Civil and Administrative Tribunal

New South Wales

Case Name:	McGrath v The Owners – Strata Plan No 13631
Medium Neutral Citation:	[2021] NSWCATAP 167
Hearing Date(s):	18 February and 19 March 2021
Date of Orders:	4 June 2021
Decision Date:	4 June 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J Lucy, Senior Member
Decision:	As the appellant has failed on all of his grounds of appeal, and as the respondent included a claim for costs of the appeal in its written submissions, we make the following orders: 1. Appeal dismissed. 2. If any party desires to make an application for costs of the appeal: (a) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages, and any evidence in support of the application, on or before 14 days from the date of these reasons; (b) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages, and any evidence in opposition to the application, on or before 28 days from the date of these reasons; (c) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of

these reasons;
(3) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

Catchwords: ADMINISTRATIVE LAW — particular administrative bodies — NSW Civil and Administrative Tribunal – Tribunal not bound by the rules of evidence – Tribunal made order that Procedural Direction 3 apply to the proceedings – whether there was power to make order that Procedural Direction 3 apply to the proceedings when s 38(2) of the Civil and Administrative Tribunal Act 2013 provided that the Tribunal was not bound by the rules of evidence – held that there was power – although not bound by the rules of evidence the Tribunal had power to order that Procedural Direction 3 apply to the proceedings to ensure the Tribunal was provided with a satisfactory basis for the findings to be sought at the hearing and that expert opinions were soundly based, complete and reliable

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), ss 26, 36(1), 38(2), 45
Evidence Act 1995 (NSW), s 56(2), 76, 79(1), 135, 136, 137
Strata Schemes Management Act 2015 (NSW), s 106
Uniform Civil Procedure Rules 2005 (NSW), r 31.23(3)

Cases Cited: Allen v TriCare (Hastings) Ltd [2016] NSWCATAP 216
Chen v R [2018] NSWCCA 106
Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd [2011] NSWCA 279
House v The King (1936) 55 CLR 499; [1936] HCA 40
Smith v Ulan Coal Mines Limited [2019] NSWSC 1263
Welker & Ors v Rinehart & Anor (No 6) [2012] NSWSC 160
Wood v The Queen (2012) 84 NSWLR 581; [2012] NSWCCA 21

Texts Cited:	Nil
Category:	Principal judgment
Parties:	Peter McGrath (Appellant) The Owners – Strata Plan No 13631 (Respondent)
Representation:	Counsel: B Le Plastrier (Appellant) P J Gow (Respondent) Solicitors: Harrington Lawyers (Appellant) James Tuite & Associates (Respondent)
File Number(s):	2020/00371127 (AP 20/45309)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	28 September 2020
Before:	G Ellis SC, Senior Member
File Number(s):	SC 19/21795

REASONS FOR DECISION

1 The appellant is a lot owner in the respondent strata scheme.

2 On a number of occasions damage was occasioned to his unit as a result of water ingress. He commenced proceedings against the respondent alleging the respondent had failed to comply with its obligations under s 106 of the *Strata Schemes Management Act 2015* (NSW) to properly maintain and keep in a state of good and serviceable repair the common property.

3 One item about which the appellant complained was the alleged presence of mould in the ceiling space above his unit. He produced reports by two experts:

Mr Seymour and Mr Lark. He was directed to have those experts comply with the Tribunal's Procedural Direction 3. He failed to do so. The Tribunal refused to admit part of one report and the entirety of the other into evidence because of that failure and rejected any claim for relief in relation to mould.

4 The central issue in this appeal was whether the Tribunal erred in not admitting that expert evidence because of the failure to comply with the Tribunal's directions.

5 For the reasons which follow we do not consider the Tribunal erred and we are of the opinion that the appeal should be dismissed.

Background

6 We will first mention two sets of orders made by the Tribunal preliminary to the hearing which took place on 27 July 2020.

7 The first set or orders was made on 11 November 2019. The relevant orders made on that occasion, most particularly being Order 7, were:

> "1. By Determination of member, on 11 November 2019 the hearing was adjourned to a date to be fixed by the Divisional Registrar.
>
> 2. The Tribunal notes the following matters:
>
> (1)-(4) …
>
> (5) in the circumstances, the application was not ready to proceed today for a formal hearing;
>
> (6) the following further orders and directions are made to facilitate the progression of the application to a formal hearing on a date to be fixed by the Divisional Registrar in the period March/April/May of 2020.
>
> 3. Leave is granted to both parties to be legally represented at the hearing.
>
> 4-6. …
>
> 7. On or before 11 December 2019, the applicant is to give to the Tribunal and the respondent in person or by post such other documents as he intends to rely upon in support of his case for orders of the Tribunal. The documents are to include statements of evidence (whether in the form of a statutory declaration or affidavit) expert reports to comply with NCAT Procedural Direction 3, written submissions …"

8 The second relevant set of orders was made on 7 April 2020. The relevant orders made on that occasion, most particularly being Orders 3 and 11, were:

> "2. The applicant is to provide access to his lot to the respondent and any expert or experts engaged by the respondent in relation to the issue of mould on 24 hours' notice.

