# Gleeson & Anor t/as ANT Building v The Owners – Strata Plan No 81893 - [2016] NSWCATAP 27

*Civil and Administrative Tribunal*

*New South Wales*

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| **Medium Neutral Citation:** | **Gleeson & Anor t/as ANT Building v The Owners – Strata Plan No 81893 [2016] NSWCATAP 27** |
| **Hearing dates:** | 7 July 2015 |
| **Date of orders:** | 03 February 2016 |
| **Decision date:** | 03 February 2016 |
| **Jurisdiction:** | Appeal Panel |
| **Before:** | D Patten, Principal Member<br>M Harrowell, Principal Member |
| **Decision:** | 1. Application to adduce fresh evidence refused.<br>Appeal in respect of the order made 13 February 2015 allowed in part.<br>2. The orders of the Tribunal made 13 February 2014 are varied by substituting in order 1 the sum of $293,228.18 for the sum of $359,064.00.<br>3. Appeal in respect of the costs order made 28 April 2015 allowed.<br>4. Subject to the appellants filing any submissions pursuant to the directions in the following order, the appellants are to pay the costs of the respondent in the proceedings below, such costs to be as agreed or assessed on a party/party basis.<br>5. In respect of the costs of the proceedings below, the Appeal Panel makes the following directions:<br>(a) The appellants are to file any submissions and material in relation the question of costs of the proceedings below within 14 days from the date this decision is published;<br>(b) The respondent is to file any submissions and material in relation the question of costs of the proceedings below in reply within 21 days from the date this decision is published;<br>(c) The appellants are to file any submissions in reply to the respondent's submissions within 28 days from the date this decision is published;<br>(d) The parties submissions are to include any submissions as to why the question of costs cannot be determined on the papers without a hearing.<br>6. Save as provided above, leave to appeal is otherwise refused and the appeals are dismissed.<br>7. Each party is to pay their own costs of the appeals. |
| **Catchwords:** | Error of law - failure to provide adequate reasons<br>Fresh evidence - evidence not reasonably available<br>Owners Corporation - standing to bring application under the Home Building Act as successor in title<br>Causation |
| **Legislation Cited:** | Building Code of Australia<br>Civil and Administrative Tribunal Act , 2013<br>Civil Liability Act , 2002<br>Consumer Trader and Tenancy Tribunal Act, 2001<br>Consumer Trader and Tenancy Tribunal Regulation,2009<br>Home Building Act , 1989<br>Home Building Regulation, 2004<br>Strata Schemes Management Act, 1996 |
| **Cases Cited:** | Al Daouk v Mr Pine Pty Ltd [2015] NSWCATAP<br>Brookfield Multiplex Ltd v Owners Strata Plan 6188 [2014] HCA 36<br>Building Insurers Guarantee Corporation v The Owners Strata Plan 60848 [2012] NSWCA 375<br>Thompson v Chapman [2016] NSWCATAP 6<br>Khan v Kang [2014] NSWCATAP 14<br>March v Stramare Pty Ltd (1990-1991) 171 CLR 506<br>Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120<br>Orr v Holmes [1948] 76 CLR 632<br>Simonius Vischer & Co v Holt & Thompson (1979) 2 NSWLR 322<br>The Craftsmen Restoration Renovations v Thomas Boland [2008] NSWSC 660<br>The Owners Strata Plan 43551 v Walter Construction Group [2004] NSWCA 429<br>The Owners Strata Plan 68372 v Allianz Australia Insurance Ltd [2014] NSWSC 1807<br>The Owners - SP69567 v Landson Alliance Australia [2014] NSWSC 1592<br>Thompson v Chapman [2016] NSWCATAP 6 |
| **Texts Cited:** | Nil |
| **Category:** | Principal judgment |
| **Parties:** | Anthony Joseph Gleeson & Ana Maria Gleeson t/as ANT Building (Appellant)<br>The Owners – Strata Plan No 81893 (Respondent) |
| **Representation:** | Counsel:<br>M Walsh (appellants)<br>T Davie (respondent)<br><br>Solicitors:<br>Makinson d'Apice Lawyers (appellants)<br>Carneys Lawyers (respondent) |
| **File Number(s):** | AP 15/34642AP 15/13452 |

**Decision under appeal**

Court or tribunal:
Civil and Administrative Tribunal
Jurisdiction:
Consumer and Commercial Division
Citation:
Not applicable
Date of Decision:
13 February 2015
Before:
N Correy, Senior Member
File Number(s):
HB 12/09956

*Reasons for Decision*

*Introduction*

1. This is an appeal from a decision of the Tribunal at first instance (Senior Member N Correy) published on 13 February 2015 following a hearing on 17 September 2014. The decision ordered the appellants to pay the respondent the sum of $359,064.00 within 28 days and gave directions to the parties regarding the making of submissions as to costs.

2. Subsequently the Tribunal on 28 April 2015 ordered the appellant to pay the respondents costs. That decision is also the subject of an appeal before us.

3. Although the learned Member below made a detailed analysis of the numerous defects alleged in respect of the building work which is the subject of the proceedings he did not in terms spell out the precise basis for his order of compensation. It may however be inferred from paragraph 1 of the reasons for decision and his analysis of each defect that he found breaches of the statutory warranties contained in section 18B of the *Home Building Act , 1989* (the Act).

