18D(2) .
>
> On the true construction of sec 18D(2) , the only relevant 'prior enforcement' is one that occurs before the creation of Statutory Warranties in a successor in title.

1. Finally, the owner submits that, to the extent that the builder requires a grant of leave to appeal, there is no allegation or substantiation of a substantial miscarriage of justice arising from the matters about which leave can properly be sought.

Owner's submissions

General

1. The owner makes the preliminary point that the builder is unclear about whether it is seeking leave to appeal or whether it is appealing as of right on a question of law. It submits that any application for leave must satisfy the requirements of cl 12 of Sch 4 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), namely that it has suffered a substantial miscarriage of justice because the decision was relevantly not fair and equitable or against the weight of the evidence.

2. In relation to ground 5, the owner submits that while there is an argument that the owner is entitled to a GST allowance, the case was conducted on the basis that the owner would not claim GST in light of the potential for input tax credits: *Gagner Pty Ltd t/as Indochine Cafe v Canturi Corporation Pty Ltd* [2009] NSWCA 413.

Notice of contention

1. As noted above, the owner submits that, while it agrees that the Tribunal was correct in dismissing the builder's s 18D(2) defence, the Tribunal should do so for different reasons other than those stated at [60] of the Decision. The owner submits that because the strata scheme was registered before the Deed, the statutory warranties be enforced were different to those that were the subject of the deed, and therefore s 18D(2) "did not come into play at all".

Ground 1

1. The owner submits that the builder's construction of cll 5 and 6 would have the effect of:

> "stripping third parties (who by definition have nothing to do with the contract) from rights – to the mutual advantage of the Builder and Developer. Such a construction is plainly absurd as well as being against policy. It is impossible to see how the Owners rights to enforce the Statutory Warranties as against either or both of the Developer and Builder could be affected by an agreement, to which the Owners were not a party, in which the Builder and Developer agree that they each would be free from liability to the Owners.

1. In summary, the owner submits that the builder's submissions do not displace the plain and logical construction to cll 5 and 6 of the Deed given by the Tribunal.

Ground 2

1. The owner submits that the builder's submission is misconceived, and appears to be based on an argument that when the architect issued an invoice to the builder for defective work, this amounted to a "*negative variation*" which removed the obligation to rectify defects from the builder's scope of works.

2. The owner submits that, from a contractual perspective, this is misconceived and, even if there was a financial adjustment to the contract in respect of the quality of the work done, this would not affect any statutory warranties and the question whether they had been breached.

3. The owner further submits that, as a matter of logic, if the rectification of defects was taken from the builder's scope of works, not only would that not affect the statutory warranties, "*the debate*" about defects rectification could not logically have featured in the releases in the Deed, making the point otiose.

Notice of Contention Point

1. In answer to both grounds 1 and 2, the owner submits that:

    1. Upon registration of the strata plan, the owner came into existence and became the beneficiary of a suite of statutory warranties,

    2. Those warranties were in the same terms (s 18B) but were independent to those held by the developer (s 18D). Their creation arose because the developer had warranties, but the warranties were not the same; there was no statutory assignment of the developer's warranties:.

    3. Because those rights arose before the Deed, and before any "*negative variation*", they had an independent existence at the time the Developer might have compromised its rights under the warranties. Having an independent existence necessarily means that the developer's compromises had nothing to do with the owner, which had its own rights.

4. The Tribunal erred in making in findings at [60] to [61] of the Decision, namely that:

> 60 The fact that the owner obtained the statutory warranties on 17 August 2004 and at that time the developer had not enforced the statutory warranties in connection with the defects the subject of these proceedings does not in my view dispose of the builder's section 18D(2) defence.
>
> 61 Section 18D(2) of the Act is clearly enacted to protect a builder in the position referred to above from being liable on more than one occasion to different parties in relation to the same 'deficiency in work.

as, the critical feature of s 18D(2) is the reference to "*the warranty*", which "*has already*" been enforced. The owner submits that this is clearly a reference to warranties enforced before the succession from one title holder to another.

1. The Tribunal was mistaken in its construction of s 18D(2) in light of *Allianz* . Section 18D(2) provides protection to builders, where owners inherit an independent suite of statutory warranties except those that have already been enforced. Section 18D(2) was not intended to allow a builder and developer to come together to strip a third party of its rights, by a mutually convenient deal between themselves. In principle, a successor in title should know (or can ask) what has already been enforced; but a stranger to the bargain has no such chance. Accordingly, the owner submits that there is no policy justification for this. In effect, there was no enforcement of the relevant statutory warranties and the rights of the third party successor in title could not otherwise be removed by the Deed to which the owner was not a party.

Ground 3

1. The owner submits that the builder's submission that the Tribunal overlooked its expert costings is wrong. The owner submits that the builder did not advance evidence to cost the scope as found, namely the whole of the terrace, and that the builder's ground of appeal is flawed and should fail.

Ground 4

1. The owner submits that the evidence before the Tribunal, from Mr Roberts for the owner and Mr Jankovich, was that a "two layer torch applied waterproof membrane" was the appropriate provision of a waterproof membrane. The owner submits that the builder's better argument is wrong, in both a practical as well as a legal sense. In providing a scope of work that made the provision of a waterproofing membrane for its purpose, there is no sense of extravagance or the privilege of betterment. The owner submits that the issue simply does not arise.

Ground 5

1. This has been dealt with elsewhere in these reasons.

Ground 6

1. As noted above, the owner submits that s 48MA does not, and cannot, apply to these proceedings.

Jurisdiction

1. The owner also submits that the Appeal Panel lacks jurisdiction to hear this appeal. This submission depends on the meaning and effect of the transitional provisions of the relevant legislation when the then Consumer Trader and Tenancy Tribunal ceased to exist upon its assumption into the NSW Civil and Administrative Tribunal (NCAT) from 1 January 2014. The owner submits, albeit somewhat faintly (in oral submissions the owner's counsel described this as "not an elaborate point"), that the Appeal Panel erred in its decision *NSW Land & Housing Corporation v Diab* [2014] NSWCATAP 8, in that the Appeal Panel did not correctly apply the "in respect of" feature of the relevant transitional provisions, and focused inappropriately on the chapeau as limiting the operation of the transitional provisions.

The builder's submissions in reply

1. The builder made the following submissions in reply.

Ground 1

1. The meaning of a clause is ascertainable by what a reasonable person would understand it to mean, and this process requires consideration not only of the text of the document, but also the surrounding circumstanced known to the parties and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35. In that context, it is significant that the parties intentionally included the word "*own*" in the phrase "*maintain their own obligations*", which appears in cl 6 of the Deed.

2. The builder submits that, at the point of time that the Deed was signed, by reason of the Superintendent's action of taking the defect rectification works out of the hands of the builder and claiming damages for those breaches, that clause would be directed in the first instances towards the developer's obligations in respect of those defects so taken out of its hands and, in the second instance, to the builder's obligation to the defects not taken out of its hands. In summary, at the point of time that the deed was signed, the builder did not owe the developer any particular obligations as to those defects taken out of its hands.

3. The real issue is whether the underlying and listed defects were included in the Deed. Paragraph [62] of the Decision confirms that the Deed did encompass resolution of the defects claim, as between the parties.

Ground 2

1. The builder disputes the owner's characterisation of the invoice and submits that the action taken by the Superintendent was not merely a financial adjustment but had the corresponding effect of taking "*the defect works*" out of the hands of the builder.

2. The builder submits that it is not trying to escape the consequences of a breach of the statutory warranty, it "*is simply trying to avoid paying twice*". In conclusion, it submits that:

The question to be answered is not so much whether those actions affected any accrued rights of the Owners Corporation, but rather whether s18D(2) of the Act is enlivened to protect the builder from double enforcement. If such protection is available, the Owners Corporations rights are not able to be enforced by the operation of that section. As between competing interests of the Owners Corporation and the Builder, [Parliament] has legislated to provide the builders protection against double payment, notwithstanding, the consequence for the Owners Corporation is unable to enforce the warranties against the builder.

Notice of contention

1. As to the owner's notice of contention, the builder submits that:

    1. There is nothing in s 18D which identifies the date of succession as being the date on which the section ceases to have effect. It merely prevents the successor/non-contracting owner from seeking to enforce a warranty if a predecessor has already enforced.

    2. The successor/non-contracting owner does not lose the right, it merely cannot enforce it.

    3. If any date can be ascertained from s 18D , it is the date when the successor/non-contracting owner seeks to enforce the warranty.

    4. Section 18D(2) of the HB Act balances the rights of the successor in title against the builder having to pay twice for the same defect, and it matters not whether the successor in title takes with knowledge of the defect or enforcement or not. There is nothing in s 18D(2) which limits the operation of the section to a date which the successor in title acquires the land.

Ground 3

1. The builder submits that what is in issue is that the Tribunal concluded that there were no costings available to consider, when in fact there were. It submits while it accepts that the (drip tray) solution proposed by its expert was not accepted by the Tribunal, the expert provided alternative costings at Appendix e to his report dated 8 September 2011.

Ground 4

1. The builder submits that there was no finding by the Tribunal as to what was specified, or that a liquid membrane system was inadequate to meet the requirements of the warranties. It submits that while the Tribunal found that the membrane laid by the builder had failed, it did not follow that any liquid membrane would fail, and that to the effect that Mr Jankovich gave evidence to this effect, his evidence cannot be relied on as was not admitted as an expert in the proceedings and was unlicensed to do the building works.

Grounds 5 and 6

1. The builder makes no additional submissions on these grounds in its submissions in reply.

Consideration

1. The Decision the subject of this appeal relates to proceedings for orders under the HB Act which had originally been commenced by the owner (the successor in title to the developer) in the Consumer Trader and Tenancy Tribunal pursuant to *Consumer Trader and Tenancy Tribunal Act, 2001* (CTTT Act).

2. In accordance with cl 7 Sch 1 of the NCAT Act, upon its establishment on 1 January 2014, NCAT became entitled to determine the proceedings. The proceedings were heard in April 2014 and the Decision published on 31 March 2015.

