Civil and Administrative Tribunal

New South Wales

Case Name:	Fitzgerald v Waterstop Solutions (NSW) Pty Ltd
Medium Neutral Citation:	[2022] NSWCATCD 84
Hearing Date(s):	20 April 2022
Date of Orders:	20 June 2022
Decision Date:	20 June 2022
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) Pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013 the application is dismissed on the basis that it is misconceived. (2) Any application for costs is to be made with supporting submissions by 4 July 2022. Submissions are to be limited to 5 A4 pages in not less than 11 point font. (3) Any reply to any application for costs is to be made with supporting submissions by 28 July 2022. Submissions are to be limited to 5 A4 pages in not less than 11 point font. (4) Subject to order (5), pursuant to s 50(1)(c) of the Civil and Administrative Tribunal Act 2013 the Tribunal dispenses with any further hearing on the issue of costs. (5) If a party contends for any different order to order (4) they are to set out the order sought and the grounds for that order in any application for costs or reply to any application for costs.
Catchwords:	BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – Statutory warranty – Due care and skill – Standing of Lot Owners to bring an application under the Home Building Act 1989 against a builder

	engaged by the Owners Corporation in relation to the repair of common property in a Strata Scheme
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Home Building Act 1989 (NSW) Strata Schemes (Freehold Development) Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Regulation 2015 (NSW)
Cases Cited:	Alchin v Rail Corporation NSW [2012] NSWADT 142 BDK v Department of Education and Communities [2015] NSWCATAP 129 EK Constructions Pty Ltd v Zhu [2017] NSWCATAP 102 Grygiel v Baine & Ors [2005] NSWCA 218 Seiwa v Owners Strata Plan 35042 [2006] NSWSC 1157
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Robert Fitzgerald (First Applicant) Emma Fitzgerald (Second Applicant) Waterstop Solutions (NSW) Pty Ltd (Respondent)
Representation:	Counsel: B Anderson (Respondent) Solicitors: Bull, Son and Schmidt (First and Second Applicant) ITC Law (Respondent)
File Number(s):	HB 21/45759
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Robert and Emma Fitzgerald (the applicants) for an order pursuant to s 480(1)(a) of the *Home Building Act* 1989 (NSW) (HB Act) that would require Waterstop Solutions (NSW) Pty Ltd (the respondent) to pay them $70,721.40 in compensation for the costs they contend they will incur in

rectifying defective building work the respondent has carried out on the balcony of their apartment. This application was made to the Tribunal on 7 November 2021 (the application).

2 The Tribunal has dismissed the application because it is misconceived. The applicants are lot owners in a strata scheme. The building works about which they complain were carried out on common property on their Lot under a contract between the Owners Corporation and the respondent. The applicants have no proprietary interest in the common property of the strata scheme which they are capable of asserting as a building claim against the respondent under the HB Act.

Procedural history

3 The application was first listed before the Tribunal on 6 December 2021 for a Directions Hearing conducted by telephone in accordance with NCAT's COVID-19 Revised Hearing Procedure. Both applicants attended that listing of the application. Mr Adrian Schokman, NSW Manager, attended on behalf of the respondent. In accordance with the usual practice where both parties are present in person at the first listing of an application the Tribunal, differently constituted, attempted to assist the parties to resolve the dispute by conciliation. Those efforts were not successful. As a consequence, the matter was adjourned to a Special Fixture Hearing. Directions were issued to the parties in relation to the filing and exchange of the documentary evidence and submissions that they intended to rely on at the final hearing. This included provision for a joint tender bundle, joint Scott Schedule, and an agreed statement of facts. Leave was also granted to both parties to be represented in the proceedings by an Australian Legal Practitioner.

Evidence and hearing

4 The parties have partially complied with the Tribunal's directions for the filing and exchange of evidence, including a joint Scott Schedule. There is no joint tender bundle or agreed statement of facts.