> 3. The applicant is given leave to rely on the reports of David Lark and Rob Seymour each dated 7 February 2020 provided a statement or affidavit that contains the report and complies with Procedural Direction 3 is provided to the Tribunal and the respondent by 17 April 2020.
>
> 4. …
>
> 5. The respondent is to provide any expert evidence in relation to the issue of mould to the Tribunal and the applicant by 1 May 2020.
>
> 6. Time is extended for the applicant and the respondent to comply with order 9 made on 11 November 2019 in respect of the issues other than mould to 1 May 2020 and the joint expert reports are to address the issues referred to in the Schedule.
>
> 7. …
>
> 8. The experts of the applicant and the respondent in relation to the issue of mould are to provide a joint expert report by 15 May 2020 and the joint expert report is to address the issues referred to in the Schedule.
>
> 9-10. …
>
> 11. If any party fails to comply with any of these orders they are notify the Tribunal and if appropriate apply for an extension of time supported by evidence."

9 Order 3 made on 7 April 2020, set out above, is centrally relevant to this appeal and shall be referred to simply as "Order 3" hereafter in these reasons for ease of reference.

10 Procedural Direction 3, referred to in both sets of orders set out above, concerns expert evidence in the Tribunal. It took effect from 28 February 2018. It was made by the then President of the Tribunal as authorised by s 26 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act").

11 Procedural Direction 3 applies automatically to certain types of proceedings (referred to as "Evidence Rules Proceedings" in the Procedural Direction) but only applies to the balance of proceedings (referred to as non-Evidence Rules Proceedings in the Procedural Direction) if the Tribunal so directs.

12 The present case was a non-Evidence Rules Proceeding and so Procedural Direction 3 did not automatically apply. However, the Tribunal made a direction that Procedural Direction 3 apply to the present proceedings in its Order 7 made on 11 November 2019 (set out at [7] above).

13 The relevant background and the Tribunal's reasons for not admitting the identified expert evidence are succinctly stated in the Tribunal's reasons at [10]-[17]:

“10. The applicant also sought to rely on two reports: the report of Mr Seymour dated 14 April 2020 and the report of Mr Lark dated 07 February 2020. A question of admissibility that arose during the hearing was whether the applicant should be permitted to rely on those reports.

11. On 07 April 2020, when this application was listed for hearing, an adjournment was granted due to the late service of reports by the applicant from Mr Seymour and Mr Lark, both dated 07 February 2020. As those reports did not comply with Procedural Direction 3, the following order (order 3) was made:

> ‘The applicant is given leave to rely on the reports of David Lark and Rob Seymour each dated 7 February 2020 provided a statement or affidavit that contains the report and complies with Procedural Direction 3 is provided to the Tribunal and the respondent by 17 April 2020.’

12. The applicant subsequently filed a report from Mr Seymour, dated 14 April 2020, which does contain an acknowledgement that has read and agrees to be bound by Procedural Direction 3. However, there was no compliance with order 3 in relation to Mr Lark. Indeed, Mr Lark’s report contains, in paragraph 2.4, an acknowledgement that his report ‘may not be in a format acceptable for litigation purposes’.

13. In the absence of any of adequate explanation for the failure to comply with order 3 in relation to the report of Mr Lark, that report has not been received as part of the evidence in these proceedings. Since Mr Seymour’s report relied on the analysis performed by Mr Lark, that rendered portions of his report inadmissible, namely the last sentence on page 2, the last sentence on page 3, the last sentence on page 4 and the ‘bullet points’ on page 5.

14. The Tribunal was not prepared to ignore order 3 which would not have been made had it not been considered necessary. Compliance with that order should not be treated as optional. It is noted that the applicant failed to respect order 3, in relation to Mr Lark’s report, at any time during the more than three months between the second time this matter was listed for hearing (07 April 2020) and the third time this matter was listed for hearing (27 July 2020).

15. That was not the only failure of the applicant to comply with orders of the Tribunal. When directed to file closing submissions, the applicant chose to add fresh evidence which the Tribunal has disregarded. Further, when requested to provide for form of the orders he sought, despite a specific indication that what was sought was the form of the orders proposed and not further submissions, the applicant included submissions with his proposed orders which submissions the Tribunal has also disregarded.

16. Indeed, as late as 20 July 2020, one week before the third occasion this matter was listed for hearing, the applicant lodged a document which included an additional report from Mr Drexler, based on an inspection he made of the unit on 02 July 2020, well after the 29 May 2020 notice that indicated this matter was set down for hearing and without any direction being sought or obtained for additional evidence.

17. That report has also been rejected as the applicant has had ample time to provide the evidence upon which he wished to rely and it would have been procedurally unfair to expect the respondent to deal with that report, a copy of which was only provided one week prior to the third occasion this matter was listed for hearing. While the Tribunal is not bound by the rules of evidence, that

> does not mean that a party can file and serve what they like, when they like and ignore orders made by the Tribunal."