3. Pursuant to ss 32 and 80(2) of the NCAT Act there is a right of appeal from a general decision made by the Consumer and Commercial Division:

    1. As of right on a question of law; and

    2. With leave on any other question.

1. Where leave is required, cl 12 of Sch 4 of the NCAT Act provides that leave may only be granted if the appellant may have suffered a substantial miscarriage of justice. The principles applicable to the grant of leave were dealt with by the Appeal Panel is in *Collins v Urban* [2014] NSWCATAP 17.

Jurisdiction to hear the appeal

1. As indicated above, the owner sought to challenge the jurisdiction of the Appeal Panel to hear and determine this appeal. In doing so, the owner sought to challenge the decision of the Appeal Panel in *NSW Land and Housing Corporation v Diab* [2014] NSWCATAP 8.

2. The substance of the owner's submission is that:

    1. Clause 7 (3) (b) of Schedule 1 of the NCAT Act provides that "*any Act, statutory rule or other law that would have applied to or in respect of the proceedings had (the NCAT Act) and the relevant amending Acts not been enacted continue to apply.*"

    2. By using the expression "*in respect of*" the legislator intended to preserve any right of appeal that might otherwise have applied had the CTTT not been abolished.

    3. The Appeal Panel in *Diab* incorrectly focused on the chapeau in the clause as limiting the operation of the clause.

    4. Rights and avenues for appeal are regulated by s 67 of the CTTT Act.

1. The owner sought to develop these submissions in oral argument. In this regard the owner submitted that the Appeal Panel was not a separate Tribunal. The owner appeared to submit that the proceedings originally commenced in the CTTT carried with them an uncrystallised right of appeal. In essence that right was preserved by the operation of cl 7(3)(b) of Sch 1 of the NCAT Act

2. In our view, none of the submissions made by the owner demonstrate that the decision in *Diab* is incorrect, or that the Appeal Panel lacks jurisdiction to hear and determine the present appeal.

3. In this regard, it is unnecessary to determine whether or not cl 7(3)(b) preserved a particular (perhaps alternative) right of appeal. Rather, as made clear by the Appeal Panel in *Diab* the question is whether or not the Decision is a general decision of the Tribunal, that is of NCAT, to which s 32 of the NCAT Act applies so that there is a right of appeal pursuant to s 80 of the NCAT Act .

4. As indicated above, these proceedings were commenced in the CTTT. However, the hearing of the proceedings commenced on 14 April 2014, after NCAT had been established, the establishment date being 1 January 2014. Therefore the proceedings were "*unheard proceedings*" as defined by cl 6 of Schedule 1 of the NCAT Act because they were "*proceedings that had not been heard before the establishment day by the court or existing tribunal in which the proceedings were instituted or commenced* ". Unlike the situation in *Diab*, these proceedings were not "part heard proceedings" within the meaning of cl 6 of Sch 1 of the NCAT Act because they were not "*pending proceedings where the Court or existing tribunal in which the proceedings were instituted or commenced had begun to hear (had not determined) the proceedings before the establishment day."*

5. Consequently, cl 7(1), and not cl 7(2), of Sch 1 of the NCAT Act is the applicable transitional provision authorising NCAT to hear and determine the proceedings.

6. Clause 7(1) of Schedule 1 of the NCAT Act provides:

> Unheard proceedings in an existing tribunal are taken, on and from the
>
> establishment day, to have been duly commenced in NCAT and may be
>
> heard and determined instead by NCAT.

1. In our view, the language of cl 7(1) is clear and unambiguous. The present proceedings are taken " *to have been **duly commenced in NCAT** and may be heard and determined **instead by NCAT** "* (emphasis added). That is, the Tribunal is exercising jurisdiction conferred upon it under the NCAT Act to hear and determine the proceedings because the proceedings are taken to have been "*duly commenced*" in NCAT.

2. There is no dispute that the jurisdiction to hear the present claim arises under the HB Act . The jurisdiction given to the Tribunal to hear and determine such claims commenced in NCAT is assigned to the Consumer and Commercial Division of NCAT as provided in cl 3 of Schedule 4 of the NCAT Act . In exercising its functions in determining such claims NCAT is exercising its " *general jurisdiction*". In this regard s 29 provides"

> (1) The Tribunal has ***general jurisdiction*** over a matter if:
>
> (a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and
>
> (b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

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

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

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

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

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

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

1. Because:

    1. The present proceedings are taken to have been "*duly commenced*" in the Tribunal;

    2. The Tribunal is authorised to hear and determine claims under the HB Act ;

    3. The Tribunal in hearing and determining unheard proceedings "*instead*" of the CTTT;

    the Tribunal is exercising general jurisdiction under the NCAT Act in respect of unheard proceedings.

1. It follows that the decision of the Tribunal in respect of the unheard proceedings is a "*general decision*" as provided by s 29(3) of the NCAT Act .

2. The owner sought to rely on the provisions of cl 7(3)(b) . We understand the submission to be to the effect that the preservation of earlier rights in connection with the original proceedings meant that the Tribunal was to determine the earlier proceedings as if it were the CTTT. To the extent

this interpretation suggests the Decision is therefore a decision of the CTTT, such an interpretation is inconsistent with the express language of cl 7(1) and the provisions of Schedule 4.

3. Even if the Tribunal is taken to be exercising the functions of the CTTT or is to apply "*the provisions of any Act, statutory rule or other law that would have applied to or in respect of the proceedings* ", it is clear from the language of cl 7(1) that any determination of unheard proceedings is a decision of the Tribunal, that is NCAT, and not the CTTT.

4. Further, to the extent that cl 7(3)(b) is inconsistent with the express grant of jurisdiction conferred by the operation of cl 7(1) and Sch 4, the provision of Schedule 4 prevail. In this regards s 29(3) of the NCAT Act provides:

> The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of this Act or the provisions of the procedural rules.

1. None of the submissions made by the owner would lead us to conclude that the reasons and conclusions of the Appeal Panel expressed in *Diab* at [31] - [34] are incorrect. The owner suggested that the Appeal Panel in *Diab* placed excessive emphasis upon the words in the chapeau of cl 7(3) and ought to have concluded that an "*uncrystallised*" right of appeal from a decision of the CTTT pursuant to s 67 of the CTTT Act was preserved. However, the words in the chapeau clearly confine the operation of cl 7(3)(a) and (b) to a determination of unheard and part heard proceedings. Further, the text of cl 7(3)(b) makes clear that the provisions only apply "*to or in respect of the proceedings*", rather than in respect of any subsequent proceedings by way of appeal.

2. The submission that the Appeal Panel and proceedings before it formed part of the original proceedings determined by the Tribunal sitting in the Division at first instance is misconceived and should be rejected. It ignores the fact the Appeal Panel exercises a separate and distinct jurisdiction which arises at the conclusion of the Division proceedings where, in the present case for example, a general decision has been made.

3. Section 32 of the NCAT Act sets out this jurisdiction in the following terms:

> 32 **Internal appeal jurisdiction of Tribunal**
>
> (1) The Tribunal has ***internal appeal jurisdiction*** over:
>
> (a) any decision made by the Tribunal in proceedings for a general decision or administrative review decision, and
>
> (b) any decision made by a registrar of a kind that is declared by this Act or the procedural rules to be internally appealable for the purposes of this section.

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal jurisdiction:

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

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

(3) However, the internal appeal jurisdiction of the Tribunal does not extend to:

(a) any decision of an Appeal Panel, or

(b) any decision of the Tribunal in an external appeal, or

(c) any decision of the Tribunal in proceedings for the exercise of its enforcement jurisdiction, or

(d) any decision of the Tribunal in proceedings for the imposition of a civil penalty in exercise of its general jurisdiction.

Note. The decisions above may be appealable to the Supreme Court and, in some cases in relation to civil penalty decisions made by the Tribunal (whether under this Act or enabling legislation), the District Court. See section 73 and Part 6.

(4) An ***internally appealable decision*** is a decision of the Tribunal or a registrar over which the Tribunal has internal appeal jurisdiction.

(5) An ***internal appeal*** is an appeal to the Tribunal against an internally appealable decision

1. The powers of the Appeal Panel in determining the appeal, both to make a decision and/or what remedies it may grant are limited as prescribed in ss 80 and 81 and cl 12 of Sch 4 of the NCAT Act

2. For there to be an appeal there must be an "*internally appealable decision*" over which the Appeal Panel has internal appeal jurisdiction. Section 5 of the NCAT Act defines a decision in the following terms:

> 5 **Meaning of "decision"**
>
> (1) In this Act, ***decision*** includes any of the following:
>
> (a) making, suspending, revoking or refusing to make an order or determination,
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
>
> (d) imposing a condition or restriction,
>
> (e) making a declaration, demand or requirement,
>
> (f) retaining, or refusing to deliver up, an article,
>
> (g) doing or refusing to do any other act or thing.
>
> (2) For the purposes of this Act:

(a) a decision is made under enabling legislation or this Act if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation or this Act, and

(b) a decision that purports to be made under enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act even if the decision was beyond the power of the decision-maker to make, and

(c) a refusal of a decision-maker to make a decision under enabling legislation or this Act because the decision-maker considers that the decision concerned cannot lawfully be made under the enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act to refuse to make the decision requested, and

(d) a failure by a decision-maker to make a decision within the period specified by enabling legislation or this Act for making the decision is taken to be a decision by the decision-maker at the end of the period to refuse to make the decision.

1. The decision, the subject of an appeal, might finally conclude the proceedings in the Division or might be an interlocutory or ancillary decision. However, in any case:
    1. The exercise by the Appeal Panel of the internal appeal jurisdiction is a review of a decision of another Member or Members sitting at first instance in a Division or of a Registrar as provided by the NCAT Act ; and
    2. The Appeal Panel has no internal appeal jurisdiction to review its own decision.
1. The fact an appeal is a separate proceeding is confirmed by the NCAT Act and procedural rules including the following:
    1. An applicant is required to make an application to the Tribunal for a general decision which is made by the Tribunal when exercising General Jurisdiction: see s 29 of the NCAT Act . This jurisdiction is separate to the internal appeal jurisdiction.
    2. There is a need to file a separate application in order to appeal.
    3. Appeal proceedings are given a separate number and separate time limits apply in connection with the commencement of any appeal.
    4. Separate time limits apply to lodging an appeal.