5 For the reasons set out following, it is unnecessary to traverse the evidence in relation to the disputed works in detail. It is sufficient to set out that the applicants filed documentary evidence and submissions on 1 December 2021,

25 January 2022, 6 April 2022, 8 April 2022, 14 April 2022 and 19 April 2022. These bundles contained substantial duplication. Primary reliance was placed on the evidence and submissions filed on 6, 14 and 19 April 2022. To the extent that these bundles contain evidence they were marked for identification A1, A2, and A3 respectively. The respondent filed documentary evidence and submissions on 18 March 2022, 28 March 2022 and 19 April 2022. To the extent that these bundles contain evidence they were marked for identification R1, R2 and R3 respectively.

6 I note that there are a number of procedural disputes between the parties concerning the evidence that has been filed. However, it is unnecessary to refer to, or resolve, these disputes because they are not reached having regard to the basis upon which the application has been determined. The parties will of course be free to re-agitate these issues if they are relevant in relation to any application for costs.

7 Where I have relied upon a specific document submitted by a party as a basis for decision I have accepted it into evidence and assigned it an exhibit number, as will appear following.

Material facts

8 In disposition of this application it is only necessary to set out the following material facts.

9 The applicants are the owners of Lot (Unit 14) in Strata Plan 92638 which is located in Hornsby. Unit 14 is a residential apartment.

10 Strata Plan 92638 was registered on 23 December 2015 pursuant to the *Strata Schemes (Freehold Development) Act* 1973 (SSFD Act). It comprises 88 lots. The Registered Plan for Strata Scheme 92638 is accepted into evidence and marked Exhibit 1. It includes the following notation with respect to the balconies of lots in that scheme:

> …where not covered the upper limit of the stratum of each balcony is 2.5 above the upper surface of its concrete floor

11 On or about 16 September 2020 the Owners Corporation of Strata Plan 92638 entered into a standard form Home building contract for work over 20,000 with the respondent (the contract). The contract price was $238,546.00. The

contract was executed by the Owners Corporation's Strata Manager on its behalf. The contract is accepted into evidence and is marked Exhibit 2.

12 The work which was the subject of the contract was remedial waterproofing of the structural slabs of 4 Lots within the Strata Scheme which required demolition of everything on the structural slabs including all dividing walls, tiled areas including the external courtyard, and planter boxes. The detail of the work is incorporated into the contract by a quotation provided to the Owners Corporation by the respondent which is dated 1 February 2020 (the quotation). The quotation is accepted into evidence and is marked Exhibit 3.

13 I note that there is an issue in dispute about the detailed scope of work that was incorporated into the contact. However, that issue is not reached in these proceedings.

14 The remedial works to Unit 14 were carried out in November 2020. The applicants contend that this work was not carried out with due care and skill and that it is defective. In overview, they have 18 complaints about the work. Most of these complaints (items 1 to 8, 10, and 17) relate to the quality of the tiling work. In this respect the applicants contend that the tile lippage, plane/levelness, junction sealing, weepholes, parallel, control/movement joints, edge straightness, floor fall, joint spacing and skirting tiling are all defective. Their other complaints relate to the re-instatement of the air conditioning overflow, sliding door of bedroom 2 and living room, mould due to water pooling, patch rendering, structural movement cracks, retaining wall and disability access over balcony door frames (items 9, 11 to 16, and 18 respectively).

15 The central issue in the disposition of these proceedings is whether the alleged defective work has been carried out to the common property of Strata Plan 92638 or to Unit 14 lot property. In this respect I make the following findings which are subsidiary to that question which I do not understand to be in dispute:

(a) The structural slabs, waterproofing, tiling, balcony doors, retaining wall and render which were the subject of the remediation works were all elements of the original construction of the building and were in situ at the time the Strata Plan 92638

was registered. They have not been replaced or modified since that time up to the date of the contract;

(b) The air-conditioning unit was also supplied and installed in the original construction work. It has not been replaced since that time;

(c) There is no common property by-law that assigns the responsibility for the maintenance of any of the building elements or air conditioning unit which are the subject of this dispute to the applicants as lot owners.