> **18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:
>
> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation,

decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

(2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the ***principal contractor*** ) who has contracted to do residential building work contracts with another person (a ***subcontractor*** to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

4. The building work in issue concerned the construction of 4 residential units in a building intended to be the subject of a Strata Plan. It was accordingly residential building work within the meaning of the Act (Schedule 1 cl 12.).

5. The obligation in s 18B (c) includes an obligation to comply with the Building Code of Australia (BCA): see *Home Building Regulation 2004* Schedule 2 clause 2(1)) .

6. Section 18D of the Act extends the benefit of the statutory warranties contained in s 18B to "a person who is a successor in title to a person entitled to the benefit of a statutory warranty (under the Act). It was by virtue of this section that the respondent commenced the proceedings in the Tribunal at first instance as it became in relation to common property the successor in title to the previous owner upon registration of the strata plan.

7. There were many grounds of appeal which we will need to consider but there was also an application to rely on new evidence pursuant to cl 12 (1) (c) Schedule 4 to *Civil and Administrative Tribunal Act 2013* (CAT Act). We took evidence on the voir dire and received submissions from Counsel on this issue early in the hearing of the appeal and we will deal with it first.

*Application to introduce new evidence*

8. Clause 12 (1) Schedule 4 to CAT Act provides:

**12 Limitations on internal appeals against Division decisions**

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

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

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

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

**Note.** Under section 80 of this Act, a party to proceedings in which a Division decision that is an internally appealable decision is made may appeal against the decision on a question of law as of right. The leave of the Appeal Panel is required for an internal appeal on any other grounds.

9. The new evidence sought to be adduced comprised a series of emails sent on 5 and 6 December 2007. The grounds for the application were set out in the affidavit of Mr Anthony Gleeson one of the appellants sworn 19 May 2015. Describing the emails as a "bundle of documents" Mr Gleeson deposed:

5. The bundle of documents was not reasonably available at the time the proceedings were being dealt with on 17 September 2014, because of the following circumstances:

(a) One of the main issues in the proceedings is whether the defects complained of by the Respondent arose from a deficiency in design documentation. The Appellants have contended from the time commencement of the proceedings that the defects were attributable to design issues, where the design was provided by the predecessor-in-title. I refer to the report prepared by Mr Stephan Iskowicz of Axiom Construction Consultants dated 29 June 2012, located at page [1200] of the Agreed Bundle before the Tribunal.

(b) The documentation concerning the construction of the building, which is the subject of this Appeal, is retained by me, and comprises approximately 20 lever-arch volumes of documents.

(c) I retained solicitors to act on my behalf in the proceedings before the Tribunal, and the solicitors prepared the instructions to the Appellant's expert (refer page 1276 of the Agreed Bundle before the Tribunal).

(d) Despite the Appellants contention that some of the defects claimed by the Respondent were the result of the deficiencies in the design, I did not realise at the time of the hearing before the Tribunal, and when the evidence was being prepared, either the existence of, or the importance of, the document that the Appellants now seek to rely on.

(e) Based on my knowledge of the allegations in the proceedings, and as it was the Appellants contention (and remains so) that the Appellants constructed the building in accordance with the plans and specifications, I did not undertake a

full search of the approximately 20 lever-arch volumes of documents. I believed that it was sufficient for the Appellants to provide evidence to the effect that the Appellants had constructed the building in accordance with the plans and specifications and architects instructions. Hence, I looked at any folder(s) marked *"Architects Instructions"* and *Site Meeting Minutes"*. I did not find **Annexure AJG1** in either of these folders.

(f) I retained new solicitors to act on behalf of the Appellants in the Appeal Proceedings. In the course of preparing submissions on the Appeal, I reviewed all the approximately 20 lever arch files and came across the documents contained in **Annexure AJG1**. I sent them to my new solicitors and queried whether they were relevant to the deficient design issue.

(g) **Annexure AJG1** was found in a folder marked *"Contractors Correspondence Subcontractors In"*. This type of folder routinely contains correspondence about the ordering of materials between ANT Building and the sub contractor, rather than correspondence between ANT Building and the architect. Given the marking on the folder, and my understanding of what it would contain, I did not look in it for plans and specifications and/or architects instructions at the time I was preparing evidence in the Tribunal proceedings. As I was not the author of the email I also didn't have personal knowledge of its existence. The author of the document, Simon Page, has not worked for ANT Building since 2009, ie before the commencement of these proceedings.

10. Mr Gleeson before us gave short oral evidence and was cross examined by Mr Davie, Counsel for the respondent. Mr Gleeson in his oral evidence identified a further email which became exhibit A on the voir dire. He conceded to Mr Davie that prior to the hearing below nothing had prevented him from looking through all his folders.

11. The email Exhibit A was sent at 2.43 pm on 5 December 2007 from Ms Skye Simons of Classic Windows to Mr Simon Page then apparently employed by the appellants.

It read:

Hi Simon,

Andy wanted me to pass on the following For Your Information –

Re – Bifold Sill Section

The rebate on the sill section i.e. the step down in the stone for internal/external. Andy has noticed that is it (sic) 15mm on the architectural drawing. Henderson and Centor's both recommend 23mm or greater for weathering.

Thankyou

Kind Regards,

Skye Simons

12. The "bundle of documents" comprised as its earliest in point of time what purports to be an email sent at 8.11 am on 6 December 2007 by Mr Page to Ms Simons. However it does not contain any message.

