Supreme Court

New South Wales

Case Name:	James v Jandson Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1686
Hearing Date(s):	2 June 2022
Date of Orders:	12 December 2022
Decision Date:	12 December 2022
Jurisdiction:	Common Law
Before:	N Adams J
Decision:	(1) The summons is dismissed. (2) The plaintiffs are to pay the defendant's costs.
Catchwords:	BUILDING AND CONSTRUCTION – NCAT – Appeal of NCAT Appeal Panel decision – application to extend time for this appeal refused – summons dismissed – statutory warranties as to residential building work – breach of statutory warranty – whether new contract entered into or original contract varied – offer and acceptance – consideration – forbearance to sue – completion date of building works – leave to appeal finding of facts – interpretation of s 3B Home Building Act 1989 (NSW)
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – ss 80, 83, 84(2), sch 4 cl 12 Environmental Planning and Assessment Act 1979 (NSW) Home Building Act 1989 (NSW) – s 3B, 18B, 18BA, 18E, 48K, sch 4 cl 109 Home Building Amendment Act 2011 (NSW) Uniform Civil Procedure Rules 2005 (NSW) – r 50.3
Cases Cited:	Abalos v Australian Postal Commission [1990] HCA 47; (1990) 171 CLR 167

	Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 326; [1990] HCA 33 Collins v Urban [2014] NSWCATAP 17 Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472 Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd [2007] NSWCA 158 Hendriks v McGeoch [2008] NSWCA 53; (2008) Aust Torts Reports 81-942 House v The King, (1936) 55 CLR 499; [1936] HCA 40 Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110 Jandson Pty Ltd v James [2021] NSWCATAP 274 Jones v Dunkel (1959) 101 CLR 298 Kriketos v Livschitz [2009] NSWCA 96 Lim v Cho [2018] NSWCA 145; (2018) 84 MVR 514 McDonnell v The Owners – Strata Plan No 64191 [2022] NSWSC 1631 Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17 Ormwave v Smith [2007] NSWCA 210 R v Clarke [1927] HCA 47; (1927) 40 CLR 227 Rosenberg v Percival [2001] HCA 18; (2001) 205 CLR 434 Sand Ground Engineering Pty Ltd v Super Render Pty Ltd [2020] NSWSC 458 Secretary, Department of Family and Community Services v Smith (2017) 95 NSWLR 597; [2017] NSWCA 206 State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) [1999] HCA 3; (1999) 160 ALR 588 Suncorp Metway Insurance v Owners Corporation SP 64487 [2009] NSWCA 223 The Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 Toplace Pty Ltd v The Council of the City of Sydney [2020] NSWLEC 121 Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9 Weiss v The Queen [2005] 224 CLR 300; HCA 81
Texts Cited:	G E Dal Pont, Law of Agency (3rd ed, 2014, Lexis

	Nexis Butterworths) at [1.39]
Category:	Principal judgment
Parties:	Brett James (First Plaintiff) Liza James (Second Plaintiff) Jandson Pty Ltd (Defendant)
Representation:	Counsel: Mr PJ Bambagiotti (Plaintiffs) Mr M Klooster (Defendant) Solicitors: Makinson d'Apice Lawyers (Plaintiffs) Michael Atkinson & Associates (Defendant)
File Number(s):	2021/00291250
Publication Restriction:	Nil.
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Appeal Panel
Citation:	[2021] NSWCATAP 274
Date of Decision:	15 September 2021
Before:	K Rosser (Principal Member), D Robertson (Senior Member)
File Number(s):	AP 20/35342

JUDGMENT

1 By amended summons filed on 27 October 2021, the plaintiffs, Brett and Liza James ("the owners"), seek leave to appeal from the decision of the Appeal Panel of the NSW Civil and Administrative Tribunal ("NCAT") under s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the NCAT Act").

2 The owners entered into a contract with the defendant, Jandson Pty Ltd ("the builder") on 23 March 2009 to build them a home in Jannali. Shortly after the

owners moved in, they observed water leakage into a garage forming part of the residence.

3 On 28 June 2018, the owners commenced proceedings against the builder for breach of the statutory warranties in s 18B of the *Home Building Act 1989* (NSW) ("the HB Act"). The proceedings were commenced in the Local Court and subsequently transferred to NCAT.

4 It is common ground that the owners did not commence proceedings within the statutory time limit arising from the 2009 contract (as set out in s 18E of the HB Act prior to its amendment). But the owners contend that towards the end of the relevant statutory time limit under the 2009 contract a *new* contract was formed between the parties such that any breaches of the statutory warranties occurred under that *new* contract and hence proceedings under the new contract *were* brought within time.

5 On 17 July 2020, Senior Member GK Burton SC ("the Senior Member") found in favour of the plaintiffs and made the following orders:

> "1. Order that the respondent builder on or before 15 September 2020 carry out, with due care and skill and in compliance with all applicable plans, specifications, warranties, laws, codes and standards, the works specified in the report of Mr Darryl Pickering dated 26 March 2019 paragraphs 86 to 106 (or such amendments to the works in those paragraphs as are specified by a consulting structural engineer pursuant to paragraphs 91 and 93), and paragraphs 129 to 133 and 135 to the extent not already done.
>
> 2. Order that order 1 is conditional on the applicant owners granting, on reasonable written notice (by email or other forms of writing), reasonable access to the respondent to undertake the works the subject of order 1. …"

6 The builder then appealed to an Appeal Panel of NCAT and was successful: *Jandson Pty Ltd v James* [2021] NSWCATAP 274 ("the Appeal Panel Decision"). The appeal to this court is against that decision under s 83 of the NCAT Act which is in these terms:

> **83 Appeals against appealable decisions**
>
> (1) A party to an external or internal appeal may, *with the leave of the Supreme Court*, appeal *on a question of law* to the Court against any decision made by the Tribunal in the proceedings.
>
> …
>
> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following—

(a) an order affirming, varying or setting aside the decision of the Tribunal,

(b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

…

(Emphasis added.)

7 Section 84(2) of the NCAT Act provides that an appeal under s 83 must be made:

(a) within such time and in such manner as is prescribed by the rules of court for the court to which the appeal is made, or

(b) within such further time as the court may allow.

8 Rule 50.3 of the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) provides that a summons commencing an appeal must be filed:

(1) A summons commencing an appeal must be filed—

(a) within 28 days after the material date, or

(b) if the appeal relates to the decision of a judicial officer, within such further time as the judicial officer may allow so long as the application for such further time is filed within 28 days after the material date, or

(c) within such further time as the higher court may allow.

(2) An application for an extension of time under subrule (1)(c) must be included in the summons commencing the appeal.

9 The decision appealed against was delivered on 15 September 2021 and the summons seeking leave to appeal was filed on 13 October 2021 and thus within time.

10 There are two statutory hurdles for the plaintiffs to overcome: the appeal is confined to questions of law and leave is also required under s 83(1) of the NCAT Act.

Grounds of Appeal

Amended summons

11 The amended summons filed on 27 October 2021 identifies the following four grounds of appeal all of which were stated to raise questions of law:

“Ground 1 New Contract Finding

1. The learned Panel erred in law in its finding at JAP [70] that there was no contract between James and Jandson as found by the Tribunal in *James v*

Jandson PIL [2020] NSWCATCD (17 July 2020) (***James T*** or ***JT***) at [24 & 40] (***new contract***).

2. And in relation the Panel erred:

(a) In its finding evaluating the evidence in support of the new contract finding at *JAP* [59), did not address all the relevant and necessary evidence considered in *James T* including the evidence that James acted at all material times through medium of their solicitor acting as agent, per *JAP* [62 & 63].

(b) at JAP [62, 67, 68, & 70] in relying upon what it suggested was the subjective knowledge of James to support its findings rather than applying the conventional objective theory of contract and so having proper regard to the terms of the documents exchanged.

(c) in its findings at *JAP* [69 & 70] as to the adequacy of the foundation for inference as to the existence of a contract by reference to the basic facts, including the Jandson having actually returned and done work.

(d) in attempting itself to re-evaluate the evidence of the witnesses, in circumstances where the Tribunal Member at first instance was best placed to evaluate the evidence having regard to his observations of the witnesses in the witness box.

(e) It incorrectly took into account subjective matters, rather than objective matters, as to whether an agreement for the rectification of defects had been formed.

(f) failed to have proper regard to the reasoning in *James T* that the new contract was a compromise agreement: *JT* [17, 18, et seq];

(g) failed to acknowledge that the conduct of the Plaintiffs solicitor should be taken to be conduct on James' behalf, rendering their personal knowledge (or lack of knowledge of matters) irrelevant to the overall consideration as to whether there was an agreement.

(h) relied upon a fact noted at *JAP* [71] which amounted to a *Jones v Dunkel* (1959) 101 CLR 298 inference relating to the evidence of the James' solicitor, Mr Wells, which was wrong in law and a denial of procedural fairness in that:

> (i) No such inference was available on the proper view of the requirements for such inference;
>
> (ii) No *Jones v Dunkel* point was taken either at first instance or on the appeal, and the issue was not a live one that could properly feature in the Panel's findings.

Ground 2 Leave to Appeal findings of Fact was not Properly Given

3. The Panel's finding at *JAP* [74] that it should grant leave to Jandson to appeal from findings of fact in James T because they were against the weight of evidence was an error and misapplication of the discretion to grant leave because:

(i) its finding that the relevant findings in *James T* were against the weight of the evidence, relied upon the Panel's own view of the evidence which was neither comprehensive or complete, and which overlooked critical features of the evidence before the Tribunal in James T, including the role of James' solicitor in acting on their behalf.

(j) its findings fail to have regard to the evidence as a whole, which involved the critical elements of accusation, agreement as to a scope for rectification, permission for Jandson to attend and undertake work, and that Jandson actually attended and undertook such work, in preference to a partial and inaccurate account.

4. The Panel's decision at *JAP* (116] that the findings in *James T* were against the weight of evidence is erroneous as a misconstruction and misapplication of the principles in *NCATA* s 80(2)(b) read with Schedule 4, Part 6, cl 12(1) in that:

(a) That finding was given without having properly dealt with the evidence, or having properly identified and weighed the evidence said to involve the 'weight'.

(b) The Tribunal failed to give any adequate reasons for its findings as to relative weight of evidence or the basis for its finding of a 'substantial miscarriage of justice', per cl 12(1).