16 Following completion of the works the Owners Corporation and the respondent fell into dispute about the work. This ultimately led the intervention of NSW Fair Trading's Home Building Service which issued a rectification order in relation to the work. That rectification order concerns only a subset of the applicants' complaints. Since the issuing of that rectification order the applicants have fallen into dispute with the respondent and the Owners Corporation about the scope of works to be carried out by the respondent pursuant to the rectification order.

17 The applicants have instituted these proceedings before the compliance date specified in the rectification order and have not permitted the respondent access to Unit 14 to carry out the rectification work specified in rectification order.

18 The By-Laws of Strata Plan 92638 include the following in relation to floor coverings:

> 14 Changes to floor coverings and surfaces
>
> (1) An owner or occupier of a lot must notify the owners corporation at least 21 days before changing any of the floor coverings or surfaces of the lot if the change is likely to result in an increase in noise transmitted from that lot to any other lot. The notice must specify the type of the proposed floor covering or surface.
>
> (2) This by-law does not affect any requirements under any law to obtain consent to, approval for or any other authorisation for the changing of the floor covering or surface concerned.
>
> 15 Floor coverings
>
> (1) An owner of a lot must ensure that all floor space within the lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot.

(2) This by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

19 The By-laws of Strata Plan 92638 are accepted into evidence and are marked Exhibit 4.

Threshold issue – standing of applicants to bring these proceedings

20 The respondent's primary submission is that the application is misconceived because the applicants do not have standing to make it. That is because, it is contended, all of the alleged defective work is in relation to common property of the Strata Plan and it is the Owners Corporation, not the applicants, who are the registered proprietors of the common property.

Contentions of the parties in relation to the threshold issue

21 The applicants contend that the defective work was carried out to both common property and lot property. In relation to the common property they contend that the Owners Corporation has subrogated to them the rectification of the defects to the property caused by the respondent. The applicants rely in particular on s 18D(2) of the HB Act and *EK Constructions Pty Ltd v Zhu* [2017] NSWCATAP 102 to submit that a non-contracting party has a right of action under s 18B in relation to defective building works. On these bases they assert that they have standing to pursue this application.

22 The respondent contends that all of the property that is the subject of the applicants' claim against it is common property of Strata Plan 92638, not lot property. It contends that it has no contractual relationship with the applicants as lot owners in relation to the disputed work. On these bases it contends that the applicants have no standing to pursue a claim against it under the HB Act in relation to the disputed work.

Applicable law

23 This section only sets out the law applicable to the dispute insofar as it concerns the disposition of the application.

24 Section 55 of the *Civil and Administrative Tribunal Act* 2013 (NSW) sets out the Tribunal's powers with respect to the dismissal of proceedings. It relevantly provides:

> 55 Dismissal of proceedings
>
> (1) The Tribunal may dismiss at any stage any proceeding before it in any of the following circumstances –
>
> …
>
> (b) if the proceedings are frivolous or vexation or otherwise misconceived or lacking in substance.
>
> …

25 In BDK v Department of Education and Communities [2015] NSWCATAP 129 an Appeal Panel held with respect to section 55(1)(b) at [66]:

> 66. In our view a reasonably broad approach should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While 'misconceived' and 'lacking in substance' may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are 'frivolous' or 'vexatious', conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings.

26 The reference to 'misconceived' and 'lacking in substance' as "relatively specific terms" derives from what was said about the meaning of those terms by Judicial Member Wright SC (as he then was) in Alchin v Rail Corporation NSW [2012] NSWADT 142 at [25] and [26] as they appeared in section 73(5(g)(ii) of the Administrative Decisions Tribunal Act 1997, which is NCAT predecessor legislation. The term "misconceived" is to be construed as including a misunderstanding of legal principle, and the term "lacking in substance" is to be understood as encompassing an untenable proposition of fact or law.

27 Section 18 of the *Strata Schemes (Freehold Development) Act* 2015 (NSW) (SS(FD) Act) set out the effect of creation of common property on the registration of a strata scheme. It relevantly provides:

> **18 Vesting of common property on registration of strata plan**
>
> (1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan …

28 "Common property" was defined in s 5(1) of the SS(FD) Act as follows:

> **"common property"**, means so much of a parcel as from time to time is not comprised in any lot.