13. The second document was an email sent at 10.07 am 6 December 2007 from Mr Page to the architect Alan Kempster:

> Alan,
>
> Attached note from Classic Windows for our discussion.
>
> Is the increase in rebate worth consideration in view of the southerly aspect of some of the installations?
>
> Regards,
>
> Simon Page
>
> Project Manager

14. The only other document in the "bundle of documents" was an email sent by Mr Kempster to Mr Page at 2.16 pm on 6 December 2007:

> Simon,
>
> I believe that the 15mm rebate is sufficient – as you pointed out this was used at Palm Beach, and it was south facing windows as well.
>
> Regards,
>
> Alan Kempster

15. The significance so it was submitted of the emails was the potential to enliven the defence provided for by s 18F of the Act. In its form at the relevant time s 18F provided:

> In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work.

16. The principles involved in the admission of new evidence following a completed trial were discussed by the High Court in *Orr v Holmes* [1948] 76 CLR 632. At page 640 Dixon J who with Latham CJ comprised the plurality said:

> If a trial has been regularly conducted and the party against whom the verdict has passed cannot complain that evidence has been wrongly received or rejected or that there has been a mis-direction or that he has not been fully heard or has been taken by surprise or that the result is not warranted by the evidence, the successful party is not to be deprived of the verdict he has obtained except to fulfil an imperative demand of justice. The discovery of

fresh evidence makes no such demand upon justice unless it is almost certain that, if the evidence had been available and had been adduced, an opposite result would have been reached and unless no reasonable diligence upon the part of the defeated party would have enabled him to procure the evidence.

17. An Appeal Panel of this Tribunal discussed the proper interpretation of cl 12 (1) (c) of Schedule 4 of the CAT Act in *Al Daouk v Mr Pine Pty Ltd* [2015] NSWCAT AP 111. This discussion included these paragraphs:

> 23 Unlike the *Work place Injury Management and Workers Compensation Act 1998* (WIM Act), the expression "reasonably available" is not qualified by the words "to the party". This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence on summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014] NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the appellant at the time of the hearing and could not reasonably be known due to fraud.
>
> 24 Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).
>
> 25 Further, to grant leave simply on the basis of whether a party has been unsuccessful in their attempt to obtain evidence would allow any party who has a personal excuse for not providing evidence otherwise reasonably available an opportunity to seek leave to appeal any decision of the Tribunal. Such an outcome would not promote finalisation of the real issues in dispute in a just, quick and cheap manner as an opposing party would be liable to face a successful appeal and a rehearing merely because of the personal circumstances of the person who failed to procure necessary evidence.
>
> 26 In our opinion the intent of cl 12 of Sch 4 of the NCAT Act is to impose additional limitations on a party's entitlement to seek leave to appeal under s 80(2) of the NCAT Act from a decision of the Consumer and Commercial Division.
>
> 27 In the present case Mrs Al-Doauk took a number of steps to obtain evidence of the type now sought to be relied upon. However, the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.

18. In our opinion the appellants have not established that the evidence sought to be adduced was not reasonably available at the hearing below. It was in fact in possession of the appellants even if inappropriately filed. They must have been aware of the potential importance of the evidence as the Claim against them was based on breach of the statutory warranties contained in s 18B of the Act.

19. But in any event we are not satisfied that the "new evidence" would likely affect the outcome of the case the second limb propounded by Dixon J. Section 18F required in the circumstances of this case in order to make out the defence that the appellants carried out defective work upon the instruction of the architect contrary to advice in writing of the appellants.

20. In our opinion nothing in the emails referred to was capable of constituting contrary advice. Even if Ms Simons' email sent at 2.43 pm on 5 December 2007 was "advice" that something more than provided in the architects drawing was desirable it was not advice by the appellants. Assuming that the reference to a "note" in the email of 10.07 on 6 December was a reference to Ms Simons' email of the day before, the statement "is the increase in rebate worth consideration" hardly constitutes contrary advice. Indeed the reply by the Architect not only indicates that he did not regard it in that way but suggests that there were other written or oral communications between them on the subject.

21. For the above reasons we refuse the application to adduce new evidence.

*The standing of the appellant*

22. On 8 October 2014 that is in the period while the proceedings below were under judgment the High Court delivered its judgment in *Brookfield Muliplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36. The NSW Court of Appeal had held that the builder of strata titled serviced apartments owed a duty of care to the Owners Corporation to avoid causing it to suffer loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable. The High Court unanimously upheld the appeal holding there was no such duty of care.

23. In the course of the judgments in Brookfield the High Court made several observations as to the status of the Owners Corporation and as to its relationship with the lot owners. For instance French CJ said:

> *The strata schemes statutes*
>
> 9. Under strata schemes laws in New South Wales, a parcel of land, including any building or buildings which comprise part of it, can be subdivided into lots in accordance with a strata plan [9] . A strata plan for freehold lots is registered in the office of the Registrar-General pursuant to s 8 (read with s 5(1)) of the

*Strata Schemes (Freehold Development) Act* 1973 (NSW) ("the Strata Freehold Act"). Common property is so much of a parcel as is not comprised in any lot [10] . Under the *Strata Schemes Management Act* 1996 (NSW) ("the Strata Management Act"), the owners of the lots from time to time in a strata scheme constitute a body corporate designated "The Owners—Strata Plan No X", where "X" is the registered number of the strata plan to which that strata scheme relates [11] . The owners corporation comes into existence upon registration of the strata plan [12] . The Corporation came into existence on 11 November 1999. An owners corporation has the functions conferred upon it by the Strata Management Act or any other Act [13] . The common property is vested in it [14] . It holds its estate or interest as "agent" for the proprietor or proprietors of the lots [15] . If different persons are proprietors of each of two or more lots, it holds the common property as agent for the proprietors as tenants in common in shares proportional to the unit entitlements of the respective lots [16] . The content of the term "agent" is to be derived from the statutory functions conferred upon the owners corporation.