Ground 3 Construction of the Building Contract and the *new* contract

5. The Panel erred in its construction of the building contract:

(a) in its finding at *JAP* (1031, as to the requirement for occupation certificate and in doing so, it overlooked Building Contract Schedule 1, item 11 which references Building Contract cl 7: as per *JT* [32].

(b) in its finding at [105] as to the character of an occupation certificate by reference to the *Environmental Planning & Assessment Act 1979* which is wrong; and

(c) in its construction of the contract definition of building works at *JAP* [108] which is contrary to the plain wording of the Building Contract and contrary to authority and which extended to the rectification of defects in the original work pursuant to the defects liability period provisions in the Building Contract.

Ground 4 Error in construction & application of *Home Building Act* s3B.

6. The Panel erred at *JAP* [114 & 115] in its construction *of Home Building Act 1989* s 38 and the application of those provisions to the Building Contract.

Application for Leave

(a) Nature of the Case

7. The case involves deficiencies in the completion and/or rectification of residential building work, including for breach of the Statutory Warranties provided in *Home Building Act 1989 (HBA)*: Part 2C, and for the purposes of this appeal, specifically:

(a) Whether rectification work undertaken by Jandson was subject to those Statutory Warranties?

(b) If so, what is the contract into which they are implied?

(c) When was 'completion' of the relevant work for the purposes of the warranty period provided for in HBA s18E?

(b) Reasons why leave should be given

8. The issues involved in this appeal, namely the errors in la set out in the grounds above, and which involve questions about:

(a) The approach taken by the Appeal Panel to the construction of the contract found at first instance, and its approach to the assessment of material before the Tribunal;

(b) The legal characterization of the framework pursuant to which rectification work is done by a builder returning to the site: including the formation of contract, the role of a solicitor agent, and the characterization to be given to the subjective knowledge of James;

(c) Whether defect rectification work falls within the ambit of a scope of work under a contract;

(d) The approach taken by the Appeal Panel to the assessment of the material before the Tribunal, and of the Tribunal's assessment of that material;

are all matters that frequently arise ands that are of considerable public importance, as well as being of decisive importance to James' case."

12 As is apparent from the amended summons extracted above, ground 1, which was the focus of oral submissions at the hearing of this appeal, in fact comprised *nine* different sub-grounds. Moreover, the summons identified 17 separate complaints in total all said to raise questions of law. The manner in which the appeal was brought, in reliance upon so many discrete complaints (not all of which in fact raised questions of law) has required these reasons to be lengthier than one might have anticipated from an appeal on a question of law arising from facts of such a relatively narrow compass.

The hearing of the appeal

13 At the hearing before me on 2 June 2022, the plaintiffs tendered a court book comprising three volumes which became exhibit A. Volume 1 comprised the amended summons with the parties' submissions and their lists of authorities in this court. Volume 2 comprised the pleadings before both the Senior Member and the Appeal Panel and the plaintiffs' seven sets of submissions before the Appeal Panel, the defendant's evidence. Volume 3 comprised the transcripts of the proceedings below, both before the Senior Member and the Appeal Panel, and the relevant decisions.

14 Counsel for both parties agreed that I did not need to read all of the submissions and transcripts below; they were tendered by the plaintiffs to establish the negative proposition that the builder had not sought a *Jones v Dunkel* direction before the Appeal Panel: *Jones v Dunkel* (1959) 101 CLR 298. One of the complaints made under ground 1 is that such an inference was drawn without any invitation by the builder to do so. Accordingly, I have not

read any of the submissions or transcripts of what occurred before the Appeal Panel which were included in the court book.

15 The nub of this appeal concerns events which occurred from July to September 2017 and turns on some limited written correspondence and conduct of the parties including some unsuccessful attempts by the builder to carry out remedial work at the property. My summary of these facts is based on the findings of the Appeal Panel.

Factual background

16 As stated above, the parties entered into a residential building contract on 23 March 2009 ("the 2009 contract"). Clause 14 of Schedule 1 to that contract specified that Tender No 2277 dated 22 January 2009 (the Tender) formed part of the contract. The terms of the 2009 contract are relevant to grounds 3 and 4 in this court and I have extracted the relevant clauses in my consideration of those grounds below.

17 The 2009 contract stipulated that the builder would build a home for the plaintiffs on their land at Jannali ("the property") for $352,005.00. The building works commenced in March 2009 and concluded in mid-2010. Possession of the building works was given to the owners on 13 July 2010. A Final Occupation Certificate ("FOC") was provided on 20 October 2010.

18 Shortly after they moved in, the owners complained of water ingress into the home, specifically into the stairwell at basement level, resulting in damage to, *inter alia*, the internal wall and floor and garage entryway. They complained that such ingress and damage constituted breaches by the defendant of the statutory warranties set out in s 18B of the HB Act.

19 The builder attended the property intermittently between 2010 and 2016 in an attempt to remedy the water ingress issue, to no avail.

20 In early 2017, the owners engaged the services of an engineer from Building and Waterproofing Reports Australia (BWR Australia), Mr Pickering.

21 On 19 July 2017, the plaintiffs through their solicitor sent a letter of demand to the defendant regarding the water penetration:

> "**Offer**

> Our clients are keen to resolve this matter as soon as possible. By reason of this, our client is prepared to provide you with an opportunity to attend the Premises to carry out the Remedial Work [set out in a draft expert report from BWR Australia prepared by the owners' expert, Mr Pickering]. The Offer is conditional upon your agreement to the following matters:
>
> 1.the Remedial Work and anything required to perform the Remedial Work, will be undertaken at no costs [sic] to our clients;
>
> 2.prior to you commencing the Remedial Work, you provide evidence that you have public liability insurances and workers compensation insurance in place;
>
> 3.the Remedial Work must be completed by 31 August 2017;
>
> 4. You agree that Mr Pickering will inspect the Remedial Work and will cooperate in providing access to the Remedial Work; and
>
> 5. That you pay $4,750.00 to our client on account of legal and expert costs.
>
> In the event Mr Pickering certifies the Remedial Work has been carried out in a proper and workmanlike manner, our clients are prepared to provide you with a release in respect of further claims concerning the defects (other than defects of which our clients are not aware of at this time).
>
> ……
>
> (the **Offer**)
>
> **Further conduct and acceptance**
>
> It is the preferred position of our client that resolution of this matter occurs without the need for our clients to commence proceedings against you. To that end, we look forward to receiving your acceptance of the Offer by **5.00 pm, Friday 28 July 2017**.
>
> Should it become necessary to commence proceedings, we put you on notice that we intend to rely on this correspondence with respect to the issue of costs."

22 On 1 August 2017, a site inspection was arranged at the residence with representatives of both the builder and the owners to attend.

23 On 15 August 2017, four persons attended the site inspection: Mr Matherson (the builder's director) and the foreman (Mr Jerochim) as well as Mr Pickering and another structural engineer, Mr Donovan. Following that meeting, Mr Pickering sent an email to the plaintiffs' solicitor, Mr Wells, relevantly stating:

> "Site visit went well with the Builder and his foreman. Agreement was reached to rectify Item 3.02 of the report as per my scope.
>
> Items 2.01; 2.02; 2.03 and 3.01 are essentially the same item. Agreement was reached to rectify the defect by adjusting the scope I had proposed slightly, as follows:
>
> > 1. Clean out the whole of the cavity from the stairwell all the way to the front of the garage;

2. Re-route the downpipe at the front of the garage so that it does not block the cavity outlet;

3. Water test the base of the cavity to ensure it drains;

4. Install flashing to the outside of the wall above ground level as per scope;

5. Repair all the water damage to timber framing and plasterboard as per scope;

6.Repaint affected areas pers scope.

This adjusted repair scope will avoid the necessity to cut the garage slab to install a new drain pipe from the cavity.

The builder appears to be committed to making good the issue. We'll see how it transpires."

24 This email reflected Mr Pickering's account of that occurred at the site meeting. It was not sent to the builder at that time and nor was there any written acceptance that this email reflected the agreed position as to what occurred at the site meeting.

25 On 18 August 2017, Mr Wells notified the builder's director by email that Mr James (one of the two owners) consented to the builder having access on the following Monday 21 August 2017. That email included the following:

> "I refer to our phone discussion yesterday afternoon. I have spoken with Mr Jones (sic) and he consents to you having access on Monday. Mr Jones (sic) requests that you use the gate on the right hand side of the house (looking from the road) and that you ensure that the gate is properly shut when you leave to ensure the dog is contained."

26 The builder attended the property to commence remedial works on 21 August 2017.

27 Three days later, on 24 August 2017, the builder's director, Mr Matherson, sent an email to Mr Wells rejecting the offer of 19 July 2017 and making a counteroffer. The email was in these terms:

> "I refer to your letter of 19 July 2017 and enclosed report from BWR Australia. As you are aware we met with Daryl Pickering on 15 August 2017 and have now had a chance to review our documentation.
>
> We agree with much of BWR's findings but unfortunately it appears that they were not supplied some of the construction details and therefore have arrived at some incorrect findings.
>
> As detailed in the attached response it appears that the owners or there [sic] landscapers have substantially contributed to the moisture problem in the basement / garage. *Therefore we reject the "Offer" contained in your letter.* With regards to points 1 to 5 set out in your letter we comment:

> 1. Jandson will carry out the works set out in our response of 24 August 2017 (attached) at its cost. Note that the majority of the work required will be the responsibility of the owners.
>
> 2. Attached is a relevant certificate of currency for insurance.
>
> 3. Darryl Pickering was not available to meet on site until 15 August 2017, making a completion date of 31 August 2017 unrealistic. We have commenced work on-site and expect to be complete by 8 September 2017.
>
> 4. As Jandson will not be carrying out the concealed works Daryl Pickering can inspect works carried out by Jandson when inspecting the works carried out by the owner.
>
> 5. As the owners or their contractors have caused the problem Jandson will not contribute to their legal expenses. We also note that the owners have not met their obligations under the Home Building Act 1989 Sect 18BA(1), (2) & (3)."
>
> (Emphasis added.)