1. It follows that the challenge to the jurisdiction of the Appeal Panel to determine the present appeal should be rejected.

Grounds 1 and 2 of the appeal

1. These grounds of appeal raise the issue of whether or not the Tribunal correctly interpreted the operation of cl 5 and 6 of the Deed. In short, the appellant contends that the effect of the Deed meant that the developer had enforced the statutory warranties Consequently, the owner, being the successful entitle was not entitled to any remedy for the identified defects by reason of s 18D(2) of the HB Act .

2. As a subsidiary submission, the builder also says that by reason of the Deed and the progress certificate issued by the architect for the developer, the works necessary to rectify the defects had been taken out of the hands of the builder who was thereby released from any obligation to carry out necessary rectification work.

3. In making these submissions the builder relies upon the decision of the High Court in *Pacific Carriers Limited v BNP Paribas* (2004) HCA 35; 218 CLR 451 and the principle that, in construing the Deed, the Tribunal should have regard to the surrounding circumstances known to the parties and the purpose and object of the transaction.

4. This principle was restated by the High Court in *Toll (FGGT) Pty Ltd (Formerly F inemores GCT Pty Ltd) v Alphapharm Pty Ltd and Ors* (2004) HCA 52, 219 CLR 165 where the High Court said at [40] :

> This Court, in Pacific Carriers Ltd v BNP Paribas, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

1. The builder says that the surrounding circumstances concerning the entry of the Deed was a claim by the builder for unpaid monies and the issue by an architect of a certificate making adjustments for incomplete and defective works, and that the objective intentions of the parties in entering in the Deed was to relieve the builder from any obligation with regards to known defects. The builder then says that the obligation to bring any defective works into compliance with the contract was removed in consequence of the determination of the architect in assessing the progress claim number 19. Consequently, the builder says that the Tribunal's interpretation of cll 5 and 6 of the Deed was not reasonably open to it.

2. The builder then says at [14-16] of its submissions in chief in the appeal:

> 14 Brodyn says on proper construction of clause 6, the defects obligations that were intended to survive the operation of the deed were not third party defect obligations, but rather defects which were not part of the subject matter of the parties dispute between the parties leading up to the deed.
>
> 15 In other words, the Developer brought to account the defects and was compensated the amount determined by the Architect and finally the parties settled their dispute in respect to the known defects, but agreed to be liable for, or maintained their own obligations as to defects which were unknown.
>
> 16 Brodyn says once the developer elected to engage others to complete the work pursuant to clause M 14.2 of the contract, it was not implied, is not an express obligation of the developer to repair those defects (as schedule) that the developer elected to engage others to complete the work, and in respect of which, the Developer claimed compensation by adjusting the contract sum.

1. Therefore, the builder says that in relation to particular defects the statutory warranties had been enforced.

2. In our view, these submissions must be rejected.

3. While it is undoubtedly correct that the Tribunal may have regard to the surrounding circumstances in construing the Deed, a consideration of those circumstances does not entitle the Tribunal to disregard the language of the Deed itself or to impose an obligation on a party which is otherwise inconsistent with the language used in the deed.

4. In this regard Mason J said in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337 at [21] – [22] :

> 21 In D.T.R. Nominees Pty. Ltd. v. Mona Homes Pty. Ltd. (1978) 138 CLR 423, at p 429 , Stephen and Jacobs JJ. and I, following Prenn, in a joint judgment said:
>
> "A court may admit evidence of surrounding circumstances in the form of 'mutually known facts' 'to identify the meaning of a descriptive term' and it may admit evidence of the 'genesis' and objectively the 'aim' of a transaction to show that the attribution of a strict legal meaning would 'make the transaction futile' . . . "
>
> And in Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty. Ltd. (1979) 144 CLR 596, at pp 605-606 in a judgment concurred in by other members of the Court I not

only accepted and applied the statement in the majority judgment in B.P. Refinery (1977) 52 ALJR 20 of the conditions necessary to support the implication of a term, but I also accepted and applied Lord Wilberforce's different treatment, for the purpose of construing a contract, of evidence of surrounding circumstances on the one hand and of the parties' intentions on the other hand. Having considered the topic in more detail on this occasion I see no reason to qualify what I then said.

22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

1. As set out above, the Tribunal at [62] of the Decision said:

> I interpret clause 5 and 6 of the Deed of Release to operate as a release by the developer of its rights against the builder based, amongst other things as the scope of the release is wide, on a breach of the contract or a breach of the warranties contained in s 18B of the Act and a release by the builder of its rights against the developer for money allegedly owing for work carried out in the construction of the premises.

1. The Tribunal then said at [63]:

> However as regards other parties who may have rights against either the builder or the developer, clause 6 of the deed is clear that the builder and the developer maintained their own obligations under the Act.

1. That is, the Tribunal concluded that, upon its proper construction, cl 5 of the Deed was no more than a release between the builder and the developer of their rights of action and not the enforcement of particular rights which the developer might have had by reason of any breach of statutory warranties.

2. In our opinion, this interpretation of the deed is correct for the following reasons:

    1. Pursuant to cl 3 "*the builder is to receive $1.00 in full payment of all monies claimed by (the builder) in relation to the Claims*". Recital A makes clear that the expression "*the C laims*" is only referring to the builder's claims, not any claim the developer may have had for breach of statutory warranties.

    2. No other clauses of the Deed suggest that the developer has compromised or settled claims for particular breaches of the statutory warranties. Such claims are not identified in the Deed. While the Deed makes reference to the parties executing all documents and attending before any Court "*to give effect to the orders set out in the Terms of Settlement and to the provisions of this Deed generally*", no proceedings have been identified in this appeal having been brought by the developer (indeed the Tribunal found at [43] there were no such proceedings) and, more particularly, no claims for

breach of statutory warranties are identified in the Deed which are being compromised by the Deed.

3. Clause 5 of the Deed, by its language, only operates to "*release, remise and forever quit claim unto the other all and singular all manner of actions , adjudications, suits, causes of action, Proceedings, arbitration, debts, dives, judgments, costs and demands... which either or both them either alone or conjunction with any other person, firm or corporation now have or could, would or might but for these presents at any times or time have or had upon or against the other*". It is a general release of both present and future rights.

4. While the Deed purports to release any right which the owner might have "*in conjunction with any other person, firm or corporation*", the rights granted under s 18D of the HB Act are not rights held jointly between the developer and any successor in title and the rights acquired do not operate as an equitable assignment of a chose in action: see *Allianz* per Ipp JA at [65] . To the contrary, they are separate rights, the successor in titles rights being limited:

    1. having regard to whether or not there has been prior enforcement by the contracting party so as to avoid double recovery: see s 18D (1B) and 18D(2) and *Allianz* per Ipp JA at [88]- [89] and Giles JA at [19] ; and

    2. to the claimant recovering losses which the claimant has suffered and not the losses "*the predecessor incurred arising out of the breach*": *Allianz* per Ipp JA at [65] .

1. The builder urges an interpretation to the effect that cl 5 is an enforcement of the statutory warranties to the extent only of defects identified in the course of assessing progress claim 19. The problem which such an interpretation is that the release is a release of claims which the developer "*now (has) or could, would or might have but for these presents at any time or times have or have had upon or against the other by reason or on account or in any way connected with their business dealings*". This language is not consistent with the submission that the objective intention of the parties in settling their dispute was to compromise only those defects which had been identified by the architect by assessing deductions to be made on progress claim 19. Rather, objectively determined, the intention was to prevent the developer from taking any action against the builder in connection with any claims in relation to "*or in any way connected with*" the building contract.

2. It is in the context of the absolute release provided in cl 5 that the preservation of obligations of each party and the effect if cl 6 needs to be considered. Clause 6 of the Deed expressly acknowledged that each of the parties "*maintained their obligations under the Home Building Act 1989 and amendments*".

3. Once it is accepted the parties had released all obligations between themselves for all defects, whether identified by reference to deductions made in respect of progress claim 19 or for future claims by the developer, the only meaning that could be ascribed to cl 6 of the Deed was a preservation of each of the parties' obligations to any successor in title for claims for defects arising from a breach of the statutory warranties. In this regard neither cl 6 nor any clause in the Deed sought to define defects or limit the effect of cl 6 to a preservation of rights in respect of defects that had not been the subject of earlier deductions made by the architect in the assessment of progress claim 19. While the parties could have chosen to identify the particular defects said to have been enforced and which were to be the subject of any compromise pursuant to the Deed,

and thereby limit the operation of cl 6 of the deed, they did not do so. Rather, the parties expressly acknowledge that, "*with regards to defects… each still maintain their own obligations under the Home Building Act , 1989 and amendments*". It follows if they have released all rights to enforce the statutory warranties inter parties, the only obligations that could remain in effect were those owed to third parties who might separately seek to enforce the statutory warranties as successor in title.

4. The builder asserted in the appeal that there was an implied obligation arising under the Deed that the developer would, in consequence for the settlement reached, carry out any necessary rectification work. However, no basis was put forward as to why such a term should be implied and no explanation was given as to how the necessary requirements for implying a term might be satisfied in the present circumstances. It is difficult to see why such a term was necessary to give business efficiency to the agreement or was so obvious it goes without saying. Further, it is inconsistent with cl 5 which operates as a release inter parties and with the provisions of cl 6 which states that both the builder and the developer are maintaining their own obligations under the HB Act : see *Codelfa* per Mason J at p 357 .

5. The last issue to deal with on these grounds is the submission that the builder can have no liability to the owner under the Deed because there had been a variation to the contract between the builder and the developer so as to relieve the builder from any obligation to rectify defective work.

6. This argument arises from an adjustment made in respect of progress claim 19 (builders appeal bundle Volume 1, Tab "Brett Matheson 15.11.10" p250 and following). The progress claim is dated 27 July 2005. The adjustment was in an assessment of the progress claim dated 4 August 2005 (builder's appeal bundle p 262 and following) made by MES Management Pty Ltd (MES), in consequence of which the developer issued to the builder an invoice in respect of overpaid progress claims of $344,188.01 (builder' appeal bundle p to 92).