10 The interest of a lot owner in the common property has been characterised by the Supreme Court of New South Wales as an equitable interest as a tenant in common with other lot owners [17] . On that basis, the owners corporation has been described as holding the common property "as trustee for all the lot proprietors in proportion to their unit entitlements" [18] . Leeming JA in the Court of Appeal also referred to the relationship as "analogous to trustee and beneficiary" [19] . That cautious description may avoid attachment to the functions of the Corporation of the full panoply of equitable and statutory incidents of the trust relationship. In any event, the characterisation of the Corporation as a trustee or an analogue of a trustee was not in dispute before the Court of Appeal or in this appeal [20] .

11 The owners corporation has a statutory duty to properly maintain the common property and keep it in a state of good and serviceable repair [21] . It must renew or replace any fixtures or fittings comprised in the common property [22] . Those duties do not apply to a particular item of property if the owners corporation, by special resolution, determines that it is inappropriate to do any of those things [23] , albeit that exemption does not apply if the safety of any building, structure or common property is affected or the appearance of any property in the strata scheme detracted from [24] . The duties of the owners corporation do not depend upon whether someone was to blame for the common property being other than in a state of good and serviceable repair. As the primary judge correctly observed [25] :

> "The duty to maintain and repair common property is not limited by reference to the source of the problem that gives rise to the need for maintenance or [repair]. The duty will extend, in an appropriate case, even to the rectification of defective work left unrectified by the builder."

Generally speaking, funding for repairs and maintenance of the common property must come from the lot proprietors by way of levies. The owners corporation must establish an administrative fund and a sinking fund and can, and in some circumstances must, impose a levy so that it can meet particular

maintenance and repair obligations [26] . Insurance payments, damages awards and negotiated settlements with persons said to be liable for damages for defects in the common property comprise other obvious sources of funding.

Hayne J and Kiefel J later observed:

The damage

45 There may be a real and lively debate about whether the Owners Corporation itself suffered any loss as a result of defects in the common property. The better view may be that any loss constituted or occasioned by defects in the common property was suffered by the owners of the lots for whom the Owners Corporation held the common property as "agent" [78] . It is not necessary, however, to pursue that question.

46 Nor is it necessary to explore what follows from observing that, at the time the builder is alleged not to have taken reasonable care in the execution of the building works, the Owners Corporation did not exist. It is convenient to assume, without deciding, that nothing turns on this observation. It is sufficient to instead focus on whether the builder owed a duty of care to a subsequent owner of part of the building.

24. We also refer to the remarks of Crennan, Bell and Keane JJ

151 If the respondent is viewed as the alter ego of the purchasers from the developer, the respondent's position is not any stronger. Before explaining why that is so, it is desirable to acknowledge that it may be the better view of the position to regard the respondent for present purposes as the representative of the lot owners.

152 In *Owners – Strata Plan No 43551 v Walter Construction Group Ltd* [189] , Spigelman CJ, with whom Ipp and McColl JJA agreed, said that the statutory description of an owners corporation in s 20 of the SSFD Act as agent for the proprietors of individual lots should not be understood "solely in terms of an agency at common law." The precise significance of the reference to agency in s 20 of the SSFD Act is debatable [190] , but it is sufficient for present purposes to say that it tends to confirm, rather than to deny, that the detriment to the economic or financial interests of the owners corporation is, in substance, suffered by the owners of lots. There is nothing in the SSFD Act to suggest that the cost incurred by an owners corporation in meeting the need to keep the common property in good repair is not a loss truly borne by the individual lot owners, given that they are called upon to make proportionate contributions by way of levy under ss 75 and 76 of the SSM Act in order to meet that expense.

153 That view is supported by s 227(2) of the SSM Act, which provides in relation to common property that "[i]f the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person ... the proceedings may be taken by ... the owners corporation." Section 227(3) goes on to provide that "[a]ny judgment ... given ... in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment ... given ... in favour of or against the owners." These provisions are consistent with the view that the

> legislation, while establishing the owners corporation as a convenient vehicle for the vindication of the interests of the individual lot owners, does not deny or diminish those interests.

25. What was said by the High Court in Brookfield was considered by McDougall J in *The Owners - SP69567 v Landson Alliance Australia* [2014] NSWSC 1592. In that case the Plaintiff sought compensation in respect of allegedly defective aluminium framed windows and doors part of common property. The case was put as involving misleading or deceptive conduct or false representations contrary to the Trade Practices Act. Alternatively it was put as breach of duty of care. Before His honour was an application to strike out the claim having regard to what was said in Brookfield. After referring to the remarks of Hayne and Kiefel JJ quoted above McDougall J said:

> 48. I accept that if the analysis to which I have referred is applicable to claims under the *Trades Practices Act* or its analogues or successors, then it will impose a very substantial burden on the Owners Corporation in the present case. However, it is important to note that the analysis was undertaken for the purpose of analysing vulnerability. Vulnerability was relevant in *Brookfield Multiplex* because, as all their Honours agreed, it was vulnerability, in the sense of inability to take reasonable steps to protect oneself from the risk of economic loss, that was determinant of the existence of a duty of care in a claim for pure economic loss.
>
> 49. It does not follow that the analysis is applicable to all cases where a claim is made, on whatever basis, for economic loss.
>
> 50. Accordingly, I do not think that it can be said to be so clear as to justify summary dismissal, that the observations made in *Brookfield Multiplex* necessarily mean that in this case the Owners Corporation cannot have suffered loss.
>
> 51. Accordingly, I do not propose to strike out the claim based on asserted breaches of the *Trade Practices Act.*

26. Mr Walsh Counsel for the appellants, correctly we think, submitted that the Tribunal at first instance was bound to make its decision in accordance with Brookfield even though decided after judgment reserved. We are certainly required to do so.