28 Attached to that email was a letter dated 22 August 2017 which proposed an *alternative* scope of rectification in these terms:

> "Scope of works
>
> For the reasons set out above we believe that points 63 a) to f) of the BWR report are not required. We believe the following work is required:
>
> > 1. Remove all debris from between the existing retaining wall and garage wall to allow the clear flow of moisture from the cavity (described above) to the existing pit. To assist with this Jandson as re-routed the downpipe on the left-hand side of the garage to Pit A as shown on the phot below. The owner now needs to retain the aggregate behind the retaining wall by sparging and remove all debris from the cavity to allow water to drain from the cavity as originally intended.
> >
> > 2. Regrade the turf adjacent the garage ensuring that overland flow of water is directed away from the house and garage.
> >
> > 3. Clean out and maintain the existing stormwater pits.
> >
> > 4. The provision of a Colorbond capping as described in BWR 63 l) may assist although there is an existing flashing below the plinth which should be performing the same function. Jandson agrees to do this work and has arranged same.

29 There was no further written correspondence entered into between Mr Wells and Mr Matherson. There was no counteroffer or acceptance of these terms *in writing* from either Mr Wells or the owner, Mr James. Despite this, the builder continued to undertake remedial works for the owner and the owners did not prevent the builder's workers from doing so.

30 On 27 September 2017, the builder's workers attended the residence to undertake remedial works at which time a dispute arose. Mr James told the builder's workers not to paint over what he saw as a mould-affected wall without replacing the gyprock. The builder's workers left the site and did not return.

31 The evidence as to what happened between the date of the 24 August 2017 letter (in which the owners' offer was rejected) and 27 September 2019 (when the builders walked off the property and never returned) came from the evidence of Mr James and Mr Matherson at the hearing before the Senior Member.

32 The evidence of Mr James was summarised by the Appeal Panel at [52]-[58]. Mr James swore an affidavit on 10 April 2019 in which he stated the following as to his understanding of the agreement:

> "Based on the outcome of the 15 August 2017 site inspection and the Respondent's request for access to complete rectification works, I understood that an agreement was in place whereby *the defects* would be rectified. For that reason, I did not take any action to commence legal proceedings against the Respondent."
>
> (Emphasis added.)

33 As the Appeal Panel observed at [53], Mr James did not refer to the contents of the builder's email of 24 August 2017 or the letter attached to that email in his affidavit; that is, he made no mention of the fact that his offer was rejected, and a counteroffer made. Based on this, the Appeal Panel concluded (also at [53]) that there was "nothing" in Mr James' affidavit to suggest that the owners had accepted the counteroffer made by the builder in the 22 August 2017 letter or that they even knew about it before 27 September 2017. I note that despite the fact that there was nothing in Mr James' affidavit deposing as to *when* he became aware of the 24 August 2017 counteroffer, a copy of it was attached to his affidavit.

34 Mr James was cross-examined at the hearing before the Senior Member. The Appeal Panel summarised Mr James' evidence on this issue (at [54]) in these terms:

(1) He could not recall when he had seen Mr Pickering's 15 August 2017 email sent to his solicitor;

(2) He retained his solicitor prior to 17 November 2016;

(3) He had no independent recollection of when he first saw the builder's letter dated 22 August 2017;

(4) He understood from the builder's response to Mr Pickering's report that the builder disagreed with part of Mr Pickering's proposed scope of work.

35 The only other evidence before the Senior Member came from Mr Matherson. The Appeal Panel summarised his evidence at [55]-[56]. It noted Mr Matherson's evidence that he denied that any agreement was reached with Mr Pickering at the site meeting on 15 August 2017 and stated that the only work the builder agreed to undertake was that set out in the builder's letter dated 22 August 2017. Specifically, of the items listed in Mr Pickering's 15 August 2017 email, the only item he had agreed the builder would do was at point 2; that is, "[r]e-route the downpipe at the front of the garage so that it does not block the cavity outlet".

36 The Appeal Panel went on at [57]-[58] to note that Mr Pickering gave expert evidence, but no lay evidence in relation to the site meeting on 15 August 2017 or his email to the owners' solicitor of that date and that Mr Wells did not give any evidence at the hearing.

The Home Building Act

37 Part 2C of the HB Act provides for the operation of the statutory warranty scheme. The presently relevant provisions are ss 18B and 18E. As at the date of the 2009 contract, s 18B was in these terms:

> **18B Warranties as to residential building work**
>
> 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 performed in a proper and workmanlike manner 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.
>
> …

38 The time limit of such warranties was provided for in s 18E which at the relevant time was in these terms:

> **18E Proceedings for breach of warranties**
>
> (1) Proceedings for a breach of a statutory warranty must be commenced within 7 years after:
>
> (a) the completion of the work to which it relates, or
>
> (b) if the work is not completed:
>
> (i) the date for completion of the work specified or determined in accordance with the contract, or
>
> (ii) if there is no such date, the date of the contract.
>
> (2) The fact that a person entitled to the benefit of a statutory warranty specified in paragraph (a), (b), (c), (e) or (f) of section 18B has enforced the warranty in proceedings in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty in subsequent proceedings for a deficiency of a different kind in the work if:
>
> (a) the deficiency the subject of the subsequent proceedings was in existence when the work to which the warranty relates was completed, and
>
> (b) the person did not know, and could not reasonably be expected to have known, of the existence of the deficiency at the conclusion of the earlier proceedings, and
>
> (c) the subsequent proceedings are brought within the period referred to in subsection (1).

39 The HB Act was amended by the *Home Building Amendment Act 2011* (NSW) which came into force, variously, on 25 October 2011 and 1 February 2012.

The limitation period in s 18E was altered from seven years to six years for “structural/major” defects and two years in any other case.

40 In the present appeal, the parties proceeded on the basis that the relevant limitation period was seven years as this was the state of the legislation at the time the 2009 contract was entered into. I accept that to be the case given the relevant transitional provision in Schedule 4 Pt 19 cl 109 of the HB Act.

41 Under s 18E, time for commencing proceedings against a builder commences to run from the “completion of the work”. That term was not defined in the HB Act at the time of the 2009 contract but s 3B was subsequently enacted by the 2011 amendments which reads, relevantly as follows:

> **3B Date of completion of residential building work**
>
> …
>
> (1) The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.
>
> (2) If the contract does not provide for when work is complete (or there is no contract), the completion of residential building work occurs on practical completion of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.
>
> (3) It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work—
>
>> (a) the date on which the contractor handed over possession of the work to the owner,
>>
>> (b) the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),
>>
>> (c) the date of issue of an occupation certificate under the Environmental Planning and Assessment Act 1979 that authorises commencement of the use or occupation of the work,
>>
>> (d) (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.
>
> …
>
> (5) This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of insurance under Part 6.

42 The transitional provision in cl 109 in Schedule 4 Pt 19 of the HB Act, (extracted above) is an exception to the general rule provided for in cl 106 which is in these terms:

> **106 Purpose and operation of amendments**
>
> The amendments made by the amending Act are made for the purpose of the avoidance of doubt and accordingly (except as otherwise provided by this Part) those amendments extend to—
>
> (a) residential building work commenced or completed before the commencement of the amendment, and
>
> (b) a contract of insurance entered into before the commencement of the amendment, and
>
> (c) a loss or liability that arose before the commencement of the amendment, and
>
> (d) the notification of a loss before the commencement of the amendment.

43 Thus, by force of cl 106(a), s 3B is applicable to the residential building works the subject of this appeal. This is consistent with the finding of the Appeal Panel: see at [112]. Accordingly, the two relevant statutory provisions are s 18E (as in force in 2009 providing for a seven-year limitation period) and s 3B as now in force.

The decision of the Senior Member

44 Senior Member G K Burton SC heard the owner's complaint on 2 December 2019. Subsequent submissions were filed by 25 May 2020. The Senior Member delivered his decision on 16 July 2020. The issues before the Senior Member were summarised by the Appeal Panel at [13] as follows:

> "(1) Were the arrangements for the remedial work separately contractual, so as to attract the statutory warranties under that distinct contract being a compromise of threatened litigation. The owners said that the scope of works in the builder's letter had the objective intent of resolving the water ingress problems and didn't, because they were done defectively and were not completed. The owners alternatively said that the original contract, which had the former seven-year limitation period for statutory warranties, had the limitation period run from when the work under the original contract (as varied in scope by the builder's letter) was complete, which occurred only when the builder left the site on 27 September 2017.
>
> (2) If so, were the proceedings out of time under HBA s 18E.
>
> (3) Liability of the builder for any defective or incomplete work.
>
> (4) Form of remediation of any defective or incomplete work as found, including whether by work order or money order and, if the latter, the amount.

> (5) Did the owners rely upon the alleged representation in the builder's letter for the purposes of their claim under ACL s 18. The alleged representations were that the scope of works in the builder's letter was adequate to address the water ingress problems and that the builder's work would perform the scope adequately with the remedial outcome that the scope was represented to give."

45 As will be seen below, only the first of those two issues are relevant to the appeal before this court.

46 The Appeal Panel summarised the findings of the Senior Member at [14]. With one minor exception (which I address under ground 1, sub ground 2(a) below), counsel for the plaintiffs in this appeal accepted the accuracy of that summary, which was as follows:

> "As at the time of the builder's letter, a claim for breach of statutory warranty would have been within time, with time running from 20 October 2010, being the date of issue of the final occupation certificate (FOC): Reasons [19]
>
> The exchange of correspondence constituting the builder's letter and the acceptance of the offer in that letter 'satisfied the required elements of a separate, new contract which provided a promise to undertake a defined scope of works, less than the owners' claimed scope under the original contract as supported by their expert's report, in the context of compromising an arguable claim for that scope under that contract as within time and potential litigation in respect of that claim': Reasons [24].
>
> The agreed scope of works "stood alone from, but in its purpose and scope was informed by, the defects under the original contract". The scope was not as the builder submitted "merely a promise to do what the builder was obliged to do (if the demand was within time) in order to effect remediation under the original contract. Nor was it 'a temporary regime of mutual forebearance [sic] to sue while the builder investigated and attempted its smaller scope of works': Reasons [25]
>
> A claim in respect of alleged incomplete and defective work within the new scope of works is a building claim: Reasons [26].
>
> Legislative intent is not circumvented if the parties agree to compromise on a scope of building works. The performance of those works attracts the statutory warranties available at the time that the compromise scope of works was agreed: Reasons [26].
>
> In the alternative, the scope of works in the builder's letter varied the scope of works in the original contract with the intent of varying water entry issues. The variation occurred on or about 24 August 2017 by the owners' acceptance of the builder's letter. Carrying out the varied works to remedy defects 'was within the time period before contract completion under the original contract as varied and within time, which ran from when the builder left the site on 27 September 2017': Reasons [28].
>
> Under cl 29.3 of the original contract, the builder had to rectify defects that were its responsibility that were notified during the defects liability period. Work under the original contract in respect of the notified defect 'was not relevantly

complete until the builder's obligations under cl 29.3 were satisfied': Reasons [30].