14 What does not appear from those reasons (because it was not argued), but is relevant to this appeal, is that Mr Lark's report was not served as a stand-alone report but was served (and was referred to as such in Mr Seymour's report) as an addendum to Mr Seymour's report. This fact is relevant to Ground 2 of the appeal.

15 The appellant relies on four grounds of appeal:

(1) The Tribunal had no power to make a mandatory order in the terms of Order 3 made on 7 April 2020.

(2) In the alternative, the Tribunal erred in finding that Order 3 was not satisfied.

(3) The Tribunal erred in construing Order 3.

(4) The Tribunal erred in exercising its discretion to not admit the identified expert evidence.

Preliminary Context

16 The appellant submitted that there were ten uncontroversial matters which were relevant to, and supported, his grounds of appeal. They were:

(1) The appellant was unrepresented.

(2) The appellant's case was as summarised in the Tribunal's reasons at [4], namely:

> "As a result, this application is now confined to a request for an order under section 232 for the respondent to carry out work, based on four areas of dispute: (1) water damage to ceilings between July 2018 and March 2019, (2) cracks in ceilings and wall linings, (3) mould, and (4) detached wall tiles in the bathroom and laundry. Each of those issues is considered separately below."

(3) The first observation of mould was made by Mr Binnington, a building (but not mould) expert called by the respondent, at p.23 of his report dated 14 October 2019. Mr Binnington said, apropos of his inspection of the appellant's unit:

> "Removal of a downlight from the West side of the ceiling, near water damage, revealed the top of the Fyrchek to have mould growth on it."

(4) The Tribunal said the following at [11] of its reasons:

> "On 07 April 2020, when this application was listed for hearing, an adjournment was granted due to the late service of reports by the applicant from Mr Seymour and Mr Lark, both dated 07 February 2020. As those reports did not comply with Procedural Direction 3, the following order (order 3) was made:

> 'The applicant is given leave to rely on the reports of David Lark and Rob Seymour each dated 7 February 2020 provided a statement or affidavit that contains the report and complies with Procedural Direction 3 is provided to the Tribunal and the respondent by 17 April 2020.'"

(5) The terms of Orders 2, 5, 6 and 8 made by the Tribunal on 7 April 2020 (set out at [8] above).

(6) The Joint Expert Report (produced as a result of a conclave of building – but not mould – experts on 27 April 2020) does not contain any expert opinion evidence relating to mould (the experts mentioned observations of a black substance that "had the appearance of mould", but all said they had no expertise in that area and so could not offer any relevant expert opinion in relation to that substance).

(7) Because Mr Lark's report was attached as an addendum to Mr Seymour's report, there was but one report (being Mr Seymour's). Mr Seymour had complied with Procedural Direction 3 (as Order 3 required), Mr Seymour was appropriately qualified, and no objection was taken to his expertise.

(8) The respondents informed the Tribunal that they had formed the view that they did not need any evidence with respect to mould, and so no report by a mould expert was served by the respondents and there was no conclave of mould experts as contemplated by the Orders made on 7 April 2020.

(9) The respondent's case at the hearing was that, if the Tribunal found there was mould in the ceiling and floor cavities, those cavities were sealed and there was no evidence of any mould in the airspace of the appellant's unit.

(10) Neither Mr Seymour nor Mr Lark were required for cross-examination.

Ground 1

17 The appellant submitted that the Tribunal had no power to make a mandatory order in the terms of Order 3 made on 7 April 2020 and expanded this ground in oral submissions to submit that the Tribunal erred in construing Order 3 as mandatory.

18 The appellant submitted that s 38(2) of the NCAT Act applied, the consequence being that all expert reports must be admitted into evidence whether or not they complied with the rules of evidence, the only question being the weight to be attached to the opinions expressed in those reports. The relevant provisions of s 38 are as follows:

> **38 Procedure of Tribunal generally**

(1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.

(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

(3) Despite subsection (2)—

(a) the Tribunal must observe the rules of evidence in—

(i) proceedings in exercise of its enforcement jurisdiction, and

(ii) proceedings for the imposition by the Tribunal of a civil penalty in exercise of its general jurisdiction, and

(b) …

(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

19 The appellant submitted that the holding in *Allen v TriCare (Hastings) Ltd* [2016] NSWCATAP 216 at [190]-[191] applied. In that case the Appeal Panel said (and we have also quoted [192] as it is also relevant):

"[190] In *Hancock v East Coast Timber Products Pty Limited* [2011] NSWCA 11, the Court of Appeal explained the approach that should be taken to expert evidence by a decision making body that is not bound by the rules of evidence. That case concerned the Workers Compensation Commission, which operates under provisions which were very similar, but not identical, to s 28(2) and (3) of the CTTT Act and s 38(2) and (4) of the NCAT Act. The Court of Appeal held, in *Hancock* at [82] and [83]:

'82. Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence based jurisdictions, that does not require strict compliance with each and every feature referred to by Heydon JA in Makita to be set out in each and every report. In many cases, certain aspects to which his Honour referred will not be in dispute. A report ought not be rejected for that reason alone.