27. However the remarks of the High Court were made in the context of an action in negligence and a conclusion that there was no duty of care. Some of those comments were obiter. This case is brought upon alleged breaches of statutory warranties expressly by the statute extended for the benefit of the respondent. The rights conferred on the respondent are as "*a successor in title to a person entitled to the benefit of a statutory warranty*" and the respondent "*is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty*": see s18D of the Act.

28. The right being exercised is not a claim for economic loss and the right of action is not dependent upon principles of vulnerability or the existence of a duty of care.

29. Further, the respondent has a statutory duty under s 61 of the *Strata Schemes Management Act, 1996* to maintain and repair the common property. As such it is illogical to suggest the statutory warranties conferred upon the respondent could not be enforced to seek orders under the Act for rectification of defective work or for recover damages for defective work caused by a builder for which an owners corporation was otherwise liable to make good.

30. For these reasons the statutory provision being remedial in nature should be interpreted beneficially.

31. In any event the decision of the Court of Appeal in *The Owners Strata Plan No 43551 v Walter Construction Group* [2004] NSWCA 429 puts any issue to rest so far as we are concerned. In *Walter Construction* the Court held that the Owners Corporation is the proper plaintiff to bring proceedings in respect of defective building work relating to the common property.

*Knowledge of the defects*

32. It was submitted on behalf of the appellants that even if the respondent is held entitled to bring proceedings there should be an adjustment of the amount recoverable by virtue of the knowledge the proprietors of lot 3 had of extensive defects, knowledge which caused them to have a clause written into the contract of purchase for the vendor to remedy a list of defects. However as Mr Davie pointed out those contractual rights could not have related to the common property which was the responsibility of the Owners Corporation.

33. We turn to other matters raised in the Appeal.

*Causation*

34. The Notice of Appeal commenced with these two grounds:

    1. The Tribunal erred in that it identified the wrong issue, in that it simply resolved the question of whether or not there was a breach of section 18B warranties by reference to whether there was breach of the Building Code of Australia, rather than identifying whether the breach was causative of Respondent's damage.

    2. The Tribunal erred in that it asked the wrong question, in that, in respect of each defect, the Tribunal:

        1. Should have asked, but failed to, whether Respondent's damage was caused solely by the Appellants implementing a faulty design received by the Appellants from the predecessor-in-title/developer; and

2. To the extent that, in relation to each, the answer to 1(a) is yes, the Tribunal should have asked, but failed to, whether in such circumstances the Appellants can be held liable for the Respondent's damage.

35. Most if not all of the defects found by the Tribunal below relate to water penetration into the living areas of the units. The Tribunal identified a number of possible causes including insufficient height of the step down from each internal to exterior area, ineffective or defective flashings, inadequately sealed or fitted doors, leaking roof membranes, insufficient drainage and poor design.

36. The Building Code of Australia includes these provisions

• Vo 1 F 1.3 "A drainage system for the disposal of surface water must

(a) Convey surface water to an appropriate outlet

(b) Avoid entry of water to a building

(c) Avoid water damaging a building"

• Vol. 1 F 2.2.2:

A building must be constructed to provide resistance to moisture from outside and moisture rising from the ground."

• "A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause –

(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and

(b) undue dampness or deterioration of building elements".

• A2.1 Suitability of materials – "Every part of a building must be constructed in an appropriate manner to achieve the requirements of the BCA, using materials that are fit for the purpose for which they are intended."

37. The Tribunal below found that external moisture penetrated the living areas of the units in circumstances which enlivened the statutory warranties. In his submissions on the issue of causation Mr Walsh referred to a number of cases including *Building Insurers Guarantee Corporation v The Owners Strata Plan 60848* [2012] NSWCA 375 and *The Owners – Strata Plan No 68372 v Allianz Australia Insurance Ltd* [2014] NSWSC 1807.

38. In our opinion none of the cases supports his argument that the appellants should not be held liable for deficiencies which arise from work which is defective.

39. The contract stipulates that the obligation of the appellants was "Demolition of existing dwellings and construction of residential development with four strata apartments and underground parking". This is to be contrasted with the situation in

*The Owners Strata Plan 60848* which involved the conversion of an existing building and it was held that the responsibilities of the builder did not extend beyond what he had actually contracted to do.

40. In this case the appellants were responsible for a new building and the statutory warranties were applicable to the whole work.

41. The decision of Ball J in *The Owners Strata Plan 68372* related to an insurance policy exclusion. That is the effect of the exclusion was to remove indemnity for a particular loss to which the policy would otherwise respond. In our opinion there is no analogy to be made between insurance policy exclusions and statutory warranties and it is not a case dealing with causation in the present sense. It is a case dealing with the construction of the provisions in a contract of insurance which excluded liability for a loss arising in whole or in part from a specified cause.