Practical completion under the original contract was reached on 20 October 2010 when the Final Occupation Certificate (FOC) was issued. This is because the building works were defined in cl 1.1 of the original contract as 'the building works to be carried out, completed and handed over to the owner in accordance with [the] contract as shown in the contract documents including variations'. Schedule 1 of the contract was part of the contract. Paragraph 11 of Schedule 1 specified that the builder was to obtain and pay for all planning and building approvals. The FOC is a planning and building approval because 'it approves lawful occupation on the basis of conformity of the physical structure with preceding approvals': Reasons [32].

The physical works are of no use to the owner to possess, even if physical possession of them is given by giving of keys, unless they are legally approved for occupation by the owner: Reasons [33].

If the Tribunal erred in its preference for the owners' argument concerning the date of practical completion, then it would accept "the thrust of the owners' submission on the meaning of 'completion' under the contract to the extent that the builder's obligation under the contract were not complete at least until the owners received the FOC as part of planning and building approvals. That provides the date that work is complete within the meaning of the original contract on the proper interpretation of the contract and within the meaning of s 3B(1) of the HB Act": Reasons [35].

The same events found to constitute a new contract by the owners' acceptance of the builder's letter could be characterised as a variation of the original contract. Such a variation must have a different completion regime from the completion regime of the original contract to which the s 3B of the HB Act would apply in due course when the varied scope was practically complete or the varied scope embodied an agreed scope for compliance of the builder's obligations under cl 29.3 of the original contract: Reasons [39] and [40]."

47 As stated above, the Senior Member found in favour of the owners and made the orders extracted above at [5].

The internal appeal

48 The builder lodged an internal appeal under s 80 of the NCAT Act which is in these terms

80 Making of internal appeals

(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note—

Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).

(2) Any internal appeal may be made—

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may—

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

49 The relevant sub-section which governed the defendant's internal appeal was sub s (2)(b). The circumstances in which the Appeal Panel may grant leave to appeal on a ground other than a question of law are set out in Schedule 4 Pt 6 cl 12 of the NCAT Act. Ground 2 of the plaintiff's appeal to this court alleges error in the manner in which the Appeal Panel dealt with that clause. It is in these terms:

Part 6 Appeals

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.

(2) Despite section 80(2)(b) of this Act, an internal appeal against a Division decision may only be made on a question of law (as of right) and not on any other grounds (even with leave) if—

(a) the appellant is a corporation and the appeal relates to a dispute in respect of which the Tribunal at first instance had jurisdiction because of the operation of Schedule 3 to the *Credit (Commonwealth Powers) Act 2010*, or

(b) the appeal is an appeal against an order of the Tribunal for the termination of a tenancy under the *Residential Tenancies Act 2010* and a warrant of possession has been executed in relation to that order.

50 Although a number of grounds were raised in the internal appeal, the nub of the complaint was that the Senior Member erred in finding that a new contract was entered into between the parties in August 2017.

51 The owners took issue before the Appeal Panel as to the vagueness of the builder's grounds of appeal and in particular, whether the builder had complied with the relevant procedural requirements. Although the Appeal Panel accepted (at [30]) that there are deficiencies in the Notice of Appeal and in the Amended Notice of Appeal, it was satisfied that the submissions made on behalf of the builder make the basis for the appeal sufficiently clear. Those appeal grounds were identified by the Appeal Panel as follows (at [31]):

> "(1) Whether there was evidence on the basis of which the Tribunal could find that the owners accepted the builder's offer (Ground 2);
>
> (2) Whether the Tribunal erred in applying relevant principles relating to contract formation in respect of offer and acceptance (Ground 3), or alternatively, whether the Tribunal's finding that the parties entered into a compromise agreement was against the weight of evidence (Ground 8);
>
> (3) Whether the Tribunal erred in applying the relevant provisions in relation to contract formation in respect of consideration, in particular whether the Tribunal failed to apply *Butler v Fairclough* (Ground 4);
>
> (4) Whether the Tribunal gave adequate reasons for its findings in respect of consideration (Ground 5);
>
> (5) Whether the Tribunal correctly construed the contract in finding that the construction works were complete on 20 October 2010, when the Final Occupation Certificate was issued (Ground 6), or alternatively, whether this finding was against the weight of evidence (Ground 7).

52 The Appeal Panel went on to conveniently group the grounds under the following three questions for determination:

> (1) Whether the Tribunal made an error of law in respect of its findings concerning contract formation (Grounds 2 and 3) or whether leave to appeal should be granted on the basis that the Tribunal's findings were against the weight of evidence (Ground 8);
>
> (2) Whether the Tribunal made an error of law in respect of its findings in respect of consideration (Grounds 4 and 5); and
>
> (3) Whether the Tribunal made an error of law in respect of its finding that the completion date of the works undertaken pursuant to the parties' 2009 contract was 20 October 2010 or whether leave to appeal should be granted on the basis that the Tribunal's finding was against the weight of evidence. (Grounds 6 and 7).

The decision of the Appeal Panel

53 The Appeal Panel considered grounds 2, 3 and 8 first and held that grounds 2 and 3 were established. It was satisfied that the questions raised were ones of law; being whether it was open on the evidence to find that a second separate contract had been entered into between the parties, citing: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 418 [90]–[91]; *The Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138 and *Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd* [2007] NSWCA 158, Basten JA (McColl JA agreeing).

54 The Appeal Panel accepted that it would also be an error of law if there had been misapplication of legal principles regarding the formation of the contract to the facts citing *R v Clarke* [1927] HCA 47, (1927) 40 CLR 227. The Appeal Panel then set out some of the relevant principles governing the formation of contracts (at [41]) including: *Hendriks v McGeoch* [2008] NSWCA 53; (2008) Aust Torts Reports 81-942 and *Ormwave v Smith* [2007] NSWCA 210. The Appeal Panel also noted *Suncorp Metway Insurance v Owners Corporation SP 64487* [2009] NSWCA 223 at [54], in which Sackville AJA cited McHugh JA in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117-11,118. It then noted the decision in *Kriketos v Livschitz* [2009] NSWCA 96 regarding the principles to be applied in determining the formation of a contract in the absence of conventional offer and acceptance.

55 No complaint is made in this court under any of the grounds as to the Appeal Panel's application of any of those authorities and I do not consider it necessary to consider them any further.

56 The Appeal Panel then applied the principles derived from these decisions to the evidence before the it, which I have summarised above at [16]-[36].

57 Having considered that evidence, the Appeal Panel concluded (at [59] that it was not open to the Senior Member to find the builder's email/letter of 24 August 2017 satisfied the required elements of a separate, new contract which provided a promise to undertake a "defined scope of works". Its reasons were set out at [60]-[63]). Nearly all of those reasons were individually challenged

under the sub grounds to ground 1 and I will address them in turn in my consideration of ground 1. Those findings are as follows:

> "[60] First, while the letter dated 19 July 2017 from Mr Wells to the builder clearly constituted an offer, the evidence before the Tribunal was not that the builder's email of 24 August 2017 or the letter dated 22 August 2017 attached to the email constituted an acceptance of the offer. On the contrary, the builder clearly stated in the 22 August 2017 letter that the offer contained in the 19 July 2017 correspondence was rejected. We conclude that the builder's 22 August 2017 letter and 24 August 2017 constituted a counter offer to the offer made on 19 July 2017. The counter offer was that the builder would undertake the scope of work set out in the 22 August 2017 letter.
>
> [61] Second, the evidence before the Tribunal that an agreement had been reached at the 15 August 2017 site meeting that corresponded with the scope of work set out in Mr Pickering's email to the owners' solicitor of that date was equivocal. On the one hand, Mr James' affidavit (at [22]) indicates that he understood that there was an agreement to rectify defects based 'on the outcome of the 15 August 2017 site inspection and the [builder's] request for access to complete rectification works'. However, Mr Pickering gave no evidence concerning this issue and while at the hearing Mr Matheson agreed that his offer reflected what was agreed at the 15 August meeting, in his statement he said that the only item the builder agreed to do was that set out at point 2 of Mr Pickering's email.
>
> [62] Third, while it was appropriate for the builder to address his counter-offer to the owners' solicitor, as noted above, Mr James' affidavit did not refer to that correspondence and he stated in cross-examination that he had no independent recollection of when he first saw it. The Tribunal could therefore not have been satisfied that the owners were aware of the builder's counter offer during the period in which the builder was undertaking work during August – September 2017.
>
> [63] Fourth, the evidence before the Tribunal did not support a conclusion that even if Mr Wells was authorised to accept offers on behalf of the owners, he had in fact accepted the builder's counter offer. In the absence of evidence that the owners were aware of the builder's counter offer at the relevant time or that the owners' solicitor was either authorised to accept offers on behalf of the owners or had in fact done so, it was not open to the Tribunal to conclude that the exchange of correspondence constituted acceptance in the conventional sense."

58 The Appeal Panel went on (at [64]), to note the owner's submission that "attempts to straight-jacket analysis of the creation of contracts to traditional forms are misconceived". It accepted that there was obvious force in that argument and then stated:

> "[64] In the reasons for decision, the Tribunal did not cite authorities concerning contract formation. Nor did the Tribunal conclude that a new contract could be inferred from the conduct of the parties, as opposed to finding that a contract existed on the basis of offer and acceptance. This does not of itself mean that the Tribunal erred in concluding that there was a new contract between the parties or a variation of the original contract."

59 Having found that it was *not* open to the Senior Member to conclude that a new contract was formed (or that the original contract was varied in the conventional sense), the Appeal Panel went on to consider whether a contract could be inferred from the evidence before the Tribunal. It was not satisfied that it could for the three reasons provided at [67]-[69] as follows:

> "[67] First, insofar as conduct is concerned, the builder was granted access to the premises on the basis of the correspondence dated 18 August 2021 and thereafter undertook work. However, as noted above, it is clear from Mr James' affidavit that he understood that the builder was undertaking work as a result of an agreement reached at the on-site meeting held on 15 August 2017. The owners could hardly have allowed access for the builder to do the work set out in the counter offer set out in the builder's letter of 22 August 2017 prior to the builder determining what scope of work it was prepared to do and the counter offer being communicated to the owners' solicitor. There is no evidence from the owners' solicitor as to what his understanding was of the work the builder was going to undertake. The only clear evidence of conduct following the counter offer is the builder undertaking work. In our view the builder's own conduct cannot be evidence of a tacit understanding or agreement with the owners.
>
> [68] Second, given the lack of evidence of when the owners became aware of the builder's counter offer and the absence of evidence from the owners' solicitor, the fact that access continued to be granted to the builder after 24 August 2017 cannot, in our view, be taken as evidence of a tacit understanding or agreement with the builder.
>
> [69] Third, the fact that the builder undertook some (or even all) of the work he proposed to undertake in his counter offer does not mean that a contract between the parties can be inferred. The builder's conduct alone cannot reasonably lead to an inference that the parties had reached an agreement."