83. In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight. This was made apparent in *Brambles Industries Limited v Bell* [2010] NSWCA 162 at [19] per Hodgson JA. That is the way that Keating DCJ dealt with Dr Summersell's evidence in this case, so that is not the relevant error.'

[191] This reasoning and approach should be applied to proceedings in this Tribunal, when the rules of evidence do not apply, and to proceedings conducted under the CTTT Act. In these situations, the question of the acceptability of expert evidence in the Tribunal will be one of weight not

> admissibility. In addition, the Tribunal is required to be satisfied that expert evidence provides a satisfactory basis upon which it can make its findings.
>
> [192] The requirement that the expert evidence provides a satisfactory basis for the making of findings by the Tribunal is reflected in:
>
> > (1) the Tribunal's procedural direction dealing with expert evidence, issued in February 2014 by the President under s 26 of the NCAT Act, NCAT Procedural Direction 3 – Expert Evidence, which the valuer expressly agreed to be bound by on p 2 of his report; and …"

20 The appellant submitted that insofar as Procedural Direction 3, made pursuant to s 26 of the NCAT Act, may suggest something inconsistent with s 38(2), s 26 should only be construed to do so if it contained express words to that effect and cited *Chen v R* [2018] NSWCCA 106 at [27] and [30] as support for that proposition.

21 We will assume for the purpose of these reasons, without deciding that it is so, that Procedural Direction 3 is a "rule of evidence" within the meaning of that term in s 38(2) of the NCAT Act.

22 We also note that the *Evidence Act 1995* (NSW) does not apply to the Tribunal in non-Evidence Rules Proceedings. Section 4(1) of the *Evidence Act* says that that Act applies "to all proceedings in a NSW court". "NSW court" is defined in the Dictionary as meaning the Supreme Court, any other court created by Parliament, and:

> "… includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

23 As 38(2) of the NCAT Act says that (in non-Evidence Rules Proceedings) the Tribunal is not bound by the rules of evidence, then the Tribunal is not required to apply the rules of evidence and so the Tribunal does not fall within the definition of "NSW court" in the *Evidence Act*.

24 *Chen* concerned two rules of the Supreme Court, being Part 75 r 3(J)(3)(b) and (c), and their interaction with the *Evidence Act* and particular s 79. Section 76 of the *Evidence Act* says that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. Section 79(1) says that:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

25 Part 75 r 3(J)(3)(b) and (c) of the Supreme Court Rules provided that unless the Court otherwise ordered, oral evidence or written reports by experts was not to be received in evidence unless an expert witness acknowledged in writing that he or she had read the code of conduct (similar to Procedural Direction 3), agreed to be bound by it, and a copy of that acknowledgment was served on all parties affected by the evidence.

26 In *Chen* the expert evidence was that of a Chinese interpreter who had translated certain intercepted telephone calls made by a suspected drug dealer, but whose oral and written evidence did not comply with the rules earlier referred to. Her evidence was admitted, and the accused appealed.

27 The Court of Appeal held, at [20], and following *Wood v The Queen* (2012) 84 NSWLR 581; [2012] NSWCCA 21, that Part 75, r 3J of the Supreme Court Rules did not confine the operation of s 79 of the *Evidence Act*, with the result that the failure to comply with that Part was not the mandatory exclusion of the interpreter's evidence. That was because (see at [23]-[24]) no provision of the *Evidence Act* made it a condition of admissibility that the provisions of the *Supreme Court Act* which regulated the expert code of conduct be complied with.

28 The rule-making power provided by s 11 of the *Supreme Court Act* – pursuant to which rr 3(J)(3)(b) and (c) were made - was not, in the absence of express words, to be construed:

> "… to repeal or amend what the Parliament expressly enacted as to the admissibility of expert evidence in s 79 of the Evidence Act."

29 The Court held (at [29]) that while s 8 of the *Evidence Act* provided that it "does not affect the operation of the provisions of any other Act", if there was any tension between the provisions expressly made in the *Evidence Act* as to the admissibility of evidence (such as s 79) and those made in the Supreme Court Rules, it must be resolved on the basis that the specific provisions as to admissibility of evidence which the Parliament has enacted in the Evidence Act, must prevail over the Rules.

30 The Court reasoned that s 79 of the *Evidence Act* established an exception to the exclusionary opinion rule created by s 76, in the case of a person who has

specialised knowledge based on his or her training, study or experience where the opinion was wholly or substantially based on that knowledge. Therefore, the Court said (and as discussed in *Wood*) an expert's evidence is not inadmissible when the requirements of Part 75 of the Supreme Court Rules were not satisfied.

31 Having said that, the Court said at [34]-[45] that the failure to comply with the Supreme Court Rules relating to experts' reports remained relevant to considering whether the evidence should be excluded pursuant to ss 135 and 137 of the *Evidence Act*.

32 Thus, the appellant submitted that the absence of express words in s 26 of the NCAT Act, which granted the President of the Tribunal the power to make procedural directions, should not be construed as authorising the President to make procedural directions effectively repealing or amending s 38(2) of the NCAT Act which says that the Tribunal is not bound by the rules of evidence (in in non-Evidence Rules Proceedings). Therefore, the appellant submitted, non-compliance with Procedural Direction 3 could not bar the admissibility of any expert report.