7. The Appeal Panel notes this was not the final claim under the contract. The final claim was made by the builder on 11 November 2005 in the sum of one dollar (builder's appeal bundle p 357).

8. The builder asserts that the adjustment made by MES constituted a variation to the contract, deleted from the contract the obligation to carry out rectification work and amounted to enforcement of the statutory warranties. This, the builder submitted, was a surrounding circumstance the Tribunal failed to take into account in construing the Deed. The items said to constitute the variation were in schedule 5 to the MES letter dated 4 August 2005, generally identified as "*transfer slab waterproofing*" and "*basement ceiling*", although the latter category of claims appears to be separate to the waterproofing of the slab constituting the courtyard/ceiling of the car park- basement area.

9. These adjustments, together with other adjustments being made by MES (identified in schedules 5 of the letter), were explained by MES in the following terms:

> **Architect Adjustment under Clause H6**
>
> In the absence of a claim, we have had to evaluate the items noted in schedule 5. Items AA001 to AA004 are self-explanatory. However item AA005 relates to defective and incomplete work on the project.

> The defective items are noted in the Trafalgar Inspection 2 and 3 August 2005. These defects were completed on the said date and a considerable number are ones which have been recorded as completed by you. Also, some of these defects have not been attended to at all, in spite of the numerous notices, discussions and meetings. Accordingly they have been valued and included in the assessment as provided for under the contract.
>
> Currently, the amount of our certification shows that you are required to make payment to the Owner the (sic) amount of $344,188.01.

1. There are a number of problems with this submission, an evaluation of which must be made in the context of the contractual provisions.

2. Clause H6 of the contract provides as follows:

> Architect may adjust contract in absence of claim
>
> 1 If the contractor has not made a claim to adjust the contract in relation to any change which results from complying with any instruction given under section J for a variation to the works or from causes of delay noted in clause L1 or L2, the architect may adjust the contract at any time up to the issue of the final certificate under clause N11, or a certificate under clause Q9 or Q17.

1. This clause relates to varying the contract as a result of an instruction given by the MES under section J of the contract or from causes of delay noted in clauses L1 or L2 of the contract. However, there is no evidence provided to the Appeal Panel to suggest that such a variation had been made which required assessment under clause H6. To the contrary, the letter from MES suggests that the cause of any adjustment was to make an allowance for defective work which had not been rectified at the time progress claim 19 was made

2. The builder referred the Appeal Panel to cl M14 of the contract and submitted that "*the architect adjusted the contract sum by assessing the value of asserted unrectified defects works under clause M14.2*". The builder then says that *"the Developer elected to remove the Builder's obligation to fix or complete those defective works and the Developer was to engage others to fix those defects*".

3. Relevantly cll M13 and M14 provide:

> **M13 Contractor to correct defects and finalise work**

1 The contractor must correct any defects or finalise any incomplete work, whether before or after the date of practical completion, within the agreed time as stated in an instruction or if no time is stated, within 10 working days after receiving a written instruction from the architect to do so.

M14 If the contractor fails to correct defects and finalise work

1 If the contractor fails to correct a defect or finalise any incomplete work within the time nominated under clause M13 or fails to show reasonable cause for the failure together with a timetable for correcting the problem that is acceptable to the architect, the owner may use another person to correct the problem at the cost of the contractor.

2 If the owner is required to use another person to rectify the problem, the owner is entitled to make a claim to adjust the contract.

3 If the owner makes a claim to adjust the contract the architect must promptly assess the claim and may issue a certificate under clause N4.

1. Again, the builder has not referred the Appeal Panel to any evidence to suggest that a relevant notice has been given pursuant to cl M13 or that there has been any failure of the type required by cl M14 to enliven that provision. Further there is no evidence before the Appeal Panel to suggest the contract had been terminated so as to require an assessment to be made under cl Q9 (which relates to the engagement of the contractor being terminated under cl Q1 or Q2).

2. Therefore it would appear that the clause identified by MES did not provide any entitlement to MES (on behalf of the developer) to make such an adjustment in respect of defective work.

3. The builder then submits that:

> (T)he Developer then issued (the builder) with a tax invoice for the value of $344,188.01 pursuant to N5.1 of the contract. The effect of that adjustment brought to account those defects and put the Developer (as far as money can) back into the possession under the contract as if the contract had been performed as promised. The defects claim and corresponding defect items are scheduled in the payment assessment and constitute what (the builder) says is the enforced defects claim.

1. There are a number of problems with this submission.

2. Firstly, as set out above, there was no valid exercise by MES of a power to delete work from the contract nor were the provisions relating to the builder's failure to correct any defects or finalise any incomplete work enlivened.

3. Secondly, the submission ignores the fact that in assessing the progress claim, MES was entitled to take account of "*the proportion of the contract price representing the value of the work completed up to and including the day of the claim, making allowance for the cost of rectifying defects*": see clause N4 of the contract. Following that assessment and the issue of a certificate as required by clause N4, the party to be paid, the developer, was required to "*prepare a tax invoice equal in value to the certificate and present both documents to the other party for payment*": see clause N5 of the contract. This is what occurred: see the developer's invoice dated 19 August 2005, at builder's appeal bundle p 292.

4. It should be noted at this stage that the certificate issued by MES included (at builder's appeal bundle p 265) a statement headed "*Progress Certificate Summary in accordance with Section N*" summarising the amount then due in the following terms:

Ref	Description	Claimed	Approved
1	Contract Works	$2,662,727.00	$2,662,727.00
2	Previous Contract Variation	$111,169.13	$107,557.19
3	Payment on account Previous Cont Variations	$48,839.41	$48,839.41
4	New Variations submitted 22 July 2005	$34,249.20	$0.00
5	Further New Variations Submitted 27 July 2005	$145,537.16	$0.00
6	Architect adjustment	$0.00	($312,898)
		Subtotal	$2,506,225.41
		Amount Paid to date (excluding GST)	$2,819,123.60
		This Claim	($312,898.19)
		GST Credit	($31,289.82)
		Total	($344,188.01)

1. Properly understood, and notwithstanding the language used by MES, what occurred in connection with progress claim 19 in respect of incomplete works was no more than an assessment of the progress claim as required by clause N4 of the contract and there is no basis to conclude that the contract was being terminated and the obligations of the builder to carry out rectification work were being removed by variation. This view is corroborated by a consideration of the

content of schedule 5. Schedule 5 is no more than a summary of adjustments to be made in assessing the progress claim, it being recognised that some items in that schedule in respect of other variations: for example item AA 001: see builder's appeal bundle p 279.

2. This view is also corroborated by the fact that the builder was paid a total of $3,123,555.15 for completion of the works, including the amount of $1.00 required to be paid pursuant to the Deed. This fact is evidenced by the builder's tax invoice dated 11 November 2005: see builder's appeal bundle p 357. Clearly further claims must have been made by the builder after progress claim 19 as the progress certificate issued by MES (as set out in the schedule above) records that the builder had only been paid $2,819,123.60 at the date progress claim 19.

3. Thirdly, when this evidence is considered as a whole, there is no proper basis upon which the Tribunal could, nor indeed should have concluded that any settlement as reflected in the Deed included an allowance for a variation in respect of defects or that the terms of the deed should be construed in a manner contrary to the meaning evident by the clear language of the Deed as we have found above. It would have been a simple matter for the parties to record any agreement in connection with the defects and the fact of enforcement and use language different to that in cl 6 of the Deed. This did not occur. Rather cl 6 expressly preserves the obligations of each party under the HB Act in a manner which was unqualified.

4. Consequently, these grounds of appeal fail.

Grounds 3 and 4 of the appeal

1. Grounds 3 and 4 of appeal relate to the Tribunal's finding that there was a need to replace the waterproof membrane installed to:

    1. The tiled area of the court yard (ground 3); and

    2. Planter boxes in the court yard (ground 4).

1. This defect relates to items 22 and 24 in the Joint Report dated 9 September 2013. The membrane was originally installed to the top side of a concrete slab constituting the roof of the garage area.

2. The appellant did not challenge the finding that there had been a failure of the membrane installed in these areas causing water ingress to the car park which required the replacement of the membrane. The challenge was to whether the Tribunal erred in its findings regarding what was the required rectification work and/or what were the reasonable costs of such work.

Ground 3

1. In relation to the tiled area of the court yard the Tribunal found:

    1. There was 223.3 square metres of tiles requiring removals and replacement as part of rectifying the membrane; and

    2. The cost of the work, including removal of the tiles and replacement of the membrane was $650.00 per square metre.

1. In reaching this conclusion, the Tribunal said at [258]:

> The only evidence that there is of the cost of rectifying the failure to waterproof is that tendered by the owner. Mr Roberts has stated this cost to be calculated on the basis of 223.2m x $650/ m. The evidentiary basis for the rate of $650/ m is stated at paragraphs 5.2.13 – 5.2.20 of Mr Roberts 30 July 2013 report which is exhibit F.

1. There is no challenge to the area of tiles that are required to be removed and the membrane to be replaced. In this regard the appellant says in its submissions in reply at [32]:

> In this appeal there is no challenge to the number of metres found. What is important, particularly having regard to the quantum of the item claimed, were the rates applicable for the particular rectification tasks associated with this item.

1. However, the appellant says that, in finding the reasonable rate was $650.00 per square metre, the Tribunal failed to have regard to the evidence of the appellant's expert Mr Taylor regarding the costs to remove and replace the tiles. The respondent says that this evidence is found in Mr Taylor's response to the owners claim at item 20 which concerns "*Central Court Yard Floor Tiling*" which was cross-referenced under item 24 of Mr Taylor's report. In paragraph [546] of Mr Taylor's report dated 8 September 2011 (dealing with item 24) he says:

> If the Tribunal determines that the Builder's work is defective as alleged and rectification involves the demolition and replacement of the court yard tiling and installation of a new applied membrane to the top of the court yard slab, my opinion of the estimated costs of that work is included in item 20 and 22.