60 The Appeal Panel then observed the following at [70]-[72]:

> "[70] Overall, we conclude that, when viewed objectively as a whole, the dealings between the parties do not demonstrate that they had a concluded agreement. The evidence before the Tribunal demonstrated that the parties did not have the same understanding of the work the builder would undertake. Rather, the evidence demonstrates that the owners understood that the builder was undertaking the scope of work proposed by Mr Pickering and the builder understood that the scope of work was the scope that proposed in its counter offer. The evidence does not support a conclusion that the owners accepted the builder's counter offer (either directly or through their solicitor) or that a contract between the parties could be inferred from the subsequent acts and conduct of the parties, including by the owners' conduct.
>
> [71] In relation to this, the only relevant conduct of the owners was that they did not refuse continued access to the builder. However, in circumstances where there is no evidence that the owners were actually made aware of the counter offer at the time it was made and the parties' understanding of the work that was to be undertaken differed, the

owners' conduct does not necessarily lead to an inference that the builder's counter offer had been accepted. The unexplained absence of evidence from the owners' solicitor further militates against the drawing of any inference in the owners' favour.

> [72] We conclude that there was no evidence from which the Tribunal could reasonably find that the correspondence dated 19 July 2017 and 24 August 2017 (the latter enclosing the letter dated 22 August 2017) constituted offer and acceptance of a new contract to undertake residential building work or a variation of the original contract. This is so, even when considered in the context of the site meeting on 15 August 2021 and access to the site granted to the builder from 21 August 2017. Further, we conclude that, even though the Tribunal did not explicitly consider the relevant principles relating to inferring a contract from the parties' conduct, a new contract or a variation of the original contract could not be inferred from the evidence before the Tribunal."

61 Having upheld grounds 2 and 3 as raising questions of law, the Appeal Panel then went on to uphold them on an alternate basis as being one of mixed fact and law. It granted leave in the event that it was wrong that those grounds raised questions of law at [74]-[75]. These two paragraphs form the basis of the owners' second ground of appeal in this court. I have extracted them in my consideration of ground 2 below

62 The Appeal Panel then considered grounds 4 and 5 at [76]-[88] which concerned the question of consideration; being the owners' offer not to bring proceedings against the builder. The Appeal Panel did not uphold those grounds and they do not form part of the arguments in this court.

63 The Appeal Panel then turned to consider grounds 6 and 7. Ground 6 concerned whether the Senior Member made an error of law in finding that the completion date of the works undertaken pursuant to the 2009 contract was 20 October 2010 rather than 17 July 2010. The Appeal Panel was satisfied that ground 6 involved the proper construction of the contract, which is a question of law and thus leave was not required. The findings under this ground form the basis of the owners' complaints under ground 3 and 4 in this court.

64 It was not necessary for the Appeal Panel to determine these grounds, but it did so for completeness. It concluded that the Principal Member erred in its interpretation of the relevant terms of the contract in finding that the builder was responsible for obtaining the FOC as part of the works to be carried out and thus the works were not complete until the FOC was provided to the owners. For ease of cross-reference, I have extracted the paragraphs of the Appeal

Panel decision to which grounds 3 and 4 in this court pertain ([92]-[116]) in my consideration of those grounds below at [165]-[171].

Ground 1: Error in finding that there was no new contract entered into

65 Ground one alleges that the Appeal Panel erred in law in finding that there was no contract between the plaintiffs and defendant. Although nine sub grounds were raised under this ground, they were said to support two primary errors: that the Appeal Panel mischaracterised the Senior Member's findings as to the composition of the contract *and* that the Appeal Panel misconstrued and overlooked elements of the evidence that underlay the Senior Member's findings. Neither of those two errors were separately identified in the summons.

66 The threshold question is whether any of these sub grounds raise a question of law.

67 Both parties accepted that the question of whether parties have entered into a contract requires the application of the relevant legal principles to the facts of the case and that a misapplication of those legal principles gives rise to a question of law. But, with some exceptions, that is not the way in which this ground was argued.

68 Nor did the plaintiffs argue that the Appeal Panel found facts where there was *no* basis to do so. It is uncontroversial that to do so would give rise to a question of law: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 326; [1990] HCA 33 per Mason J.

69 The plaintiffs contended that all of the arguments raised under this ground raised questions of law as they all concerned the formation of a contract.

70 I do not accept the plaintiffs' submission that in every case a ground of appeal alleging error in finding that a contract was formed raises a question of law, although it might, depending on the way in which the ground is pleaded. I considered a similar ground and whether it raised a question of law in *Sand Ground Engineering Pty Ltd v Super Render Pty Ltd* [2020] NSWSC 458 at [51]-[56] as follows:

> "[51] Before turning to consider the merits of each ground I must first be satisfied that it involves a question of law alone (or a question of mixed fact and law). When grounds concern the construction of a statute or error in the

statement of relevant legal principles identifying a question of law may be straightforward. But often there can be a fine line between what is a question of law, and what is a question of fact. As the High Court observed in *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389; [1996] HCA 3 at 394:

> 'The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has as yet been formulated.'

[52] Similarly, Spigelman CJ stated the following in *Attorney General for the State of New South Wales v X* (2000) 49 NSWLR 653; [2000] NSWCA 199 at [28]:

> '28. The determination of whether a particular alleged error in matters such as fact finding, the exercise of a discretion or a process of evaluation answers the description "question of law", will depend on the scope, nature and subject matter of the statute, including the nature of the body making the relevant decision.'

[53] A ground asserting that the decision maker should have made a different factual finding is a question of fact. Even a ground alleging that a finding of fact was 'perverse' or 'illogical' does not raise a point of law: *Azzopardi v Tasman UEB Industries Pty Ltd* (1985) 4 NSWLR 139 at 156 (Glass JA, Samuels JA agreeing, Kirby P dissenting) ('Azzopardi'):

> 'To say of a finding that it is perverse, that it is contrary to the overwhelming weight of the evidence, that it is against the evidence and the weight of the evidence, that it ignores the probative force of the evidence which is all one way or that no reasonable person could have made it, is to say the same thing in different ways. Upon proof that the finding of a jury is vitiated in this way, it will be set aside because it is wrong in fact. Since the Act does not allow this Court to correct errors of fact, any argument that the finding of a Workers' Compensation Commission judge is vitiated in the same way discloses no error of law and will not constitute a valid ground of appeal. It is also pointless to submit that the reasoning by which the court arrived at a finding of fact was demonstrably unsound as this would not amount to an error of law: *R v District Court of the Metropolitan District Holden at Sydney*; *Ex parte White* (1966) 116 CLR 644 at 654.'

[54] On the other hand, a claim that there is "no evidence" to support a particular finding does raise a question of law: per Hayne, Heydon, Crennan and Kiefel JJ in *Kostas v HIA Insurance Services Pty Limited* (2010) 241 CLR 390; [2010] HCA 32 at [90] and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 326; [1990] HCA 33 per Mason J.

[55] Despite Ground One alleging error 'in the application of the legal principles concerning the formation of the contract', the nub of the submissions in support of this ground was that some of the factual findings made by the learned Magistrate in relation to the formation of the contract 'beggar belief'. Similarly Ground Two alleged error in failing to make a particular factual

> finding, namely, that it was a term of the agreement that the defendant would waterproof the entirety of the walls over three levels.
>
> [56] The difficulty for Sand Ground is that Grounds One and Two involve questions of fact not law. It is well settled that questions as to the terms of any offer and any consensus reached, including the subject matter of any agreement, are questions of fact, *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26 at [22]-[27] (French CJ, Kiefel and Bell JJ): see also Y*ousif v Commonwealth Bank of Australia* at [42] (Kenny, Tracey and Jagot JJ) and *Carmichael v National Power Pie* at 2049 (Lord Hoffman).

71 Thus, although questions as to the evidence of any offer and acceptance and the subject of the agreement are questions of fact, the question of whether certain facts are *capable* of giving rise to a finding that a contract was formed gives rise to a question of law as does error alleging misapplication of relevant contract law to those facts. But, as I observed at [55]-[56] in *Sand Ground Engineering Pty Ltd,* it is well settled that questions as to the terms of any offer and any consensus reached, including the subject matter of any agreement, are questions of fact as are allegations that factual findings regarding contract formation were *unreasonable*.

72 Under this ground it was contended that the Appeal Panel should have found different facts and if it had, it would have held that a new and separate contract *had* been formed regarding the rectification works. Considerable time was spent during the hearing before this court on this ground in seeking to persuade the court that this ground raised a question of law.

73 In oral submissions, it was further contended that the question of law was that, contrary to the terms of s 80 of the NCAT Act, the Appeal Panel treated the internal appeal as a re-hearing. It seems to me that if there *was* sufficient evidence before the Senior Member to find a new contract was entered into in August 2017 and the Appeal Panel simply took a different view, then that *would* involve a question of law because the Appeal Panel would have misapplied the "no evidence" test of appellate review.

74 But even if I was satisfied such error was shown (which I am not) the difficulty for the plaintiffs is that they would then have to *also* establish error under Ground 2. That ground alleges error in the finding by the Appeal Panel that even if it was wrong in characterising the complaint the subject of this ground

as one of “no evidence”, it would grant leave to the builder to rely on it as a question of mixed fact and law in any event.

75 When pressed during the hearing to identify how the complaint that the Appeal Panel *mischaracterised* the contract found by the Senior Member was a question of law, counsel submitted that the question of law arose in this way:

> “BAMBAGIOTTI: … if a court has two matters before it, question A and question B, and it makes a finding about question A and it makes a finding about question B, but some of the findings in question B are necessary for the question A question, but they don't look at those at all, then it's a failure to –
>
> …
>
> BAMBAGIOTTI: … the tribunal panel in this case must may findings with respect to the elements that go to that finding. Now, if they overlook critical elements such as identifying the contract as being a different contract than was found and they don't deal with the elements of the finding of the contract that was actually in issue, then they have failed to consider those issues.
>
> If they then proceed to a completely separate point and deal with those criteria there, certainly they've considered them in the context of finding B but it's not - that would not be adequate for a finding on finding A unless you could conclude that they only referred to the issues on question B and they really had those issues in mind when they reached finding A.”