Decision

33 *Chen* was a criminal case, but much the same position applies in civil cases in courts governed by the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") and particularly UCPR 31.23(3) (an equivalent rules to the rule considered in *Chen*). That rule says:

> [U]nless the Court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert by whom it was prepared that he or she has read the Code of Conduct and agrees to be bound by it.

34 The considerations applicable under that sub-rule are not so different from those set out in s 135 of the *Evidence Act*.

35 In *Wood* at [729], quoted with apparent approval in *Chen* at [19], the Court said:

> "This is not to say that the Expert Witness Code of Conduct is merely aspirational. Where an expert commits a sufficiently grave breach of the Code, a court may be justified in exercising its discretion to exclude the evidence under s 135 or s 137 of the *Evidence Act*. Campbell J adverted to this

possibility in *Lopmand* when his Honour stated at [15]: "The policy which underlies the existence of Part 36 rule 13C is one which I should take into account in deciding whether [the expert evidence] should be rejected under s 135." I respectfully agree with that approach. While there is no rule that precludes the admissibility of expert evidence that fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the Evidence Act. The expert's 'failure to understand his [or her] responsibilities as an expert' (*Lopmand* at [19]) may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead or confuse or be unfairly prejudicial to a party."

36 Sections 135-137 of the *Evidence Act* say:

> **135 General discretion to exclude evidence**
>
> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
>
> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing, or
>
> (c) cause or result in undue waste of time.
>
> **136 General discretion to limit use of evidence**
>
> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—
>
> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing.
>
> **137 Exclusion of prejudicial evidence in criminal proceedings**
>
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

37 We divert briefly to note that whilst the Tribunal is not *bound* by the rules of evidence, that does not mean that the Tribunal may not apply them in appropriate circumstances, or at least apply them by analogy. After all, the rules of evidence attempt to ensure that the trial process is fair for the parties and the decision maker is not provided with evidence upon which it is thought it would be unsafe to rely.

38 That would seem to be implicit in the statutory obligation in s 38(4) of the NCAT Act which says that whilst the Tribunal is to act with as little formality as the circumstances of the case permit, it is also to act:

> "… according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

39 Section 36(1) of the NCAT Act also says that the guiding principle for the NCAT Act [which, of course, includes s 38(2)] and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the *just*, quick and cheap resolution of the real issues in the proceedings. The word "just", in our view, encompasses considerations such as ensuring that the Tribunal will have a satisfactory and reliable basis upon which to base its findings against one party or the other.

40 It would be inimical to those statutory obligations to act according to equity, good conscience and the substantial merits of cases, and in applying the guiding principle to facilitate the *just*, quick and cheap resolution of the real issues in the proceedings, to read s 38(2) of the NCAT Act as if it meant that in no circumstances the Tribunal ever apply the rules of evidence, including, by analogy, rules such as the exclusionary rules set out in ss 135-136 of the *Evidence Act*. Of course, the most fundamental of all the rules of evidence is that which provides that evidence that is not relevant in proceedings is not admissible [s 56(2) of the *Evidence Act*]. It can hardly be suggested, for example, that the Tribunal is prevented by s 38(2) from excluding irrelevant evidence. Nor, in our opinion, can one read s 38(2) as preventing the Tribunal, in appropriate cases, from excluding or limiting the use of evidence in the same way as courts might do so under ss 135-136 of the *Evidence Act*.

41 Returning to admissibility and non-compliance with the expert code in the Supreme Court, in *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 Ball J was taken to a number of authorities which considered the question whether non-compliance with UCPR 31.23(3) or its predecessor could be cured by a subsequent affidavit asserting that the expert had since read the Code (the equivalent of Procedural Direction 3), agreed to be bound by it, and adhered to the opinions previously expressed without alteration. His Honour considered the position was authoritatively stated by Young JA, with whom Beazley JA (as her Excellency then was) and Handley AJA in *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279. Ball J then said:

> "[35] In my opinion, it follows from what Young JA said that it is necessary to consider all the circumstances of the case in order to determine whether the

> objectives sought to be secured by UCPR r 31.23 have been affected by the non-compliance. Those circumstances include the nature of the instructions that were actually given to the expert, the expert's prior familiarity with the code, the extent to which the report on its face appears to comply with the code and the evidence subsequently given by the expert concerning the question whether he or she complied with the code at the time and whether his or her opinions have been affected by non-provision of it. It is for the party seeking to lead the evidence to satisfy the court that the non-compliance with UCPR r 31.23 has not affected the objectives of the rule, or that there are other reasons which justify a departure from it.
>
> [36] In this case, I am not satisfied that I should make an order dispensing with compliance with UCPR r 31.23 in respect of any of the reports. Although each of the experts has sworn an affidavit saying that he has now read the code and confirms the opinions expressed in his report, none has said that he complied with the code at the time he prepared his report. None says that, at the time he prepared his report, he had any familiarity with the obligations of an expert giving evidence. The letter of instructions each received gave no hint that the expert was to act independently of those instructing him. On the contrary, the letter of instructions is phrased in terms that suggest that the experts' assistance was being sought to help "demonstrate" to the court that "increased media interest and reporting of a person's wealth is causally linked to [an increase in] that person's risk profile". To a greater or lesser degree, each of the reports reads as if the author saw his task as an advocate for Mrs Rinehart's case. The authors' subsequent affidavits are not, in my opinion, sufficient to dispel that impression.