1. At paragraph [459], when dealing with a separate defective tiling claim (item 20), Mr Taylor estimates the costs of demolition and replacement of the tiling at $24,350.00, which is referred to his costing alternative C. The details of this costing information in respect of item 20 is set out in Appendix E of Mr Taylor's report, which has been included at paragraph 73 of the appellant's submissions in this appeal,. It should be noted that at paragraph [546] of Mr Taylor's report he also refers to item 22 – "*central court yard area-membrane in Planter Boxes*" the award for which is challenged in ground 4 of the appeal, a matter to which we will refer below. Again, the costing for item 22, which Mr Taylor assess at $18,081.00 to provide a new membrane in the planter boxes, is set out in [73] of the appellant's submissions.

2. Lastly, the appellant refers to the joint report prepared by Mr Taylor and the owners' expert Mr Roberts dated 9 September 2013 in which, in respect of item 24, garage floor/car park area moisture ingress through ceiling slab, Mr Taylor says as alternative C:

> If found and demolition and replacement of tiling required cost included at item 20 Alt C and planter boxes at item 22 Alt C.

1. It is in this context that the statement at [258] of the decision and the findings in connection with $650.00 being a "*realistic rate for carrying out the work in question*" (Decision [258] – [261]) needs to be considered.

2. The first question is whether the finding at [258] is correct, namely that the only evidence "*of the cost of rectifying the failure of waterproofing*", being item 24 which relates to waterproofing of the slab above the car park, "is that tendered by the owner".

3. The builder points to the original evidence prepared by the builder's expert, Mr Taylor. It seems to us that this evidence, particularly at par [546] of the report dated 8 September 2011 and under the heading "Alt C" in item 24 of Appendix E of that report, provides a costing for the "*demolition and replacement of the courtyard tiling and installation of a new applied membrane to the top of the service of the courtyard slab*" for the purpose of rectifying this defect which is described as "*Garage/Car park-Moisture Ingress Through Ceiling Slab*". However without reference to Appendix E, the main body of Mr Taylor's report does not identify the amount which the expert contends is the reasonable cost of rectification nor does Mr Taylor identify in the body of his report that the costings are found in Appendix E under the heading "*Alt C*".

4. The evidence in Appendix E under item 24 refers to item 22 in the appendix. Item 20 would suggest that Mr Taylor had determined the cost to "demolish and replace drumming tiles" was $24,350 for an area 136 m² a rate of approximately $179 per square metre.

5. This costing does not appear to support the builder's submission that a rate of $290.64 per square metres was appropriate "*applying Cordell's industry rates*": see builder's original submissions to the Tribunal dated 23 October 2013 at [219]. Further, the builder has accepted for the purpose of the appeal that the relevant area to be rectified is 223 m².

6. Next the Appeal Panel notes that despite the content of Mr Taylor's report, no reference is made to this costing in the Scott Schedule filed 14 June 2013: see folder 1 or 2 of the bundle provided by the builder to the Appeal Panel behind tab "*Scott S chedule*" at pp 1826-1828. In the Scott Schedule, the only cost there propounded was "*to rectify by installing drip trays*" in the sum of $9309. Bearing in mind that the purpose and obligations upon the parties in relation to preparation of a Scott Schedule, the failure to make reference to the costs is significant.

7. However, in the joint expert report filed 9 September 2013, "*Alt C*" is again referred to by Mr Taylor (although no amount is specified). The joint report states that *"(i)f found and demolition and replacement of the tiling required cost included at Item 20 Alt C and planter boxes at Item 22 Alt C*". In this regard, reference is made to two reports of Mr Taylor, WT0809201l appendix E, and WT05072013 pars 105 to 138.

8. At this point, the Appeal Panel notes that it appears that the report WT05072013 describes in the joint report as Mr Taylor's fourth report dated 4 July 2013 being a "*reply to Mr Roberts report dated 9 May 2013*" was not provided to the Appeal Panel, the two volumes provided by the builder to the Appeal Panel being without an index or relevant pagination. It may well be that this fourth report provides costings in support of the original submission made to the Tribunal at [219], namely that a reasonable rate for works in removing the tiling and membrane and replacing it was $290.64 per square metre and not $650 per square metre. In this regard, reference is made in [219] to the original tender bundle reference "*TB 5 of 5 page 2009*", the same reference found as Mr Taylor's opinion in respect of item 24 in the joint expert report: see page 20 of the joint expert report.

9. Be that as it may, it seems clear to the Appeal Panel from the above facts that there was some evidence provided by the builder which the builder asserted was relevant to the question of the

reasonable cost of removal and replacement of the membrane in the tiled area of the courtyard and that the finding of the Tribunal that there was no evidence provided by the builder is incorrect.

10. Our conclusion is supported by the fact that the Tribunal did find there was evidence from the builder in relation to the cost to remove and replace the waterproof membrane in the area of the planter boxes in the courtyard. This evidence itself could be evidence relevant to the cost of replacing the waterproof membrane in the tiled areas of the courtyard, which were adjacent to the planter boxes.

11. For these reasons, the Appeal Panel is satisfied that the Tribunal was in error in concluding that "*(t)he only evidence that there is of the cost of rectifying the failure to waterproof (the slab above the carpark in the tiled area of the carpark) is that tendered by the owner*".

12. The next question that arises in relation to this ground of appeal is whether or not it raises a question of law. Alternatively, leave is required and the appellant must demonstrate it may have suffered a substantial miscarriage of justice: see cl 12 of Sch 4 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act).

13. This question is relevant because if leave is required the Appeal Panel would not be inclined to grant leave as the appellant has not demonstrated it may have suffered a substantial miscarriage of justice and/or any discretion should be exercised against the appellant. The reasons for this are as follows:

    1. Despite:

        1. directions originally having been made for the filing and service of all evidence relevant to the appeal; and

        2. leave being granted to either party to file any relevant transcript,

    the appellant did not otherwise seek to provide to the Appeal Panel all the evidence filed by the parties nor any transcript of the oral evidence of the experts provided during the course of the hearing necessary to demonstrate it may have suffered a substantial miscarriage of justice;

    1. Any decision to grant leave requires the evaluation of all the evidence in relation to the cost of rectifying the defective membrane, including the finding in relation to the cost of rectifying the membrane in the area of the planter boxes; and

    2. The Tribunal in fact analysed:

        1. the evidence of the owner in relation to the competing evidence of the extent of water penetration and the owners evidence of the cost of replacing the membrane in the tiled area of the courtyard: see Decision [232]- [261]; and

        2. the competing evidence as to extent and cost of rectification of the membrane in the adjacent area of the planter boxes in the courtyard: see Decision [210]-[231];

and found that the reasonable rate for replacing the membrane was $750 per square metre in the case of the planter box area and $650 per square metre in the case of the tiled area of the courtyard

1. it is therefore doubtful a different decision as to the reasonable rate for the tiled area of the courtyard could have been reached.

1. On the other hand, as neither party has tendered all evidence before the Tribunal on this issue, if leave is not required, the question as to what orders should be made gives rise to different considerations.

2. It is therefore necessary to consider whether there was an error of law.

3. In the present case, the respondent contended that the "*no evidence hearing rule*" did not apply and that the Tribunal correctly determined that the builder had not advanced any evidence to cost the scope of work found to be necessary by the Tribunal, namely the replacement of the waterproof membrane for the whole of the terrace. Consequently there was no error.

4. What amounts to an error of law is a matter that has been the subject of significant judicial discussion and what constitutes an error of law is not always easy to discern. However, it is clear from the authorities that an erroneous determination by a court or tribunal that there was no evidence to support a particular finding of fact is an error of law. As Mason CJ said in *Australian Broadcasting Tribunal v Bond ("Bond Media case")* [1990] HCA 33; (1990) 170 CLR 321 at [87] :

> 87. The question whether there is any evidence of a particular fact is a question of law: McPhee v. S. Bennett Ltd. (1934) 52 WN(N.S.W.) 8, at p 9 ; The Australian Gas Light Co. v. The Valuer-General [1940] NSWStRp 9; (1940) 40 SR(NSW) 126, at pp 137-138 . Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: Australian Gas Light, at pp 137-138; Hope v. Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1, at pp 8-9 . This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: Federal Commissioner of Taxation v. Broken Hill South Ltd. [1941] HCA 33; (1941) 65 CLR 150, at pp 155, 157, 160 . So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: Sinclair v. Maryborough Mining Warden [1975] HCA 17; (1975) 132 CLR 473, at pp 481, 483 .

1. This position was confirmed by French CJ in *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 at [33] and Hayne, Heydon, Crennan, Keifel JJ at [90] – [91] .

2. The question in the present case is whether the failure to consider this evidence from Mr Taylor and only consider the evidence of the owner's expert, Mr Roberts, constituted an error of law.

3. In *Mifsud v Campbell* (1991) 21 NSWLR 725, Samuels JA said at 728 C-D:

> ...it is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceeding or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence

given and the findings made dependent, as the duty to give reasons does, upon the circumstances of the individual case.

Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in the case and contrary to an assertion of fact made by one party and accepted by the judge – as the defendant's denial of having consumed alcohol – may promote a sense of grievance in the adversary and create a litigant who is not only "disappointed" but "disturbed"... It tends to deny both the fact and the appearance of justice having been done. If it does, as in my opinion is the case here, then it will have worked a miscarriage of justice and have produced a mis- trial and resulted in what I would take to be an error of law which is reviewable on appeal.

1. The decision in *Mifsud* concerned the failure of the trial Judge to refer to some of the evidence provided by the plaintiff's witnesses concerning the conduct of the defendant at the scene of a motor vehicle accident which, the plaintiff contended, supported the plaintiff's version of the events.

2. In that case, Hope AJA did not find it necessary to consider whether the error of the trial Judge amounted to an error of law or something other than an error of law. Clarke JA, who otherwise agreed with Samuels JA said at 729B:

> My reservation concerns a question whether we are concerned here with an issue of law. For my part, I regard any deficiencies in the judgement is indicative of an unsatisfactory or incomplete reasoning process which has led to a judgement based on grounds which are unsupportable."

1. In *Beale v GIO of NSW* (1997) 48 NSWLR 430, Meagher JA said at 444 :

> Another question, which need not presently be decided, is whether the failure to provide reasons or the provision of inadequate reasons constitutes either an error of law or some other appealable error. This was a question which Hope A-JA noted but found unnecessary to decide in *Mifsud v Campbell* (at 729). It is sufficient to note that most cases have assumed the error is one of law.