76 Given the way ground 1 was argued it is necessary to address each of the sub grounds in turn to consider three questions: do they raise questions of law, should leave be granted to bring them and has any error is established.

Ground 1(2)(a): Failure to consider all of the relevant and necessary evidence including that Mr James’ solicitor acted as his agent: [62]-[63]

Ground 1(2)(g): Error in failing to have regard to fact that Mr James’ solicitor was acting on his behalf

77 There was considerable overlap between these two sub grounds and I propose to address them together.

78 The plaintiffs submitted that the Appeal Panel erred because it failed to address all of the relevant and necessary evidence in relation to the *new contract* considered by the Senior Member, in particular, that the plaintiffs acted at all material times through their solicitor acting as agent. The plaintiffs contended under this sub ground that the Appeal Panel failed to acknowledge that the conduct of the plaintiffs’ solicitor should be taken to be conduct on Mr James’ behalf rendering their personal knowledge (or lack of knowledge of

matters) irrelevant to overall consideration as to whether there was an agreement.

79 It was further submitted that Mr James had personal knowledge of the agreement based on his affidavit and evidence given to the Tribunal.

80 It was contended that the Appeal Panel misconstrued the relevant findings of the Tribunal at [24] summarised at the second bullet point in [14] extracted above at [49] when it referred to the “offer” on 19 July 2017 and found that Jandson’s email of 24 August was not acceptance of that offer. As I understand it, the complaint is that it was not open to the Appeal Panel to find that it was not open to the Senior Member to find that the correspondence constituted acceptance in the sense.

81 It was further submitted that it “misses the point” to observe (as the Appeal Panel did at [63]) that there was no evidence that Mr Wells was authorised to accept offers, although regard was had to the sequence of correspondence which would justify an inference that he had. In this way, it was submitted, the Appeal Panel erred in overturning the Senior Member’s finding without having engaged at all with the basic elements of their finding, and without having dealt with or accounted for the basic, salient features of the contract finding itself.

82 It was submitted that the solicitor’s conduct should have been treated as conduct of Mr James and that the relevant conduct expressing acceptance of the builder’s offer was Mr James’ conduct, as set out in his affidavit. Reliance was placed on *Dal Pont’s Law of Agency*[1] and the relevant principles concerning agency.

83 In response the defendant submitted that this argument was being raised for the first time and should not be entertained on that basis. It was further submitted that even if Mr Wells was the agent of the owners, the finding made by the Appeal Panel that there was an absence of any evidence to confirm Mr Wells accepted the counteroffer conveyed by the builder on 24 August 2017 made any agency relationship redundant.

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[1] G E Dal Pont, Law of Agency (3rd ed, 2014, Lexis Nexis Butterworths) at [1.39].

84 The defendant further submitted that Mr Wells' conduct goes no further than sending an email to the builder on 18 August 2017 granting access. Even if treated as the conduct of the owners, that could not constitute acceptance of the counteroffer conveyed a week later.

Consideration: Grounds 1(2)(a) and (g)

85 The Senior Member found that despite the fact that Mr James gave access to the builder for the rectification work to commence *before* the scope of that work was finally agreed, that was sufficient to constitute acceptance of the scope of works outlined in a *subsequent* email of 24 August 2017. The Appeal Panel found such a finding was not open.

86 I am not satisfied that this sub ground raises a question of law. It contends, in effect, that the Appeal Panel erred in taking a different view of the evidence. I am not satisfied that is what the Appeal Panel did.

87 Even if I am wrong as to whether this ground raises a question of law, I am not satisfied that any error has been established in any event.

88 The owners' reliance on the presumption that, unless the contrary is established, any document prepared by a solicitor is on instructions does not assist him. The last correspondence from Mr Wells was on 18 August 2017 granting the builder access. On its face, that was written on instructions. But that access was granted *before* the 24 August email, which was the last document between the parties prior to when the builder's workers walked off the site in late September. It was a document from *the builder* to Mr Wells rejecting the offer and making a counteroffer offer. There was no written acceptance of that offer by the plaintiffs' solicitor.

89 As for the claim of error in the second bullet point of the summary at [14] of the Appeal Panel judgment, I do not accept any such error is disclosed. The claim that it (incorrectly) summarises [24] of the decision before the Senior Member cannot be sustained for two reasons. First, I do not read that summary as stating that the Appeal Panel treated the 24 August email as acceptance. But in any event, the second bullet point was a summary of [24] of the decision of the Senior Member which was extracted in full by the Appeal Panel at [34] in any event.

90 I can find no error in the finding by the Appeal Panel that the Senior Member could not have been satisfied that the owners were aware of the builder's counteroffer during the period in which the builder was undertaking work during August–September 2017 (at [62]). The Senior Member's finding was inconsistent with Mr James' evidence. The sole fact that the owners were acting through Mr Wells could not outweigh Mr James' evidence on this issue.

91 Even if there had been evidence that the owners' solicitor *was* authorised to accept offers on the owners' behalf (contra [63]), there was no evidence to infer it had done so beyond the fact that the builder's workers continued to do some remedial work.

92 No error is established.

Ground 1(2)(b): Error in having regard to Mr James belief

Ground 1(2)(e): Error in having regard to subjective matters

93 Again, there was considerable overlap between these two sub grounds.

94 Under sub ground 2(b) it was contended that the Appeal Panel erred in relying upon what it suggested was the subjective knowledge of Mr James to support its findings rather than applying the conventional objective theory of contract and the terms of the documents exchanged. It was submitted that the Appeal Panel should have accepted that the relevant "intentions" of a party to a contract lie in the intentions to be inferred objectively from the parties' conduct.

95 The plaintiffs relied upon the offer in the 24 August 2017 email, the fact that Mr Wells received it, the fact that Mr James did not sue the builder and that he continued to allow access to the site as objective evidence as to the contract formation. It was submitted that Mr James' conduct on his own part or by his solicitor is what mattered, from an objective stance, and the Appeal Panel failed to engage in this point.

96 It was submitted that the observation at [53] that there was *no evidence* that Mr James knew about the contents of the 24 August email was incorrect because Mr James exhibited a copy of that email to his affidavit.

97 It was submitted on behalf of the owners that the error under this sub ground arises in two ways. Firstly, it is a clear principal of law that a person can act by

a solicitor as agent. Counsel referred to Mr James' evidence that "[b]ased on the outcome of the 15 August site inspection and the respondent's request for access I understood that an agreement was in place whereby the defects would be rectified."

98 It was further submitted in support of this ground that Mr James deposed to the provision and continuation of access and the forbearance of suit and that those were the relevant matters, not his subjective belief.

99 The defendant accepted that these sub grounds raised an error of law, but it was submitted that it is patently clear from the Appeal Panel's reasons that it correctly considered and applied the objective theory of contract when considering the conduct of the parties at paragraphs [44] and [70].

Consideration: Ground 1 (2)(b) and (e)

100 These sub grounds allege error in the Appeal Panel's consideration of Mr James' evidence (as summarised above at [32]-[34]) as to what he understood the agreement was when he provided access to the builders.

101 The overarching error alleged is that the Appeal Panel relied upon the subjective knowledge of Mr James to support its findings rather than applying the conventional objective theory of contract and so having proper regard to the terms of the documents exchanged.

102 I am satisfied that these sub grounds raise a question of law to the extent of the complaint regarding the misapplication of contract law to the facts in this case, namely the objective theory of contract formation. The principle of objectivity by which the rights and liabilities of the parties to a contract are determined was described this way by the High Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]:

> " ... It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have

> understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

103 I am not satisfied that the Appeal Panel applied a subjective theory of contract formation. In fact, it stated its conclusion at [70] in this way": "when viewed objectively as a whole, the dealings between the parties do not demonstrate that they had a concluded agreement". The Appeal Panel provided numerous reasons as to why it was satisfied that it was not open to the Senior Member to find that a new contract was formed. The paragraphs in which those reasons appear, when read together, state the somewhat obvious proposition that in circumstances where the onus was on the owners before the Senior Member to establish that a new contract was formed the bare fact that access to the premises was not withdrawn by the owner, in the absence of any other evidence, was not sufficient to establish any "tacit understanding or agreement with the builder". In other words, that fact alone could not establish what *scope of works* was agreed to.

104 As for the complaint concerning [53], it is also misconceived. Mr James would clearly have been made aware of the 24 August 2017 letter in the course of the proceedings. The fact that it was annexed to his affidavit says nothing about *when* he was made aware of it. Moreover, he was cross-examined about this and the Appeal Panel was satisfied that he had not seen it at the relevant time. No error is disclosed in that factual finding.

105 I do not accept the plaintiffs' submission that Mr James' evidence (summarised at [54]), including that he could not recall when he saw that letter, is irrelevant "on an objective basis of conduct" because he had a solicitor acting for him for the reasons I have already provided. The Appeal Panel simply noted that there was, objectively, no knowledge as to when Mr James became aware of that letter.

106 No error is established under these sub grounds.

Ground 1(2)(c): Error as to significance of evidence that builder returned and did some work: [69]-[70]

107 This sub ground alleged error at [69]-[70] as to the adequacy of the foundation for the inference as to the existence of a contract by reference to basic facts, including that the builder returned to the site and undertook work.

108 The plaintiffs submitted that it was an error for the Appeal Panel to find there was no contract reached between the parties arising from the letter of 22 August because there was no 'meeting of the minds' between the parties: This was because the fact that Mr James continued to allow the builder to attend the site was an indication that the relevant "offer" of Jandson made on 24 August was accepted.

109 The defendant did not specifically address this sub ground.

110 I am not satisfied that this sub ground raises a question of law. Nor is it established in any event.

111 At [69]-[70], the Appeal Panel provided some of its reasons for not being satisfied that any contract could be inferred from the evidence before the Senior Member. Those reasons were that, in effect, given that there was no evidence as to *why* that continued access was granted by the owner it was an insufficient basis to infer acceptance of the counteroffer made in 24 August letter in its terms. That was just one of the reasons enumerated.