42 In *Smith v Ulan Coal Mines Limited* [2019] NSWSC 1263 Campbell J said at [11]:

> "As the express words of UCPR 31.23(3) make clear, the absence of an acknowledgment from an expert's report does not engage an inflexible exclusionary rule. The Court retains a discretion. In the exercise of that discretion, the Court will, of course, prefer substance over form. Where it appears that the expert in preparing the report has been guided by impartiality, independence from the parties and a motivation to assist the Court rather than the party retaining him, there will have been substantial compliance with the Code. However mere retrospective inclusion of the required acknowledgment in an amended report will not satisfy the requirements of the sub-rule unless it can be shown that there has been substantial compliance in the sense I have already discussed."

43 Although those authorities are not directly binding because they do not concern the relevant provisions of the NCAT Act or Procedural Direction 3, the statutory and other provisions referred to in those authorities are sufficiently analogous to s 38(2) of the NCAT Act and Procedural Direction 3, taken with what we have said above at [37]-[40] about the Tribunal being required to act according to equity, good conscience and the substantial merits of the case, and to facilitate the facilitate the *just*, quick and cheap resolution of the real issues in

the proceedings, that their Honours' reasoning should also be applied by analogy to non-Evidence Rules Proceedings in the Tribunal.

44 This, as we read the decision, was also the approach of the Appeal Panel in *Allen* (see at [19] above) wherein the Appeal Panel said that the Tribunal, although not bound by the rules of evidence, is required to be satisfied that expert evidence provides a satisfactory basis upon which the Tribunal can make its findings. The Appeal Panel said that the requirement that expert evidence provide a satisfactory basis for the making of findings by the Tribunal is reflected in the Tribunal's procedural direction dealing with expert evidence.

45 For that reason, per *Allen*, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. That does not mean that strict compliance with each and every feature referred to in Procedural Direction 3 is required, as long as the Tribunal is satisfied that the expert evidence provides a satisfactory basis upon which the Tribunal can make its findings.

46 The insistence on being provided with a satisfactory basis for the findings sought (by compliance with Procedural Direction 3) is different to a question of admissibility per the rules of evidence, although the distinction may perhaps be a fine one. It is analogous to the Supreme Court excluding evidence under ss 135 and 137 of the *Evidence Act* in criminal cases (as *Chen* said could be done) and excluding expert evidence for non-compliance with the requirements for expert evidence in civil cases per *Hodder Rook* and *Smith* (see at [41]-[42] above).

47 Therefore, in our opinion the Tribunal does have power to make a mandatory order in the terms of Order 3 made on 7 April 2020, namely that a party may rely on certain expert's reports provided a statement or affidavit that contains the report and complies with Procedural Direction 3 is provided. That power is not an implied "repeal" or "amendment" of s 38(2) of the NCAT Act because it does not attempt to apply any "rule of evidence", but rather is a power exercised in order for the Tribunal to be satisfied (in appropriate cases) that the expert evidence provides a satisfactory basis upon which the Tribunal can make its findings.

48 That view is supported, we think, by the fact that Procedural Direction 3 only applies in non-Evidence Rules Proceedings if the Tribunal makes an order to that effect, whereas in the Supreme Court authorities referred to earlier the requirement for compliance with the Code of Conduct operated automatically by operation of either r 3J of the Supreme Court Rules in the criminal cases or UCPR 31.23(3) in the civil cases. That is, no judicial officer turned his or her mind to the Code of Conduct and determined that it was appropriate that experts comply with the Code of Conduct in those cases. Here, compliance with Procedural Direction 3 was imposed because the Tribunal *specifically turned its mind* to that Direction and whether it should be complied with in this case.

49 Our view is also supported by the fact that, speaking generally, parties in the Tribunal (in cases such as the present) generally have the carriage of their own case and are not entitled to be represented by any other person, including a legal practitioner, unless leave is granted by the Tribunal – s 45 of the NCAT Act. In the Supreme and District Courts, parties are entitled to be legally represented if they wish, and most commonly are.

50 The point being that the Supreme Court will commonly have placed before it experts' reports prepared with the assistance of lawyers. Those lawyers are governed and bound by professional conduct rules, and those lawyers will generally have directed their minds to ensuring (as far as possible) that the experts' reports provide a satisfactory basis for the findings to be sought at a hearing.

51 That is not generally the position in the Tribunal where non-legally represented parties are not bound by professional conduct rules, and do not have the training and experience that lawyers have in ensuring experts' reports provide a satisfactory basis for the findings to be sought at a hearing.