29 A "lot" in a strata scheme was defined in s 5(1) of the SS(FD) Act as follows:

> **"lot"**, means one or more cubic spaces forming part of the parcel to which the strata scheme relates, the base of each such being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot.

30 The meaning of "floor plan" in the definition of "lot" also defined in s 5(1), relevantly as follows:

> **"floor plan"** means a plan consisting of one or more sheets, which:
>
> (a) defines by lines (in paragraph (c) of this definition referred to as "**base lines**") the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any party of a proposed lot, to which the plan relates …
>
> …

31 In relation to paragraph (a) of the definition of floor plan in s 5(2) of the SS(FD) Act provides:

> (2) The boundaries of any cubic space referred to in paragraph (a) of the definition of "**floor plan**" in section (1):
>
> (a) except as provided in paragraph (b):
>
> (i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition – the inner surface of the wall, and
>
> (ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space – the upper surface of that floor and the under surface of that ceiling
>
> (b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to a structural cubic space within that building).

32 In *Siewa v Owners Strata Plan 35042* [2006] NSWSC 1157, Brereton J considered the construction to be given to s 5(2) and stated at [17] and [18]:

17 Although Mr Young, for Siewa, at first submitted that the words "except where covered" referred to a cover on the concrete floor, I prefer the construction advanced by Mr Sirtes, that those words refer to a cover of some part of the cubic space above the patio, such as a roof or awning. The effect of the annotation is to describe the upper boundary of part of the relevant cubic space, by reference to the floor. It does not describe the lower boundary. Accordingly, as the floor joins vertical boundaries of the relevant cubic space, the lower boundary of the lot is, pursuant to section 5(2)(a)(ii), the upper surface of the floor.

18 The evidence of Mr Azuma establishes that the tiles (and therefore, necessarily, the membrane which is under the tiles) had been affixed prior to the date of registration of the strata plan. In those circumstances, the upper surface of the floor was the top of the tiles. The tiles were not themselves within the cubic space and thus do not form part of the lot. As common property is comprised of those parts of an allotment which are not within an individual lot, the tiles, and more particularly the membrane underneath them, were part of the common property.

33 Part 2, Division 2, of the *Strata Schemes Management Act* 2015 (NSW) (SSM Act) deals with the management of strata schemes. Section 9 of that Part relevantly provides:

> **9 Owners corporation responsible for management of strata scheme**
>
> (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
>
> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme –
>
> (a) the management and control of the use of the common property of the strata scheme, and
>
> (b) the administration of the scheme
>
> (3) The owners corporation has responsibility for the following –
>
> …
>
> (c) maintaining and repairing the common property of the strata scheme (see Part 6),
>
> …

34 Section 10 of Part 2 deals the functions of an owners corporation generally. Subsection 10(2) provides:

> **10. Functions of owners corporation generally**
>
> …

(2) An owners corporation must not delegate any of its functions to a person unless the delegation is specifically authorised by this Act

35 Section 13 of Part 2 sets out the functions of an owners corporation that may only be delegated to a member of a strata committee. It relevantly provides:

> **13 Functions that may only be delegated to member of strata committee or strata managing agent**
>
> (1) The following functions of an owners corporation, strata committee or officer of an owners corporation may be delegated to or conferred only on a member of the strata committee or a strata managing agent:
>
> …
>
> (h) such other functions as may be prescribed by the regulations.
>
> …

36 Regulation 4 of the *Strata Schemes Management Regulation* 2016 (NSW) is made pursuant to s 13(1)(h) of the Act. It relevantly provides:

> **4 Functions that may only be delegated to strata committee member or strata managing agent.**
>
> For the purposes of section 13(1)(h) of the Act, the following functions of an owners corporation are prescribed as functions that may be delegated to or conferred only on a member of the strata committee or strata managing agent –
>
> …
>
> (c) entering into contracts relating to the maintenance of common property or the provision of services to common property (other than contracts relating to a parcel)
>
> …

37 Part 6 of the SSM Act deals with property management in a strata scheme.

38 Section 106 of that Part concerns the duty of an owners corporation to maintain and repair common property. It relevantly provides:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> …
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably

> foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> …
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> …

39 Section 107 in Part 6 deals with common property memoranda. It relevantly provides:

> **107 Common property memorandum**
>
> (1) The by-laws for a strata scheme may adopt a common property memorandum prescribed by the regulations for the purposes of this section.
>
> (2) The common property memorandum is to specify whether an owner of a lot or the owners corporation is responsible for the maintenance, repair or replacement of any part of the common property.
>
> …

40 Section 48I(1) of the HB Act provides that "[a]ny person may apply to the Tribunal for determination of a building claim". The term "building claim" is defined in s 48A(1) of that Act, relevantly, as follows:

> **"building claim"** means a claim for –
>
> (a) the payment of a specified sum of money, or
>
> …
>
> that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim

41 The scope of s 48A(1) was the subject of consideration by the Court of Appeal in *Grygiel v Baine & Ors* [2005] NSWCA 218. The primary issue in those proceedings was whether a builder could pursue a claim for negligent advice against a solicitor who had provided him with advice in relation to a contract for residential building work under the HB Act in circumstances where the solicitor was the home owner. That turned on whether such a claim is a "building claim" for the purposes of s 48A(1). The majority held, relevantly, (per Mason P at [1] and Basten JA at [59 -60]) that legal advice could constitute part of a building

claim if it had sufficient connection with the carrying out of the building work because its purpose was to give rise to the residential building work and it has sufficient causal nexus with such work.

42 Section 18B of the HB Act contains warranties in relation to residential building work that are implied in every contract to do residential building work. It relevantly provides:

> **18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor license, or person required to hold a contractor license 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.

43 The term "residential building work" is defined in clause 2 of Schedule 1 of the HB Act. It relevantly provides:

> **2 Definition of residential building work**
>
> (1) In this Act,
>
> "**residential building work**" means any work involved in, or involved in co-ordinating or supervising any work involved in –
>
> …
>
> (c) the repairing, renovation, decoration or protective treatment of a dwelling.

44 The benefit of the s 18B warranties is extended to certain other persons by operation of s 18D of the HB Act. It provides:

> **18D Extension of statutory warranties**
>
> (1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.
>
> (1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of s statutory warranty.
>
> ….

45 The term "non-contracting owner" is defined in clause 1 of Schedule 2 of the HB Act as follows:

"**non-contracting owner**", in relation to a contract to do residential building work on land, means an individual, partnership or corporation that is the owner of the land but is not a party to the contract and includes any successor in title to the owner.

Consideration

46 Resolution of the threshold issue requires the determination of the following questions:

(a) Are each of the building elements and the air conditioner which are the subject of the alleged defective work common property or lot property?

(b) If these building elements (or any of them) are common property, do the applicants have a personal cause of action against the respondent in relation to the allegedly defective work?

(c) If the answer to (a) is "yes" and (b) is "no" are the applicants acting on behalf of the Owners Corporation in pursuing this application?

47 On the basis of the material facts and applicable law I have set out above I am comfortably satisfied that each of the building elements and air conditioner that are the subject of the alleged defective work by the respondent are common property of the strata scheme. In this respect each element was in existence at the time of registration of the strata plan and vested in the body corporate (owners corporation) upon registration. There is no common property by-law that devolves responsibility for the maintenance of any of these building elements or the air-conditioner to the applicants as lot owners. Nor, at any time before the contract that gives rise to this dispute, were there any works carried out to these building elements or air conditioner that did (or had the potential to) convert them from common property into lot property.

48 Specifically with respect to the balcony tiling, the notation on the Registered Plan for SP 92638 set out at paragraph 10 above is conclusive that they are common property having regard to Brereton J's construction of s 5(2)(a)(ii) of the SS(FD) Act in *Siewa* set out at paragraph 31 above. I note that the Registered Plan notations in this case and in *Siewa* are the same.