112 No error is established.

Ground 1(2)(d): Error in attempting to re-evaluate the evidence of witnesses

113 Sub ground (2)(d) of appeal was a complaint that the Appeal Panel erred in attempting to re-evaluate the evidence of witnesses, in circumstances where the Senior Member was best placed to evaluate the evidence having regard to his observations of the witnesses in the witness box. It was submitted that the Appeal Panel failed to give proper regard to the advantage of the member hearing and seeing Mr James' evidence dealing with that issue.

114 With reference to this submission, the plaintiffs cited (but did not discuss) a number of cases: *Abalos v Australian Postal Commission* [1990] HCA 47; (1990) 171 CLR 167 at 178-179; *Devries v Australian National Railways*

Commission [1993] HCA 78; (1993) 177 CLR 472; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* [1999] HCA 3; (1999) 160 ALR 588; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 at 448.

115 It was accepted by the owners' counsel that the Appeal Panel referred to the nature and extent of Mr James' knowledge of the relevant events, but it was submitted that it overlooked the fact that Mr James was cross-examined, and the Senior Member had the opportunity of seeing him give evidence as to his understanding and belief.

116 The builder submitted that Mr James oral evidence regarding the content of the letter confirms there was a dispute as between what works were appropriate, which supports the conclusion reached by the Appeal Panel that the parties did not have the same understanding as the builder as to what works it would undertake. It was further submitted that the plaintiffs had failed to demonstrate or otherwise articulate how any impression Mr James' conveyed to the Tribunal giving his evidence is of any import.

Consideration: Sub ground 1(2)(d)

117 This ground does not raise a question of law and is not established in any event

118 I am not satisfied that the Appeal Panel "re-evaluated" the evidence of witnesses in the sense of re-assessing their credit or demeanour. Nothing in the Reasons supports such a conclusion. What the Appeal Panel was required to do was to consider the ground of appeal before it which alleged error in the findings of the Senior Member as to the adequacy of the evidence before the Tribunal as to the formation of a new contract. In complying with that statutory task, it was required to assess the sufficiency of evidence and identify any error in the decision of the Senior Member. That is a different matter to simply revaluating all of the evidence.

119 Nor did the Appeal Panel state anything from which it could be inferred that it made any credit findings about Mr James.

Ground 1(2)(f): Failure to have proper regard to the reasoning that the new contract was a compromise agreement

120 Sub ground (2)(f) alleged that the Appeal Panel erred in failing to have proper regard to the finding of the Senior Member that the new contract was a compromise agreement. It was submitted that in reaching its findings the Appeal Panel overlooked the critical elements of the contract found by the Tribunal, namely, compromise and forbearance. It was submitted that the Appeal Panel mischaracterised the access finding at [67] in referring to the builder having had access before the 24 August offer; that was said to overlook Mr James' argument that it was the continuation of permitting access, which was the relevant element combined with the evidence of forbearance that was accepted by the Senior Member.

121 The defendant did not separately address this sub ground.

Consideration: Ground 1(2)(f)

122 The complaint that the Appeal Panel overlooked the question of consideration cannot be sustained. Grounds 4 and 5 before the Appeal Panel were directly concerned with the question of consideration. The builder unsuccessfully contended before the Appeal Panel that the Senior Member had erred in his conclusion that sufficient consideration existed provided that the owners held a belief in good faith that they had an arguable claim and that it failed to provide reasons or adequate reasons for its decision in that regard. The Appeal Panel addressed these complaints at [76]-[88] and found no error in the Senior Members' finding on this issue.

123 In these circumstances it cannot be said that the Appeal Panel "overlooked" the issues of the compromise and forbearance.

124 The focus of the reasons of the Appeal Panel under grounds 2 and 3 below, which form the basis of ground 1 in this court, was that there was no evidence that the *scope* of the works had agreed upon. The only evidence in support of that aspect was the continued access to the site. Whether or not there was consideration is irrelevant to the question as to what was actually agreed to.

125 No error is established under this sub ground.

Ground 1(2)(h): Error in drawing a Jones v Dunkel inference when not sought

126 The complaint under this sub ground is that the Appeal Panel erred in drawing a "*Jones v Dunkel"* inference when it noted the absence of Mr Wells at [58]. It was submitted that such a finding was inappropriate and without foundation and could not be used to fill a gap in a party's evidentiary case. It was submitted that it only rises to the point of a conclusion that the absent witness' evidence "would not have assisted the asserting party's case".

127 Reliance was placed on the fact that the builder did not seek such an inference be drawn and had it done so it could have been answered. It was submitted that Mr Wells' evidence was all conveyed by objective documents and the case did not turn on any non-documentary conduct on his part.

128 Reliance was placed on the reference to "unexplained absence" at [71]. It was submitted that this was "plucked out of the air" by the Appeal Panel without any foundation or any submission or any allegation being highlighted.

129 The defendant accepted that this sub ground was a question of law but submitted that the complaint is unsustainable. It contended that the reasons go no higher than stating Mr Wells did not give evidence, that there were evidentiary deficiencies as a result, and that his unexplained failure to provide evidence made it harder to draw an inference that the owners were made aware of the builder's counteroffer conveyed on 24 August 2017. It was accepted that the builder had not sought that such an inference be drawn before the Appeal Panel.

130 It was submitted that the three conditions that are required for the operation of the principle are: the missing witness would be expected to be called by one party rather than the other; the witness' evidence would have clarified a matter; and the witness' absence is unexplained. It was submitted in the circumstances that Mr Wells was the relevant witness who could clarify whether the owners were made aware of the builder's counteroffer on 24 August 2017, the three conditions were satisfied in any event. It was submitted that the Appeal Panel was permitted to infer that Mr Wells evidence would not have assisted the owners establish that they were made aware of the counteroffer.

Consideration: Sub ground 1(2)(g)

131 This ground raises a question of law.

132 It is to be accepted that the Appeal Panel noted the absence of Mr Wells at [58], but only in the context of its summary of the evidence as to what Mr James knew about the 24 August letter and when he did so. It made no comment about that absence; it was simply noted.

133 The other reference to Mr Wells, which forms the basis of the complaint under this sub ground, is at [71]. In that paragraph, the Appeal Panel noted the absence of any evidence from Mr James that he was aware of the counteroffer at the time it was made and found that in *that* context the continued access granted by the owners was insufficient to infer acceptance of the terms of the counteroffer. I have already found no error in that finding. It was in that context that the Appeal Panel went on to note that the "unexplained absence of evidence from the owners' solicitor further militates against the drawing of any inference in the owners' favour".

134 I am not satisfied that any *Jones v Dunkel* inference was drawn by the Appeal Panel in this matter thus the denial of any procedural fairness cannot be sustained. Mr James did not give evidence that he was aware of the scope of the works (from the 24 August email) when he granted access. All the Appeal Panel noted was that any inference that he was *in fact* aware could not be drawn and a further basis for that was the absence of Mr Wells.

135 Even if the Appeal Panel did draw such an inference (which I do not accept) there are limits to such an inference as Sackville AJA observed in *Lim v Cho* [2018] NSWCA 145; (2018) 84 MVR 514 at [41]:

> "It allows an inference that evidence not called by a party would not have assisted that party, but not that the evidence would have been adverse to that party. Nor does the rule enable a party to fill gaps in the evidence by relying on the absence of a witness the other party might have called."

136 I am not satisfied such an inference was drawn. No error is established under this ground.

Conclusion: Ground 1

137 Not all of the sub grounds to this ground raised a question of law. In relation to those that did, no error is established.

138 I would refuse leave to appeal on ground 1.

Ground 2: Error in consideration of clause 12(1) of Schedule 4 of the NCAT Act.

139 The scope of the grant of leave under s 80(2)(b) is set out in Schedule 4 Pt 6 cl 12 of the NCAT Act which I have extracted above at [51]. The discretion to grant leave in s 80(2)(b) of the NCAT Act can only be exercised if the Appeal Panel is satisfied the appellant may have suffered a "substantial miscarriage of justice" on one or more of three bases as set out in cl 12, namely:

> (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).

140 The Appeal Panel addressed the relevant circumstances in which such leave can be granted at [18]-[21] of its reasons as follows:

> "[18] The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:
>
> > (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).
>
> [19] In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:
>
> > … there was a 'significant possibility' or a 'chance which was fairly open' that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh

> evidence under para (c) had been before the Tribunal at first instance.

[20] Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

[21] In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

141 After concluding that ground 1 raised a question of law and should be upheld, the Appeal Panel went on to uphold ground 1 on an alternate basis in the event that it was wrong as to whether it did in fact raise a question of law. The reasons for doing so are at [74]-[75] of the reasons as follows:

> “[74] In the event that we are wrong in concluding that Grounds 2 and 3 raise a question of law, or if the Tribunal’s findings can be more properly characterised as involving a mixed question of fact and law, we would grant leave to appeal on the basis that the Tribunal’s findings in relation to the creation of a new contract or a variation of the original contract are against the weight of evidence. As noted above, the evidence before the Tribunal indicated that Mr James understood that the builder had accepted the 19 July 2017 offer put to the builder by the owners’ solicitor and had no independent recollection of when he saw the builder’s counter offer. Even had the owners’ solicitor been empowered to accept the builder’s counter offer on behalf of the owners, there was no evidence before the Tribunal to suggest that he had done so. Further, in these circumstances, the preponderance of evidence does not lead to a conclusion that a contract between the parties could be inferred. We consider that leave should be granted in respect of this ground for leave to appeal, as we consider that the Tribunal’s finding that there was a new contract or a variation of the original contract gives rise to an injustice to the builder which is reasonably clear.
>
> [75] We do not imply by our conclusion in respect of the above grounds of appeal that an agreement between a builder and an owner that the builder will return to undertake work to rectify defects after the end of the statutory

> warranty period will never amount to a new contract. If there is an agreement between the parties as to the scope of work to be undertaken, as well as sufficient consideration, a new contract could come into existence either through the application of conventional principles of contract formation or by implication. However, as we have found above, we do not accept that the available evidence in this case established a contract either on the application of conventional legal principles or by implication from the surrounding circumstances. At most, the evidence established that the builder was prepared to return to undertake a scope of work proposed by the builder, not a scope of work agreed with the owner."

142 The plaintiffs contended under ground 2 that the Appeal Panel erred in granting leave on the basis that the decision of the Senior Member was "against the weight of evidence" as it misapplied its discretion to grant leave.