1. In our opinion, the present case is not one where the Decision obscures or makes uncertain whether or not a particular piece of evidence has been considered by the Tribunal in reaching the conclusion of fact, namely that the reasonable rate for removing and replacing the waterproof membrane on the slab above the car park was $650 per square metre. It is certainly not a case where there is ambiguity in competing evidence and where an inference has been drawn adverse to the appellant. Rather, it is a case where, as we are found above, there was relevant evidence provided by the builder's expert, Mr Taylor which was not considered by the Tribunal in reaching its conclusion. Further, it is a case where the Tribunal proceeded to evaluate the owners claim and expert evidence despite the builder's submission at paragraph 219 that "*Mr Taylor arrives at a figure of $290.64 psq applying Cordell's industry rates ".*

2. Once it is accepted that:

    1. The dismissal of a claim based on the incorrect finding that there is no evidence amounts to a question of law; and

    2. There is a duty upon the decision maker to consider all the relevant evidence as part of the obligation to provide adequate reasons,

in our view it must follow that the finding in the Decision at [258] that *"(t)he only evidence that there is of the cost of rectifying the failure to waterproof is that intended by the owner*" constitutes an error of law as does the failure to evaluate that evidence as part of the decision making process in satisfaction of the obligation to provide adequate reasons.

1. Consequently, leave to appeal is not required and this ground of appeal must succeed.

2. The next question to determine is what, if any, orders should be made in connection with this error. A determination of this question also depends upon whether ground 4 of the notice of appeal is established, this ground being that the award for rectification costs in respect of the defective membrane in the area of the planter boxes amounted to betterment.

Ground 4

1. The substance of this ground was that in awarding the owner the cost of installing a two layer membrane system, rather than a single layer membrane system, the award constituted a betterment for which no allowance was made by the Tribunal.

2. The builder relied upon the High Court decision in *Bellgrove v Eldridge* and the principle that the measure of damages is the cost of making the work or building conform to the contract. The builder said that the works required under the contract was a single layer membrane system and that the amount allowed by the Tribunal was for work in excess of that provided under the contract. The builder referred to a specification for the work, a copy of which was handed up to the Appeal Panel and was in the following terms:

> **Single layer membranes**
>
> Fix and lap sheets with appropriate proprietary adhesive or by heat welding using a gas ("torch on"), self finished or finished with a proprietary servicing.

1. In response, the owner says that the evidence establishes that a two layer torch applied waterproof membrane was appropriate to rectify the breach of the statutory warranty, namely that the membrane as installed was not fit for purpose and that the evidence established that a one-layer system was "*simply inadequate*". The owner says that there was no relevant betterment in the award which the Tribunal made.

2. This issue relates to Item 22 of the owners claim – failed waterproof membranes in the planter boxes in the central and rear courtyard areas. The submission made by the builder to the Tribunal was in the following terms:

Supply and install new waterproof membrane system

196. Mr Taylor applies Cordell's rate for liquid membrane at $41.80 m2. (See TB 5 of 5 page 2004 para 82). Mr Roberts adopts a rate of $160 sqm based on a 2 layer torch applied sheet membrane. He justifies this approach in his report by stating that a liquid membrane – "as is the case with the membrane applied, not UV stable causing it to break down and fail where exposed" (TB 5 of 5 page 2053 para 5.2.6). Mr Roberts's proposal would result in a betterment of the works.

1. In our view the submissions concerning betterment obscures the issue the Tribunal was to resolve, namely what award should be made for the reasonable cost to remedy the breach as found by the Tribunal. In this regards the Tribunal found at Decision [224]- [225], that there were breaches of the statutory warranties in that:

    1. The works were not performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract; and

    2. The works were not fit for purpose.

1. In reaching this conclusion, the Tribunal (Decision [218] and following) accepted the evidence of Mr Roberts that:

    1. The membrane which had been applied had failed.

    2. The "*usual requirement of recognise membrane manufacturers is for 1 mm thickness of membrane made up of two coats*".

    3. "*Since he was unable to get a sample, the inference is that only one coat was used and the thickness was less than 1 mm*"; and

    4. Because of the membrane failure, "*there is water ingress through the concrete slab of the central courtyard into the garage below*".

1. These findings of fact were not challenged in the appeal.

2. What constitutes betterment was considered by the Court of Appeal of the Supreme Court of New South Wales in *Hyder Consulting (Australia) P/L v Wilh Wilhelmsen Agency P/L & An o r* [2001] NSWCA 313. That case, Sheller JA after referring to a passage in McGregor on Damages, 16th Ed, said at [28]- [30] :

    28 ... in Halsbury's Laws of Australia, Volume 9 "Damages" appear the following passages. The first is in Volume 9 at 135-1090 discussing damages for the destruction of goods:

    "The plaintiff must credit the defendant for the fact that the plaintiff now receives new goods in place of old (that is, for betterment) (Hoad v Scone

Motors Pty Limited (1977) 1 NSWLR 88) except where the plaintiff would never have replaced the chattel in question (Harbutt's 'Plasticine' Limited v Wayne Tank and Pump Co Limited [1970] 1 QB 447)."

29 The second passage is in Volume 9 at 135-1165 "Betterment" discussing damages for injury to property:

"Where cost of reinstatement is the appropriate measure of damages, plaintiffs must give credit for betterment where the property increases in value after reinstatement, except where reinstatement involves plaintiffs in making an investment they would never had made at all (Harbutt's)."

30 Several considerations are material. The most significant is whether there is evidence that the plaintiff had a reasonable choice between adopting a less expensive course of repair or reconstruction which would mitigate its damage and the course it chose which would not. A plaintiff may decide for good business reasons to use the occasion not merely to repair or rebuild but to improve its facilities. To adapt the words of Dr Lushington the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.

1. At [50]- [54], Sheller JA then said:

50 In *Murphy v Brown* [1985] 1 NSWLR 131 at 133 Mahoney JA in reasons for judgment with which Hope JA agreed said at 133 :

"In some cases, to put the plaintiff in the physical position in which, uninjured, he would have been will result in his being financially in a better position than he was. Thus, it may be that to give the plaintiff what he had before, eg, a factory, would result in his being in a better financial position than he was: a new factory may be worth more than the factory that he had. In such circumstances, the sum to be awarded will sometimes, though not always, be reduced: cf Harbutt's case. Rules of this kind are, in principle, directed to ensuring that the plaintiff has, but has no more than, what will put him in his uninjured position.

But there is a further rule which operates by way of qualification of the general principle. Where a plaintiff claims the cost of the work necessary to put him or his property in the pre-injury condition, the work must not merely be necessary for that purpose but 'it must be a reasonable course to adopt' to do that work: Bellgrove v Eldridge (1954) 90 CLR 613 at 618 . And, as the

> defendant's argument here suggested, it will not normally be reasonable to spend, for example, $4,000 to restore a vehicle which, undamaged, was worth, say, $1,000."

51 In the recent New Zealand case of *J & B Caldwell v Logan House Retirement Home* [1999] 2 NZLR 99 Fisher J noted at 106 that "two somewhat extreme positions" had been taken over betterment. At 107 his Honour expressed the view that neither of those extremes fully accorded with the fundamental object of damages to restore financially the plaintiff to no more and no less than the position which it would have occupied if the contract had been performed. His Honour regarded the logical middle ground to be to make a deduction for betterment but only after allowance to the plaintiff for any disadvantages associated with the involuntary nature of the additional investment.

52 Fisher J referred to the decision of the Ontario Court of Appeal in *James Street Hardware and Furniture Co v Spizziri* (1987) 62 OR (2d) 385. At 403-4 the Court of Appeal of Ontario quoted from Waddams, The Law of Damages (1983) [see now the 2nd edition (1991) at 1.2730 and following] and summarised what Dr Lushington said in *The Gazelle* about the plaintiff being obliged to submit to "some loss or burden" and what Widgery LJ said in *Harbutt's* about "forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them". The Court of Appeal went on:

> "These considerations, however, do not necessarily mean that in cases of this kind the plaintiff is entitled to damages which include the element of betterment. As Waddams suggests, the answer lies in compensating the plaintiff for the loss imposed upon him or her in being forced to spend money he or she would not otherwise have spent – at least as early as was required by the damages occasioned to him by the tort. In general terms, the loss would be the cost (if he has to borrow) or value (if he already has the money) of the money equivalent of the betterment over a particular period of time."

53 However as there was no evidence on the effect of the replacement of new for old components on the value of the building, the Court of Appeal concluded that there was no reasonable basis for a deduction on account of betterment and pointed out that the trial judge had not considered the concomitant question of loss flowing to the plaintiff if its compensation was reduced by the deduction for enhancement.

54 In a sense the *British Westinghouse* case may represent the middle ground. However, the context was that the railway company had replaced the defective turbines with superior turbines. In my opinion, if a defendant negligently damages or destroys the plaintiff's property and there is no evidence that the plaintiff had any reasonable choice other than to

replace or repair what had been damaged or destroyed, the cost of replacement or repair, provided it is not extravagant, is recoverable as damages. In each case it is a question of fact.