52 The evident purpose of Procedural Direction 3, when directed to apply to a non-Evidence Rules Proceeding such as the present where the relevant party is not legally represented, is to seek to ensure the reports provide a satisfactory basis for the findings to be sought at the hearing. The Procedural Direction itself makes this point in saying (in cl 1) that:

> "It is important that experts' opinions are soundly based, complete and reliable."

53 The Tribunal obviously turned its mind to this issue when it made the order requiring the parties to comply with Procedural Direction 3 on 11 November 2019. There is no appeal from that order which is of a discretionary kind. That is, the appellant does not appeal on the basis that the order that Procedural Direction 3 apply to the present proceedings was made in error.

54 Therefore, the appellant starts from the position that he does not submit there was any error in the Tribunal deciding that, in this case (and for the purpose of ensuring there was a satisfactory basis upon which it could make its findings and that the experts' opinions were soundly based, complete and reliable) the parties should comply with Procedural Direction 3.

55 Of course, the making of Order 3 did not necessarily tie the Tribunal's hands at the hearing as it was an interlocutory order, a fact implicitly recognised by the Tribunal in this case. The Tribunal retained a discretion to dispense with that requirement, but that is a different issue which is addressed by Ground 4 of the appeal.

56 In our view there was power to make Order 3 and we do not accept ground 1.

Ground 2

57 The appellant contends that the Tribunal erred in finding that Order 3 was not satisfied.

58 The Tribunal found, at [12] of its reasons, that there was no compliance with Order 3 in relation to Mr Lark because there was no acknowledgement that he had read and agreed to be bound by Procedural Direction 3.

59 The appellant submitted that there did not need to be a separate acknowledgement by Mr Lark because there was only one report, being that of Mr Seymour. Mr Lark's report was not in fact a report, submitted the appellant, because it was an addendum to Mr Seymour's report and thus fell within clause 19(g) of Procedural Direction 3.

60 Clause 19 of Procedural Direction 3 says:

> 19. An expert's report must, either in the body of the report or in an annexure, include the following:
>
> (a) an acknowledgement that the expert has read the experts' code of conduct and agrees to be bound by it;
>
> (b) the expert's name, address and qualifications as an expert on the issue the subject of the report;
>
> (c) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed);
>
> (d) the expert's reasons for each opinion expressed;
>
> (e) if applicable, that a particular issue falls outside the expert's field of expertise;
>
> (f) any literature or other materials used in support of the opinions;
>
> (g) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out;
>
> (h) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

61 The appellant submitted that Mr Lark's report was a document which set out the examinations, tests or other investigations on which Mr Seymour had relied, including details of the qualifications of the person who carried them out.

62 This submission must be rejected for two reasons.

63 First, it elevates form over substance.

64 Without attempting to define a precise boundary between reports on the one hand, and examinations, tests and investigations on the other, the critical feature of expert reports in litigation are opinions, whereas the critical feature of examinations, tests and investigations are observed or observable facts.

65 Mr Seymour took six air-impact samples on site and sent them to Mr Lark whose laboratory analysed those samples and provided results tabulated by area sampled, concentration of mould per cubic metre, and the concentration of particular species of mould per cubic metre. Therefore, it is true that Mr Lark's report does refer to what may be regarded as examinations, tests and investigations.

66 But Mr Lark's report goes much further, and, particularly in section 4 headed "Conclusions", proffers expert opinions. Included in those opinions were, for example, opinions that:

> "4.4 … the presence of fungal hyphae is indicative of recent active mould growth and therefore constitutes a potential health hazard.
>
> …
>
> 4.7 Based on the samples submitted for analysis, the levels and genera of mould detected constitute a health hazard, as reported by References 1,3,5,7 and continued occupancy is ill advised until remediated.
>
> 4.8 Access to the assessed premises shall only be granted to personnel equipped with appropriate PPE and appropriate signage should be in place in order to enforce this requirement.
>
> 4.9 The premises requires remediation by an accredited remediator, employing methods in accordance with Reference 2 or equivalent.
>
> 4.1 Following remediation, retesting to confirm post remediation verification should be performed in accordance with Reference 8."

67 These opinions formed the gravamen of Mr Lark's report, and went beyond mere examinations, tests and investigations. In our view Mr Lark's report is better viewed as an expert report.

68 Second, Order 3 said that the appellant was:

> ".. given leave to rely on the *reports* of David Lark and Rob Seymour …".
>
> (Our emphasis)

69 By use of the plural "reports" rather than "report", and by the express reference to Mr Lark, it was made clear to the appellant, and the respondents for that matter, that the two documents were to be treated as two separate expert reports.

70 We do not accept ground 2. In our view the Tribunal did not err in construing Order 3 as requiring Mr Lark to provide a statement or affidavit that contains the report and acknowledging that he had complied with Procedural Direction 3.

Ground 3

71 The appellant contended that the Tribunal erred in construing Order 3 in that the Tribunal erred in applying Order 3 as a precondition to admissibility in circumstances where Orders 2, 5 and 8 of 7 April 2020 (set out at [8] above) were not enlivened. Those three orders provided for access to the premises for the respondent's mould expert, the service of any report as to mould and for a joint report to be produced by the parties' mould experts.