42. Nor do we think that the indemnity given by the owner to the builder in cl A4 of the contract affects the liability of the appellants under the statutory warranties. The loss did not arise solely from any defective design.

43. Further, such a provision to the extent that it purports to impermissibly restrict the rights of the respondent would be void (s 18 of the Act).

44. In our opinion, in the present case the only defence available to the appellants is that provided by s 18F of the Act. In that connection we follow the observations of Howie J in *The Craftsmen Restoration Renovations v Thomas Boland* [2008] NSWSC 660. At paragraphs 92 and following His Honour said:

> 92 It is clear that the builder purchased the windows from Trend and supplied them to the owner by installing them into the building. It was common ground that the builder purchased the Trend windows upon the instructions of the owners. The question of warranties by the builder under *Building Act* arises. Section 18B of the Act relevantly provides:
>
> "The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:
>
> (a)...
>
> b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new..."
>
> 93 Section 18F contains the following defence:

> "In proceedings for a breach of a statutory warranty, it is defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work."
>
> 94. It seems clear that it was to this issue that the Senior Member was referring in the second quote from her judgment when she commented upon the fact that it did not matter whether the leaking was due to defective windows or defective installation. The result would be the same because the builder had breached the warranty under s 18B(b) in relation to his supply of those windows. The builder does not come within the statutory defence because he did not give "advice in writing" to the owners that the windows were defective.
>
> 95 Although it is unnecessary for this Court to decide the issue, it seems to me that there is a legislative intention that the warranties and defences available are to be only those set out in the Act. The builder argued that the defence in s 18F was only **one** defence available. But I find it impossible to accept that, if the defence provided to a statutory warranty does not apply because the builder has not done what was required to engage the defence, the builder can look to some other non-statutory defence that does not have such a precondition.
>
> 96 The builder argued that he installed the windows at the express instruction of the architect and that it was obliged to comply with that instruction under the contract notwithstanding the builder's view, orally expressed to the architect, that the windows were defective. It was submitted that "contractual compliance with an Architect's instructions in the face of reasonable objection by a Builder is within the contemplation of section 18F". I do not accept that submission. The builder could, and should, have raised those concerns in writing with the architect. The defence would then have applied. It seems clear to me that the defence is limited in order to avoid the very contest that arose in this case: a dispute as to whether the builder gave advice against the work it was required to carry out. By not giving advice in writing the statutory defence did not apply. There is no justification to read the defence wider than it is stated or to read some other defence into the Act.
>
> 97. In my opinion, if the windows were defective, the builder was in breach of the statutory warranty in respect of them so far as the owners were concerned. The builder would have to look to Trend for any compensation for the breach of any warranty that it gave in selling the windows to the builder.

45. It follows that in our opinion where water penetration resulted from defective workmanship, whether or not in combination with faulty design, the appellants are liable under the statutory warranties.

46. Causation being a question of fact to be answered by common sense and experience ( *March v Stramare Pty Ltd* (1990-1991) 171 CLR 506) we have no difficulty in concluding as did the Tribunal below that the appellants by breaching the statutory warranties were a cause if not the cause of damage suffered by the respondent related to water penetration.

47. Generally in relation to causation we accept Mr Davies' submission that the law is as stated in *Simonius Vischer & Co v Holt and Thompson* [1979] 2 NSWLR 322. We quote from it the following passages:

> It was, of course sufficient for the plaintiffs to establish that the defendants' breaches were a cause of the loss notwithstanding that there may have been other concurrent causes. Hence, the defendants' argument must show that the plaintiffs' lack of care was the sole cause of the loss, to the exclusion of any causative influence exerted by the defendants' breaches. I take the correct principle to be that stated in *Chitty on Contracts*, General Principles, 23rd ed.; p. 670, par. 1448:
>
> "If a breach of contract is one of two causes, both cooperating and both of equal efficacy in causing loss to the plaintiff, the party responsible for the breach is liable to the plaintiff for that loss."
>
> This statement is supported by the authority of Devlin J., as he then was, in Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1046-1048, and the cases there cited. In particular, I refer to what was said by Lord Wright with whom Lord Atkin agreed, in Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co. Ltd [1940] AC 997 at 1007 . His Lordship's remarks, although delivered in a context different from that which obtains here, are of undoubted application. Lord Wright said:
>
> "The sole question apart from express exception, must then be: 'Was that breach of contract "a" cause of damage."

48. Further, as the *Civil Liability Act , 2002* (CL Act) does not apply to claims for breach of statutory warranty under the Act, no issue of proportionate liability between concurrent wrongdoers can arise: see s34(3A) of the CL Act.

49. In the present case, as recorded by the appellants' expert, Mr Iskowicz, in his report dated 29 June 2012 (Bundle Vol 5 tab 20, eg at Bundle p1213) and as found by the Tribunal found at [42], the BCA required, inter alia:

    1. A drainage system for the disposal of surface water to avoid water building up and entering the premises; and

    2. Prevention of water penetration that might cause undue dampness or deterioration of building elements.

50. Further, as is clear from the Tribunal's findings, these requirements were not met: see eg reasons for decision at [43] including the concessions of the appellant's expert recorded therein.

51. It follows that the loss suffered by the respondent was caused by the appellants and that the respondent was entitled to appropriate compensation.