1. Subsequently, the Court of Appeal considered the decision of *Hyder* in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd & Ors* [2004] NSWCA 333 In *Tyco* , Hodgson JA said:

> 260 Where it appears that a plaintiff may in some respects be better off as a result of expenditure it has incurred in consequence of a defendant's wrong or breach of contract, difficult questions can arise. This is particularly so where the plaintiff is left with an enduring asset that may be of greater value than an asset which had to be replaced because of the defendant's conduct. The basic principle is that the plaintiff is to be compensated for its loss, and no more, and there is no more particular statement of principle that will determine the result in all cases; but in my opinion, the authorities do support a number of subsidiary propositions.
>
> 261 First, if a plaintiff choses to acquire a more valuable asset than that which had to be replaced, where the plaintiff could for a lesser expenditure have acquired an asset that would have been as satisfactory as that replaced, the plaintiff cannot recover more than that lesser expenditure: British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] AC 673 .
>
> 262 Second, even if there is no alternative available to a plaintiff other than to acquire a more valuable asset, a plaintiff may have to give credit reflecting the greater value of this asset to the plaintiff, if there is a benefit to the plaintiff which is not remote in time or speculative, and which can be quantified. In Hoad v. Scone Motors Pty. Ltd. [1977] 1 NSWLR 88, it was accepted that the plaintiff had no reasonable alternative other than to acquire a new tractor; but since the plaintiff was shortly to sell his business including this tractor, the greater second-hand value of this tractor over that which had been destroyed would have to be deducted from the plaintiff's damages. No such deduction was made in Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd. [1970] 1 QB 447, where the plaintiff rebuilt a destroyed factory; but there was no suggestion that the new factory would be sold in the foreseeable future. Nor, apparently, was there any evidence or even any suggestion that there would be gains by way of productivity or economies of maintenance of the new factory: had there been evidence to that effect, the result would I think have been different. Similarly, in Hyder Consulting (Australia) Pty. Ltd. v. Wilh Wilhelmsen Agency Pty. Ltd. [2001] NSWCA 313, there was no deduction where a pavement with a life expectancy of twenty years collapsed after four years, and was replaced by one with a similar life expectancy: the prospect that, about sixteen years in the future, the new pavement would probably continue for four years longer than the original pavement should have done, was considered too remote and speculative. Had the life expectancy of the asset that failed after four years been (say) eight years rather than twenty years, I think the result would have

been different; but in my opinion the deduction from damages would have been substantially less than 50%, because the benefits would have become available between four and eight years in the future, and been less than 100% certain.

263 Third, where any benefit received by the plaintiff is considered as not truly caused by the defendant's conduct and expenditure undertaken in consequence of it (and paid for by the defendant), but rather considered as being collateral, no credit is given for it: Monroe Schneider Associates (Inc) v. No.1 Raberem Pty. Ltd. (1991) 33 FCR 1 .

264 Fourth, although the plaintiff has the general onus of proof of damages, there can be legal or at least evidentiary onuses cast on the defendant. If a defendant wishes to say that the plaintiff incurred loss or expenses that it could have avoided by taking reasonable steps in mitigation, the onus of proof is on the defendant: Roper v. Johnson (1873) LR 8 CP 167. If a defendant wishes to say that some part of the loss would have occurred in any event, there may be an onus on the defendant to "disentangle the causes": Watts v. Rake (1960) 108 CLR 158 at 159, Purkess v. Crittenden (1965) 114 CLR 164 at 168, Shorey v. PT Ltd. (2003) 77 ALJR 1104 at [46]-[47] . If a defendant wishes to say a benefit received by the plaintiff was caused by the defendant's conduct or by expenditure caused by that conduct, it appears that the defendant bears an onus: Monroe Schneider. The onus or at least standard of proof may also be affected by considerations of who has the capacity to offer proof (Blatch v. Archer (1774) 1 Cowp 63 at 65; 98 ER 969) and, where events have prejudiced the provision of proof, who is responsible for those events (Murphy v. Overton Investments Pty. Ltd. (2004) 78 ALJR 324 at [74]).

1. These four propositions were cited with approval by Ball J in *Tzaneros Investments Pty Limited v Walker Group Constructions Pty Limited* [2016] NSWSC 50 at [134], who then said at [135]-[137] :

135 A discount on the ground of betterment is likely to be appropriate where the plaintiff has had machinery or other property used for a commercial purpose replaced with property of greater efficiency or productivity, resulting in increased profits for the plaintiff: British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 . A discount is also likely to be appropriate where the replaced or repaired property is a "marketable commodity" that has been or is likely to be sold in the near future, as this would realise for the benefit of the plaintiff any increase in value due to the replacement or repair of the damaged or defective property: Hoad v Scone Motors Pty Ltd [1977] 1 NSWLR 88 at 93 per Moffitt P.

136 On the other hand, if the benefit said to accrue to the plaintiff is not quantifiable, is too remote in time, or could be considered to be merely speculative, a discount on the ground of betterment is less likely to be appropriate: Harbutt's 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd [1970] 1 QB 447, see also Tyco Australia v Optus Networks at [262] per Hodgson JA. In Hyder Consulting (Australia) v Wilh Wilhelmsen Agency [2001] NSWCA 313, a defective

pavement with a life expectancy of twenty years collapsed after four years. In reaching the decision that a discount for betterment would not be appropriate in that case, Sheller JA said that it was no more than a "speculative proposition that the new pavement might last longer than the old one would have" (at [55]).

137 It may be appropriate for any reduction in damages itself to be adjusted where the benefits that make the discount appropriate will only become available at some point in the future or are not certain to eventuate: Tyco Australia Pty Ltd v Optus Networks Pty Ltd [2004] NSWCA 333 per Hodgson JA at [262] . In that case Hodgson JA did not consider a discount for betterment appropriate but noted in obiter that even if he had been, "the deduction from damages would have been substantially less than 50%, because the benefits would have become available between four and eight years in the future, and been less than 100% certain". In the New Zealand case of J & B Caldwell Ltd v Logan House Retirement Home Ltd [1999] 2 NZLR 99 (referred to by Sheller JA in Hyder Consulting at [51]-[52]), Fisher J made an adjustment to a discount for betterment to take into account disadvantages to the plaintiff "associated with the involuntary nature of the additional investment" (at 107).

1. Lastly, In *Monteleone v AV Constructions Pty Ltd* NSWCA 13 (unreported, 13 December 1989) the Court of Appeal had to consider the question as to whether or not an error had been made by the trial judge in reducing the amount claimed for defective work because there was a less expensive membrane which was available to rectify the defect. In that case, Hope AJA, with whom Clarke JA and Meagher JA agreed said:

The remaining ground concerns the cross-action, and is limited to the question of whether his Honour was entitled to deduct from the amount claimed by the defendant the cost of the more expensive membrane to carry out remedial work and to substitute for that cost the cheaper cost of the other form of membrane. There is evidence from the experts called by each side that the more expensive membrane was a reasonable method to carry out remedial work, it not being in issue that some sort of membrane was necessary to ensure "weather tightness", to use the expression used by Mr Jack, the expert called for the plaintiff. It is also clear on the evidence that the cheaper membrane, being the one which his honour concluded would be valued for the purpose of the cross-section, would last only for four years. On the other hand, the evidence of the plaintiff's own expert was that the other and more expensive membrane would last fourteen years.

The reasons which his Honour gave for accepting the plaintiff's submission that the defendant should be credited only with the value of the cheaper membrane were these. There was no evidence from the defendant whether she would accept or carry out the more expensive remedy, and, in his Honour's view, the more expensive membrane would not be in keeping with the rest of the premises as reflected in photographs which were in evidence, nor with the use to which his Honour understood the slab which constituted the reef of the garage was to be put.

> It is submitted for the defendant that in light of the decision of the High Court in Bellgrove v Eldridge ... the course in fact adopted by the defendant would be immaterial to her right to recover the appropriate amount of damage for the defective work. In that case the question for decision was whether an owner was entitled to the cost of demolishing the work that had been carried out and rebuilding as opposed to merely carrying out some lesser form of remedial work. Relevantly to the question in issue here Dixon CJ and Webb and Taylor JJ said at 620:
>
> "To give to the respondent the cost of a doubtful remedy would by no means adequately compensate her, for the employment of such a remedy would not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations.
>
> It was suggested during the course of argument that if the respondent retains her present judgement and it is satisfied, she may or may not demolish the existing house and redirect another. If she does not, it is said, she will still have a house together with the cost of erecting another one. To our mind this circumstance is quite immaterial and is but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all."
>
> In my opinion, applying that reasoning to the present case, his Honour was in error in concluding that the defendant could only recover in the cross-action the cost of the less expensive membrane which would last only four years as opposed to the cost of the more expensive membrane which would last fourteen years

1. From these cases, the following principles can be derived:

    1. The appropriate award of damages is an amount representing the cost of reasonable and necessary work to rectify the defect arising from the breach found.

    2. In the case of a claim in contract, that is the amount to bring the works into conformance with the contract.

    3. The fact that the proposed method and/or materials is not the least expensive method is not, of itself, sufficient to reject that claim.

    4. Where the work undertaken is not extravagant and the plaintiff had no other reasonable choice then the sum expended to repair or replace the defective work will be recoverable.

5. Where a benefit is shown to be derived because of the rectification or replacement method adopted, allowance must be made for that benefit or betterment where it is not remote in time or speculative and the amount can be quantified.

6. Resolution of these matters are questions of fact; and

7. While a claimant has the general onus of proof of damage, a respondent may have a legal or evidentiary onus to prove a claim of betterment.

1. Applying these principles to the present case, in our opinion the issue that the Tribunal was required to determine was the cost of the work reasonably necessary to rectify the defect arising from the identified breach, namely that the works were not performed in a proper and workmanlike manner and were not fit for purpose.

2. As the Tribunal records at [226] of the Decision, the rectification methodology proposed by the owner's expert, Mr Roberts, which the Tribunal accepted as a reasonable method of rectification, was set out in the owner's Scott Schedule, and the reports of Mr Roberts filed in the proceedings. These reports are not in evidence before the Appeal Panel. However, it is clear from the Scott Schedule that forms part of the builder's two-volume bundle filed in the appeal that this work includes "*Supply and install a waterproof membrane system to the entire planter box in strict accordance with the Manufacturers recommendations. Provide Manufacturers and installer ' s warranties for the work on completion.... Ensure the membrane coating laps a minimum 100mm over the courtyard membrane upturn at the base of the planter walls and over the planter box membrane at the top of the planter boxes*".

3. The builder has not suggested in the appeal that the works proposed were not reasonable and necessary to correct the identified defect, namely the failure of the waterproof system over the slab over the car park in the location of the planter boxes which is Item 22. Rather, the challenge is based in the fact that the specification, a copy of which was handed up on the appeal, required "*Single layer membranes*" and that the rectification work proposed was a system different to that in the specification and constituted a betterment.