49 In argument it was contended on behalf of the applicants that by-laws 14 and 15 of Strata Plan 92638 indicated that the balcony tiles were lot property because they were "floor coverings" for which the applicants as lot owners

were responsible. That argument must fail for the reasons I have already stated. The tiles were common property on registration of the Strata Scheme and there is no common property by-law which devolves the responsibility for their maintenance to the applicants as lot owners. The tiles are therefore not lot "floor coverings" to which by-laws 14 and 15 apply.

50 It is the Owners Corporation that is the registered proprietor of common property in a strata scheme and it is the Owners Corporation which is responsible for the management and control of its use and its maintenance: s 9 of the SSMA. Additionally, s 106(1) of that Act imposes a statutory duty on the owners corporation with respect to the maintenance of common property. It follows from this that the applicants have no proprietary interest or right in relation to the common property that is capable of being asserted independently of the owners corporation.

51 On the question of whether the applicants are entitled to pursue this claim under delegation from the Owners Corporation, the SSM Act does not provide an Owners Corporation with the power to "subrogate" its functions in relation to common property unless it does so by means of a common property rights memorandum: see s 10(2) and 107 of the SSM Act. In this case, there is no common property rights memorandum giving the applicants any proprietary interest in relation to the common property that is the subject of this dispute.

52 Section 13 of the SSM Act and Regulation 4 of the SSM Regulation do not change that position. They only permit the delegation of the exercise of a function to a strata committee member or strata managing agent. The delegation permits the delegate to act for the owners corporation in relation to the function. It does not permit the delegate to act on their own behalf in relation to the function. In any event, the applicants are not a strata manager or a strata committee member. They are lot owners only, and thus do not fall within the categories of person to whom the relevant function can be delegated.

53 I also note that there is no evidence of the owners corporation or strata committee purporting to delegate or subrogate its functions with respect to the

common property of Unit 14 to the applicants other than the applicants' mere assertion of this.

54 It follows from this reasoning that the applicants reliance upon s 18D(1A) of the HB Act as entitling them to pursue this action is misconceived. Section 18D(1A) operates to permit a non-contracting *owner* (emphasis added) to pursue a home building claim in relation to breach of a s 18B implied warranty. The applicants are not owners of the common property.

55 Additionally, while s 48A(1) of the HB Act permits "any person" to make a building claim, and a building claim is potentially very broad in scope for the reasons stated in *Grygiel,* the claim must be founded upon a cause of action found in that Act. In this case the applicants are not persons who have the benefit of the s 18B warranties because they are not owners of the common property that is subject to dispute. They thus have no cause of action against the respondent under the HB Act.

Conclusion

56 For the foregoing reasons, this application must be summarily dismissed on the basis that it is misconceived in the sense stated in *Alchin.* It rests on a misunderstanding of legal principle. The applicants have no cause of action against the respondent under the HB Act. The disputed work concerns common property. There is no sense in which the applicants are the owners of that property, nor could there be, or is there, any delegation of the Owners Corporation entitling the applicants to institute this claim on its behalf.

57 This does not mean that the applicants are bereft of any remedy in relation to the alleged defective work. As lot owners they have avenues of recourse under the SSM Act against the owners corporation in relation to any failure by it to perform its functions in relation to the common property, and in relation to any loss they may have suffered as a result of any breach by the owners corporation of its statutory duty to maintain common property. I note that this proceeding does not involve any such claim however.

Orders

58 For the foregoing reasons I make the following orders:

(1) Pursuant to s 55(1)(b) of the *Civil and Administrative Tribunal Act* 2013 the application is dismissed on the basis that it is misconceived.

(2) Any application for costs is to be made with supporting submissions by 4 Jul2022. Submissions are to be limited to 5 A4 pages in not less than 11 point font.

(3) Any reply to any application for costs is to be made with supporting submissions by 28 July 2022. Submissions are to be limited to 5 A4 pages in not less than 11 point font.

(4) Subject to order (5), pursuant to s 50(1)(c) of the *Civil and Administrative Tribunal Act* 2013 the Tribunal dispenses with any further hearing on the issue of costs.

(5) If a party contends for any different order to order (4) they are to set out the order sought and the grounds for that order in any application for costs or reply to any application for costs.

****

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