52. What we have said deals with appeal grounds 1, 2, 3, 4, 6, 7, 14 and 15. As to those remaining.

53. Ground 5: This ground asserts that in relation to defect items 3, 5, 11, 12, 13, 17 and 18 the decision was so unreasonable that no reasonable decision maker would have made it. However as it seems to us the decision in *Simonius Vis c her* and the matters we have set out above determine the question contrary to the appellants.

54. Ground 8: The assertion in this ground that the decision in relation to defect items 4, 6, 7, 15 and 16 was so unreasonable that no reasonable decision maker could have made it is also covered by our reliance upon what was said in *Simonius Vischer* and the matters we have set out above.

55. Grounds 9, 10 and 11: These grounds relate to an allowance by the Tribunal of $22,400.00 for the removal and replacement of balustrades in respect of defect items 5, 11, 13 and 17. We agree that no reasons were given by the Tribunal for this allowance nor was there any reference to supporting evidence

56. Further a review of the evidence shows that the respondent's expert did not suggest that the removal and replacement of the balustrades formed part of the necessary rectification work. In this regard see the Polombo report and amended Scott Scheduled which records the scope of the rectification work for the following:

    1. Item 5 - Bundle Vol 3 P.436 (Report) and p.860(Scott Schedule)

    2. Item 11 - Bundle Vol 3 p.497 (Report) and p.865 (Scott Schedule)

    (The Appeal Panel notes in passing that this item appears to be item 12 – Bi fold doors, which also relate to item 13 concerning Apartment B).

    3. Item 13 - Bundle Vol3 p.506(Report) and p.867 (Scott) Schedule)

    4. Item 17 – Bundle Vol 3 p.530 (Report) and p.871 (Scott Schedule)

57. Rather, all that has occurred is that the quotation relied upon by the Tribunal has recorded this item of work as an allowance which the Tribunal has the allowed but reduced for reasons unexplained. However there is no evidence to which we have been referred suggesting it was otherwise reasonable or necessary to remove and replace the balustrades in order to rectify the identified defects.

58. Accordingly the claim for $22,400.00 should be disallowed and the original award reduced accordingly.

59. Ground 12: This related to defect item 4. The appellants submit that the respondent had asserted in submissions at the original hearing that this item of defect had been "*rectified in 2013 by Auspipe Plumbing Services at a cost of $3,661.90*" and that "*there was no evidence served to explain what this work extended and why it did not fix the alleged problem*": The appellants assert they are "*effectively being ordered to pay for the rectification of this i tem t wice*". See appellants' submission [36] – [37]

60. We agree that the reasons do not explain why the second amount of $4,897.00 was allowed despite the earlier repair. However in our opinion there was evidence before the Tribunal from which it could conclude that the repair effected by Auspipe in May 2013 was a temporary repair only, done on an urgent basis to protect the premises until final repairs were undertaken. This evidence is:

    1. The statement of Ms Denis dated 04/07/2013 at [18]: Bundle Vol 2 p.623-4, and

    2. The Auspipe invoice dated 22/05/2015: Bundle Vol 2 p. 652

61. The invoice expressly records work as "temporary patch on parapet".

62. Consequently, we are satisfied that the amount allowed by the Tribunal represented final repairs based on the fact that the Polombo report prepared in December 2013, that is after May 2013, records this work as still needing to be completed: see Vol 2 at p859

63. Ground 13: This ground related to the allowance by the Tribunal against the appellants of $15,720.00 for a head flashing. The appellants assert that the decision was one which no reasonable decision maker could have made. However the Tribunal gave extensive reasons in relation to the matter at paragraphs 47, 83-85 and 119 and we see no reason to disturb its conclusion.

*Calculation of Damages – Grounds 16, 17, and 18*

64. These grounds relate to the assessments of loss by the Tribunal below. There were two quotations in evidence from the respondent namely Pick Rectification Pty Ltd (Pick) and Fluid Building Services Pty Ltd (Fluid). Pick quoted $586,494.00 for rectification work and Fluid $877,438.00. It should be noted that these were quotations for actually carrying out the work and not expert reports. Obligations cast upon expert witness did not apply to the quotations.

65. It should also be noted that the quotations identified the items of defect in the Scott Schedule prepared by the respondent's expert and provided costings to carry out that rectification work.

66. The appellants relied upon the reports of Stephan Iskowicz (SI) of Axiom Consultants Pty Ltd. These were provided as expert reports and the requirements for such reports were complied with.

67. Under Section 38 of the CAT Act the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit subject to the rules of natural justice.

68. The Tribunal below dealt with the quotations and reports in the following Paragraphs of its reasons

> 113 Although each of the owners quotes give a price for each numbered item, they do so in different ways and for this reason it is submitted that caution should be adopted in attempting any mix of the two quotes in formulating the determination of damages. I accept that such a submission is appropriate and have therefore only used the Pick quote in formulating my assessment, which I consider appropriate having regard to it being an amount approximating two thirds of the fluid quote.
>
> 114 The builder relies on the rectification costs summary provided by SI which concedes costs totalling around $35,000.00 including GST in respect of the items for which the builder agrees there is liability. In respect of the balance of the items where liability is not conceded it submits that the reasonable cost of rectification for such disputed items would amount to about an additional $34,000.00 including GST if the Tribunal were to find in favour of the owners on the liability for those items. The SI summary however proposes a cost in respect of a scope of works which he considers is appropriate in relation to both the conceded and the disputed items and he does not give an alternate costing on the scope of works for each item which the owners experts have recommended.