4. In our opinion, this fact, even if accepted, is not of itself sufficient to demonstrate that the rectification method accepted by the Tribunal gave rise in any relevant sense to a benefit or betterment. At best this evidence demonstrates that the system of waterproofing proposed in the rectification method adopted was different to the originally specified system. However, that does not prove that the rectification method adopted was not both reasonable and necessary to rectify the defect as found. Further, this fact does not prove that upon completion of the rectification work using a two layer membrane system the owner will receive a benefit over and above its entitlement to be compensated for the cost of repairing the identified defect.

5. To use the language of *Bellgrove v Eldridge* , the measure of damages adopted by the Tribunal is properly to be seen as the "*cost of making the work or building conform with the contract*", the contractual requirement being for the works to be constructed in a proper and workmanlike manner and to be fit for purpose. In this case this amount was the reasonable cost to correct the failure of a waterproof membrane in the planter boxes which permitted the egress of water and its entry through the slab to other areas of the building, namely the garage/car park area.

6. No submission was made by the builder that the choice of rectification method was not a reasonable method of rectification or conferred a quantifiable benefit over and above the entitlement to be compensated for the reasonable cost for rectifying the defect. Accordingly, the Appeal Panel is not satisfied that the Tribunal was in error or that the award made by the Tribunal failed to take account of any betterment arising from the rectification method which formed the basis of the damages assessed.

Orders in respect of ground 3

1. The builder has only succeeded on ground 3, the Appeal Panel having determined that there was an error of law in the Tribunal failing to consider the evidence of Mr Taylor on the question of whether or not a reasonable rate for removing and repairing the waterproof membrane in the tiled area of the courtyard was $650 m2.

2. Having rejected the challenge to the Tribunal's determination of damages in relation to the planter boxes, it follows that the finding that the rate of $750 per square metre for rectifying the planter boxes, including the replacement of the membrane in this area of the courtyard, remains undisturbed by our decision. In these circumstances, we have some doubt about whether the Tribunal will come to a different decision concerning the cost of replacing the membrane in the tiled area of the courtyard having regard to the findings, particularly at [230] of the Decision.

3. As we indicated above, we may have been inclined to refuse leave to appeal had leave been required. However in the absence of all relevant evidence, including the evidence of Mr Roberts and Mr Jakovljevic referred to at decision [258] – [260], in our view there is no alternative other than to refer the assessment of the reasonable rate and amount payable in connection with the replacement of the membrane in the tiled area of the courtyard back to the Tribunal as originally constituted so as to allow the Tribunal to consider all the evidence and provide appropriate reasons.

4. In doing so, we should make clear that, subject to any directions concerning submissions which the Tribunal might consider appropriate, the remittal would be on the following terms:

    1. The area of the works in the tiled area is 223.2 m as recorded in the Decision at [258];

    2. The only issue for redetermination is the assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area

    3. The assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area is to be determined:

        1. on the papers;

        2. without a further hearing;

        3. based on all relevant evidence originally before the Tribunal and not new evidence; and

        4. without further submissions.

Ground 5 of the appeal

1. The parties agree that the inclusion of GST in the Decision was incorrect. Accordingly, it is appropriate to make orders to remove any GST from the orders made by the Tribunal on 31 March 2015. In making this adjustment, it is necessary to remove from the award the amount of $145,080.00 in respect of item 24 - replacement of waterproof membrane to the tile area of the courtyard, which amount is to be re-determined having regard to our decision in connection with ground 3 of the appeal.

2. In addition to GST, it is also necessary to remove an amount of 8% for builder's margin and a percentage of the amount of $33,000 allowed in respect of Supervision. The appropriate course is to make a proportional adjustment consistent with the Tribunal's approach at [351], no alternative being proposed in submissions by the parties. Therefore the money award allowed by the Tribunal in the Decision at [352] should be adjusted with the Tribunal to separately recalculate any additional amount to be allowed for supervision in respect of item 24 once this is re-determined by the Tribunal.

3. This will mean that the amount of the award in favour of the respondent, excluding the amount payable in respect of item 24 in the schedule found in the Decision at [352] will be varied to $112,900.49, calculated as follows:

Calculation of adjusted award in favour of Respondent (excluding Item 24)		
Total allowed in Decision (excluding Overhead, margin, Supervision and GST)		**$235,617.00**
Less:		
Item 24 (Replacement of membrane in tiled area of courtyard		($145,080,00)
Net award		**$92,537.00**
Add:		
Builders margin	8%	$7,402.96
Sub-Total		**$99,939.96**
	($92,537/$235,617) = 39.27%	
Supervision	39.27% x $33,000.00	$12,960.53
Total adjusted award excluding GST		**$112,900.49**

Ground 6

1. The last ground of appeal to deal with is the builder's submission that the Tribunal was obliged to consider s 48MA of the HB Act and have regard to the principle that rectification of the defective work by the builder is the preferred outcome in a home building case.

2. Section 48MA of the HB Act was inserted by the HB Act 2014. That amending Act also inserted Part 20 into Sch 4 - Savings and transitional provisions - of the HB Act . Part 20 includes the following provisions:

> **119 Definitions**
>
> In this Part:
>
> *amending Act* means the Home Building Amendment Act 2014 .
>
> *amendment* of a provision includes:
>
> (a) substitution or omission of the provision, and
>
> (b) in the case of a new provision, the insertion of that provision.
>
> **120 Application of Part**
>
> (1) This Part prevails to the extent of any inconsistency with any other provision of this Schedule.
>
> (2) Regulations made under clause 2 of this Schedule have effect despite any provision of this Part.
>
> **121 General operation of amendments**

(1) Except as otherwise provided by this Part or the regulations, an amendment made by the amending Act extends to:

(a) residential building work or specialist work commenced or completed before the commencement of the amendment, and

(b) a contract to do residential building work or specialist work entered into before the commencement of the amendment (including a contract completed before that commencement), and

(c) a contract of insurance entered into before the commencement of the amendment, and

(d) a loss, liability, claim or dispute that arose before the commencement of the amendment, and

(e) an application for a license or certificate that is pending on the commencement of the amendment.

(2) However, an amendment made by the amending Act does not apply to or in respect of:

(a) proceedings commenced in a court or tribunal before the commencement of the amendment (whether or not the proceedings were finally determined before that commencement), or

(b) a claim made before the commencement of the amendment under a contract of insurance (whether or not the claim was finalised before that commencement).

1. The builder submits that, upon the proper construction, the transitional provisions in Sch 4 do not prevent s 48MA having effect because s 48MA are procedural in nature and not substantive rights.

2. In our view, this submission should be rejected.

3. The proceedings were commenced in 2008 and have a very long history. They were commenced in the CTTT, heard by NCAT over 4 days commencing 14 April 2014, with reasons for decision been published on 31 March 2015.

4. The amendments brought about by the HB Act 2014 commenced on 15 January 2015.

5. Clause 119 of Sch 4 provides a new provision inserted into the HB Act is an "amendment" for the purpose of Pt 20 of Sch 4 of the HB Act . Section 48MA is therefore an amendment within the meaning of Pt 20 .

6. Clause 121(2)(a) is clear in its terms. An amendment made by the HB Act 2014 "*does not apply to or in respect of proceedings commenced in a court or tribunal before the commencement of the amendment (whether or not proceedings were finally determined before that commencement)*".

7. It follows that:

1. Any obligation imposed upon the Tribunal by s 48MA to have regard to the principle that rectification of defective work by the responsible party is the preferred outcome is not a principle that applies to the Tribunal in determining the owner's application; and

2. In determining what remedy should be granted in consequence of the builder's breaches of statutory warranties as found by the Tribunal did not require the Tribunal to consider this principle or to provide reasons as to why it did not give effect to the principle.

1. Accordingly, no error has been made by the Tribunal and this ground of appeal fails.

Orders

1. Our preliminary view is that the appellant has had limited success in this appeal, although the success has significantly altered the amount of the award, at least until the issue of the reasonable rate is re-determined. Also one matter (GST) was conceded by the respondent. The appellant has otherwise failed on the remaining grounds.

2. Having regard to the partial success of the builder, our preliminary view is that each party should pay their own costs of the appeal. This is a case is in which either party seeking costs would need to establish that special circumstances exist and, even if these circumstances were established, the relative success of the parties would militate against an order in favour of one or other of the parties. This is particularly so because the Appeal Panel has not been able to resolve all issues in dispute because all relevant evidence has not been provided. So as to avoid any unnecessary application, we will make a conditional costs order and allow the parties to make submissions if either contends for a different order for costs. Those submissions should include submissions on the issue of whether a hearing should be dispensed with pursuant to s 50 (2) of the NCAT Act .

3. Accordingly, the Appeal Panel makes the following orders:

    1. The appeal is allowed in part.

    2. Order 1 made by the Tribunal on 31 March 2015 is varied by substituting the amount of $112,900.49 in lieu of the amount of $316,212.99.

    3. The proceedings are remitted to the Tribunal as originally constituted to re-determine the amount to be awarded in respect of item 24 recorded in the Schedule found at par [352] of its reasons for decision dated 31 March 2015 in accordance with these reasons and on the following terms:

        1. the area of the works in the tiled area is 223.2 m as recorded in the Decision at [258];

        2. the only issue for re-determination is the assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area;

        3. the assessment of the reasonable rate for rectifying the waterproof membrane in the tiled area is to be determined:

1. on the papers;

2. without a further hearing

3. based on all relevant evidence originally before the Tribunal and not new evidence; and

4. subject to any directions which the Tribunal might consider appropriate, without further submissions.

1. Subject to the following order, each party is to pay their own costs of the appeal.

2. In the event either party contends that a different order for costs should be made, the following directions apply:

    1. any application for costs, including any evidence and submissions, must be filed and served within 14 days from the date of these reasons;

    2. any reply to any application for costs made pursuant to Order 5(a) must be filed and served within 28 days from the date of these reasons;

    3. any submissions in reply by the applicant for costs must be filed and served within 35 days from the date of these reasons;

    4. any submissions must include submissions on the issue of whether or not an order should be made dispensing with a hearing pursuant to s 50 (2) of the NCAT Act

1. Save as provided above, the appeal is otherwise dismissed.

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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

Decision last updated: 23 May 2016