72 The respondent did not retain any mould expert in the proceedings, and so those orders we have mentioned were not enlivened. The appellant submitted that, in those circumstances, non-compliance with Order 3 should not have prevented the two reports being admitted.

73 We disagree.

74 The fact that the respondent did not engage a mould expert, and thus there was no need for access for this access, service of his or her report and joint expert report to be prepared, did not relieve the appellant from compliance with the Tribunal's Order 3.

75 Had the appellant complied with that order he would have been in the advantageous forensic position of having tendered expert opinions without there being any contesting expert opinions tendered on behalf of the respondent, and the respondent obviously took that forensic risk in not obtaining and serving any expert opinion to the contrary. Such is one feature of our adversary system of litigation.

76 But the absence of expert opposition did not turn the rejected passages into something they were not. That is, and as we mentioned earlier, the purpose of Order 3 and Procedural Direction 3 was to ensure the Tribunal was provided with material which would form a satisfactory basis upon which the Tribunal could make its findings and to ensure that the experts' opinions were soundly based, complete and reliable.

77 In the absence of the Tribunal being provided with the relevant information (compliance with Procedural Direction 3), the rejected passages did not become a satisfactory or reliable basis for findings simply because there was no opposing expert opinion.

78 For those reasons we do not accept ground 3.

Ground 4

79 The appellant's final ground of appeal was that, in refusing to allow Mr Lark's report and parts of Mr Seymour's report into evidence, the Tribunal erred in the exercise of its discretion.

80 In seeking to challenge a discretionary decision for an error of law the appellant is required to demonstrate one of the errors described in *House v The King* (1936) 55 CLR 499; [1936] HCA 40. As is well known, that authority establishes that a discretionary judgment on a matter of practice and procedure can only be overturned in five limited circumstances. These circumstances only exist when it is demonstrated that the decision-maker:

(1) made an error of legal principle;

(2) made a material error of fact;

(3) took into account some irrelevant matter;

(4) failed to take into account or gave insufficient weight to, some relevant matter; or

(5) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.

81 The appellant relies on the fourth of those matters. The appellant submits that, in exercising its discretion whether to admit the evidence, the Tribunal failed to take into account the following relevant matters:

(1) The other experts in the case did not opine on the mould issue.

(2) The other experts in the case said they would defer to a mould expert in relation to that issue.

(3) There was no cross-examination of Mr Seymour.

(4) The respondent's case at the hearing was that, if the Tribunal found there was mould in the ceiling and floor cavities, those cavities were sealed and there was no evidence of any mould in the airspace of the appellant's unit.

(5) Clause 7 of Procedural Direction 3 provided that:

> "In non-Evidence Rules Proceedings, a failure to comply with the code of conduct does not render any expert report or evidence inadmissible but it may, depending on the circumstances, adversely affect the weight to be attributed to that report or evidence."

(6) The appellant was unrepresented.

(7) It would be more difficult for an unrepresented litigant in the Tribunal to adduce expert evidence than it would be a for a prosecutor to adduce expert evidence in criminal proceedings (with reference to *Chen* as an illustration).

(8) The absence of prejudice to the respondent.

82 It is correct to say, as we have said earlier at [51] above, that Order 3 was an interlocutory order which the Tribunal could have set aside or excused the appellant from non-compliance with it.

83 But we are unaware of any such application having been made, and unless and until that was done Order 3 remained extant.

84 The point of that observation is that the decision of the Tribunal which is challenged by ground 4 is the decision not to set aside Order 3, rather than a decision per s 38(2) [as the appellant says in his written submissions] whether to admit the evidence.

85 The distinction is important because the considerations bearing upon relief from Order 3 are different to considerations whether to admit evidence. As to the latter, as the appellant correctly points out, the Tribunal is not bound by the rules of evidence. However, in relation to the former, and taking into account what we have said in relation to ground 1, the basal considerations concerned ensuring the Tribunal was provided with a satisfactory basis for the findings to be sought at the hearing and in particular that the (rejected) opinions were soundly based, complete and reliable.

86 When looked at that way, the appellant's contention that the Tribunal erred fails because, in our opinion, none of the matters identified by the appellant were relevant to the proper question.

87 None of the matters identified by the appellant address, as a matter of substance, the basal considerations at play in the decision not to set aside Order 3. As we said similarly in relation to ground 3, the factors identified by the appellant (at [77] above) did not turn the rejected passages into something they were not, and were not relevant to the basal considerations we have identified or the ultimate question whether non-compliance with Order 3 should have been excused.

88 We do not accept ground 4.

Orders

89 As the appellant has failed on all of his grounds of appeal, and as the respondent included a claim for costs of the appeal in its written submissions, we make the following orders:

(1) Appeal dismissed.

(2) If any party desires to make an application for costs of the appeal:

(a) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages, and any evidence in support of the application, on or before 14 days from the date of these reasons;

(b) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages, and any evidence in opposition to the application, on or before 28 days from the date of these reasons;

(c) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(3) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

****

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

Registrar

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