69. In the following paragraphs of its reasons the Tribunal considers in relation to each of the defects it has found the cost of rectifying the defect by reference to the Pick quotation and the SI expert report. It was entitled to approach the matter in this way if it thought fit and gave in our view adequate reasons for its conclusions subject to the items mentioned above which in our view should be disallowed.

70. The appellants effectively submit that the quotations obtained from third party contractors cannot be evidence of the reasonable cost to carry out rectification work. In the present case that submission was made despite the fact that the quotations provided in fact priced the scope of work which the expert for the respondent identified as necessary to rectify the defects. In our view such a submission is plainly wrong: see eg *Khan v Kang* [2014] NSWCATAP 14.

71. Accordingly, we see no reason to disturb the findings of the Tribunal.

*Deduction for GST and Mathematical errors*

72. Two final matters to deal with are GST on the amount of the award and mathematical errors.

73. The appellants raised these issues at the appeal, having handed up a reconciliation schedule that became MFI 1.

74. Firstly the appellants submitted that GST should not be added to the award because the respondent was registered for GST and therefore would receive any input credit when the rectification work was paid done.

75. Secondly, the schedule shows that an amount of $14,517.00 for previously incurred rectification costs was included in the total of total of $344,547.00 recorded by the Tribunal at [138]. Consequently, the appellants say the Tribunal was in error in again adding $14,517.00 to the sum of $344,547.00 and making a final award of $359,067.00 as recorded in the reasons at [138].

76. The respondent did not dispute these matters but said it wished a chance to review MFI 1.

77. No subsequent submissions were made by the respondent and we accept these adjustments should be made. These adjustments will also need to take account of the matters we have raised above.

*Conclusion*

78. The total rectification cost calculated by the Tribunal was $359,046.00 inclusive of GST. As explained above, this sum should be adjusted to $344,951.00 being the amount in MFI 1 to remove the amount of $14,517.00 which has been double counted and to correct what otherwise seems to be a mathematical error where the Member totalled the items allowed and calculated that total as $344,547.00: see [138]

79. This amount should then be reduced by $22,400.00 (inclusive of GST) which we have disallowed above.

80. This leaves a balance of $322,551.00

81. After removing GST, the amount is reduced to $293,228.18 exclusive of GST.

82. Consequently, the award should be varied and reduced to the sum of $293,228.18.

*Costs*

83. As to costs, an award of costs on appeal requires special circumstances to be demonstrated. That is the claim must be out of the ordinary: see *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11] .

84. In our view the case was not complex although there were errors of law which we have identified. A substantial number of grounds were raised and the appellant had limited success. Some reduction was also made for mathematical errors and GST, issues first raised at the hearing of the appeal and properly conceded by the respondent when raised.

85. On balance we do not think the case is out of the ordinary and, in any event, where the appellants have been only partially successful it is appropriate that each party pay their own costs.

86. There remains the question of the appeal against the costs order below. It is submitted that this order was made in contravention of a stay order in operation and without the opportunity for the appellants to make submissions. We agree that the order for costs was made despite the fact there was a stay.

87. The Tribunal made an order that the appellants pay the respondent's costs on a party/party basis as agreed or assessed.

88. The original proceedings were commenced in 2012. The proceedings are therefore unheard proceedings to which Sch 1 of the CAT Act applies. This means that s 53 of the *Consumer Trader and Tenancy Tribunal Act, 2001* and cl 20(4) of the *Consumer Trader and Tenancy Tribunal Regulation , 2009* apply. This provides the Tribunal "*may award costs in such circumstances as it thinks fit*".

89. The respondent was successful and therefore the usual order for costs would ordinarily be made in favour of the successful party: see *Thompson v Chapman* [2016] NSWCATAP 6 at [68]-[76] . Accordingly, it is our preliminary view the appellants should pay the respondent costs of the proceedings before the Tribunal as agreed or assessed on a party/party basis.

90. The appellants say that they have not had the opportunity to make submissions about what order should be made in respect of these costs. They have not done so in their submissions on appeal. Accordingly, we will give them a short time to do so and allow the respondent an opportunity to reply.

91. The Appeal Panel will then deal with the issue as Senior Member Correy is no longer a Member of the Tribunal.

92. If no submissions are made by the appellant, the order for costs before the Tribunal will be as we have outlined above.

*Orders*

93. The Appeal Panel makes the following orders:

    1. Application to adduce fresh evidence refused.

    2. Appeal in respect of the order made 13 February 2015 allowed in part.

    3. The orders of the Tribunal made 13 February 2014 are varied by substituting in order 1 the sum of $293,228.18 for the sum of $359,064.00.

    4. Appeal in respect of the costs order made 28 April 2015 allowed.

    5. Subject to the appellants filing any submissions pursuant to the directions in the following order, the appellants are to pay the costs of the respondent in the proceedings below, such costs to be as agreed or assessed on a party/party basis.

    6. In respect of the costs of the proceedings below, the Appeal Panel makes the following directions:

        1. The appellants are to file any submissions and material in relation the question of costs of the proceedings below within 14 days from the date this decision is published;

        2. The respondent is to file any submissions and material in relation the question of costs of the proceedings below in reply within 21 days from the date this decision is published;

        3. The appellants are to file any submissions in reply to the respondent's submissions within 28 days from the date this decision is published;

        4. The parties submissions are to include any submissions as to why the question of costs cannot be determined on the papers without a hearing.

    7. Save as provided above, leave to appeal is otherwise refused and the appeals are dismissed.

    8. Each party is to pay their own costs of the appeals.

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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: 03 February 2016