143 It was submitted that it is "clear" the legislature intended a narrow route to bring internal appeals from findings of fact. The plaintiffs noted that the standard limit regarding the requirements for leave are set out in NCAT Act s 81(2)(b) and the right to appeal is further narrowed by requirements regarding "fairness & equity" and the "weight of evidence" as set out in Schedule 4 cl 12 of the NCAT Act.

144 In this vein, the plaintiffs submitted that the legislation contemplates that a party may identify error in the Tribunal's fact finding that is *not* an error that warrants leave. It was submitted that the grounds of appeal put to the Appeal Panel were not adequately articulated and as such the Appeal Panel and the plaintiffs were "burdened by the inadequacies" in the way that they were drafted, and the Appeal Panel only dealt with the foundation for the grant of leave in "passing comments" at [74] and [116].

145 It was submitted that in finding that the Senior Member's findings were against the weight of evidence, the Appeal Panel relied on the Appeal Panel's own view of the evidence which was neither comprehensive or complete and which overlooked critical features of the evidence before the Tribunal, including the role of the plaintiffs' solicitor in acting on their behalf. It was submitted in reaching those findings (at [74] and [116]) the Appeal Panel spent no time either in referring or evaluating the evidence with respect to which it granted leave. It was submitted that at a minimum a finding that a decision below was against the weight of evidence should at least identify the evidence whose weight is said to have been against the finding

146 It was contended that the Appeal Panel's findings fail to have regard to the evidence as a whole. It was submitted that it spent "no time" referring to or evaluating the evidence with respect to which it granted leave. It was submitted that the Appeal Panel misconstrued and misapplied the principles in s 80(2)(b) of the NCAT Act when read with Schedule 4 Part 6 cl 12(1). It was submitted in exercising the discretion to grant leave, the Appeal Panel should have articulated the statutory elements required for the grant of leave, as specified in the legislation rather than justifying its conclusion in the event that it is 'wrong'.

147 A further complaint was made as to the inadequacy of the reasons for its findings as to relative weight of evidence or basis of its finding of a 'substantial miscarriage of justice'.

148 As for the complaint that the Appeal Panel failed to have regard to the evidence as a whole, this argument was put this way in oral submissions:

> "So we say if you are going to make a finding under that head, you have to say the decision below reached finding X but was based upon evidence Y, or in generic terms. But there was also a mass of other evidence, Z, just in general description, and when you compare Y with Z it is clear that Z was an overwhelming balance of evidence that should have led to an alternative description. That is the process you have to undertake in order to exercise that jurisdiction."

149 Further arguments were raised under this ground during the hearing of this appeal. It was submitted that it is a jurisdictional questions and that in order to make a competent finding that a finding is against the weight of fact the Appeal Panel should identify what the error was and identify why it is an error.

150 It was submitted that the grant of leave under s 80(2)(b) is not a default power to simply make another finding; the Appeal Panel was required to at least go through the process or demonstrate they have gone through the process that is required in order to allow an appeal on those grounds.

151 The defendant did not address this ground in his written submissions. At the hearing, it was submitted that the Appeal Panel was satisfied there was an injustice that was reasonably clear, in relation to cl 1 of Schedule 4 cl 12 of the NCAT Act. With regard to whether the Appeal Panel dealt with the rigors of the need for the builder to establish a foundation for the grant of leave at [74]-[75], the defendant submitted that although the Appeal Panel did not describe what

the weight of evidence was, this is because the Appeal Panel already did so at [60].

Consideration: Ground 2

152 This ground alleges error in the exercise of the discretion to grant leave to the builder to appeal against the decision of the Senior Member on a question of mixed fact and law. It is to be accepted that a "discretion" may refer to a number of different legal concepts: *Norbis v Norbis* (1986) 161 CLR 513 ("*Norbis*") at 518 (Mason and Deane JJ); [1986] HCA 17. But it still seems to me that the finding of the Appeal Panel is subject to the constraints on the review of the exercise of discretionary power identified in *House v The King*, (1936) 55 CLR 499; [1936] HCA 40 at 504-505 (Dixon, Evatt and McTiernan JJ) and restated in Norbis. My only reservation in that regard turns on the fact that the discretion conferred on the Appeal Panel was not a broad one; rather, it was a binary one: either leave would be granted or refused.

153 During the hearing of this appeal, I inquired of the plaintiffs' counsel what the standard of appellate review relevant to this ground was, given that it is an appeal against the discretionary decision to grant leave. It was submitted that the relevant test was *Warren v Coombes* (1979) 142 CLR 531; [1979] HCA 9 but, as I indicated during the hearing, I do not accept that to be the case. Ultimately, I have arrived at the conclusion that no error is established under this ground on any of the tests of error on appellate review.

154 To the extent that this ground complains of a failure to provide adequate reasons, I do not accept that to be the case. At [46]-[72], which immediately precede [74]-[75], the Appeal Panel provided detailed reasons as to why the decision of the Senior Member was not open on the evidence. In finding in the alternative that, to the lesser standard, the decision of the Senior Member was also "against the weight of the evidence" the Appeal Panel clearly did so for the same reasons.

155 To the extent that this complaint is made under this ground that the Appeal Panel did not refer to the statutory language of cl 12 in Schedule 4. I note that at [18]-[21] the Appeal Panel set out the relevant statutory test and the principles derived from the decision in *Collins v Urban* [2014] NSWCATAP 17

as to their application. There can be no doubt that the Appeal Panel was aware of the relevant statutory test.

156 At [74], express reference is made by the Appeal Panel to the language in cl 12 (b) when it stated that the decision under appeal was "against the weight of the evidence". The Appeal Panel also stated that the decision of the Senior Member gave "rise to an injustice to the builder which is reasonably clear". Although it is to be accepted that the statutory language of cl 12 refers to the need for a "substantial miscarriage of justice", the decision in *Collins v Urban*, extracted by the Appeal Panel at [21] of its reasons, uses the language of "injustice" in consideration of the statutory test.

157 It is to be accepted that it is preferable to use the statutory language rather than any judicial gloss put on them (see for example the consideration of what is a "substantial miscarriage of justice" in a different statutory context in *Weiss v The Queen* [2005] 224 CLR 300; HCA 81), but I am satisfied that when [74]-[75] of the reasons are read with [18]-[21] and [65]-[72] it is abundantly clear that the Appeal Panel applied the proper test and did not err in its discretion to grant leave to the builder to appeal on a mixed question of fact and law.

158 It could not be said, as was submitted under this ground, that the Appeal Panel did not perform its statutory function to assess whether there was a substantial miscarriage of justice, analysing the evidence and explaining why the decision of the Senior Member was against the weight of the evidence.

159 I would dismiss this ground.

Ground 3: Error in construction of the 2009 contract

Ground 4: Error in construction of s 3B(1) of the HB Act

160 Grounds 3 and 4 in this appeal contend that the Appeal Panel erred in upholding the builder's grounds 6 and 7 in the internal appeal. Ground 3 contends that the Appeal Panel erred in finding that a FOC does not fall with the meaning of "building works" in the 2009 contract and ground 4 contends that the Appeal Panel erred in its finding of when "completion" occurred for the purposes of s 3B(1) of the HB Act.

161 It seems to me, given my earlier findings and those of the Appeal Panel (at [76]-[91]) (dismissing grounds 4 and 5 below), that any further arguments raised under these grounds cannot advance the plaintiffs' case as to whether a new contract was formed in August 2017. They both concern when it was that the (then) seven-year period for bringing proceedings commenced under the 2009 contract. The Senior Member found that it was on 20 October 2010 (when the FOC was obtained) whereas the Appeal Panel found that it was 13 July 2010 (when the works were handed over to the owners).

162 The owners' offer that in return for the works being rectified they would not sue was contained in a letter dated 19 July 2010. On the Senior Member's construction, the owners were still within the defects period at that time. On the Appeal Panel's construction, they were already out of time to commence proceedings by then. On either finding, the owners did not commence proceedings within time on the 2009 contract. Given that I have found no error in the Appeal Panel's conclusion that no new contract was formed in August 2017, the question of whether it erred in its conclusion regarding the date of completion could make no difference to the result for the owners. Similarly, if I had upheld the plaintiffs' appeal on ground 1, the determination of these grounds could make no difference to the result either.

163 The defendants accepted that this ground raises a question of law but submitted that it cannot succeed, and no leave should be granted.

164 Despite my reservations as to the need to consider these grounds, I propose to do so for completeness.

The Appeal Panel's findings

165 The Senior Member's findings were summarised by the Appeal Panel at [92] in these terms:

> "In summary, the Tribunal's reasoning process in relation to completion date was:
>
> > The builder was responsible for obtaining the FOC;
> >
> > The builder's obligation to provide the FOC fell within the definition of "building works" under the contract

> Completion of the works occurred within the meaning of the contract and therefore for the purposes of s 3B(1) of the HB Act upon the owners' receipt of the Final Occupation Certificate (FOC)."

166 At [93], the Appeal Panel observed that this finding was relevant to its finding that there was consideration in respect of the new contract it found that the parties had entered into.

167 At [94], the Appeal Panel concluded that the Senior Member erred in its interpretation of the 2009 contract. It set out the relevant provisions of that contract (which was a standard form Housing Industry Association (HIA) contract) at [96]-[102] as follows:

> "[96] Clause 1 of the contract defines 'building works' as:
>
>> The building works to be carried out, completed and handed over to the owner in accordance with this contract as shown in the contract documents and including variations.
>
> [97] In accordance with clause 1, 'practical completion' means:
>
>> When the building works are complete except for minor omissions and defects that do not prevent the building works from being reasonably capable of being used for their usual purpose.
>
> [98] Clause 7 of the contract is headed 'Planning and Building Approvals'. Clause 7.1states:
>
>> 7.1 The party named in Item 11 of Schedule 1 must obtain and pay for all building and planning approvals.
>
> [99] Item 11 names the builder as the responsible party for the purposes of clause 7.
>
> [100] Clause 27 of the contract is headed 'Final Certificate'. It comes after clause 26 which is headed 'Practical Completion'. It states:
>
>> 27.1 Unless stated elsewhere in this contract, the builder is not required to obtain any certificate of occupancy or final inspection certificate relating to the building works.
>
> [101] Clause 29 of the contract is headed 'Defects Liability Period'. It states:
>
>> 29.1 The defects liability period is a period of 26 weeks commencing on and including the date of practical completion. [Note: The standard form contract provides for a 13 week period. In this contract '13' is struck through and '26' inserted. The amendment is initialled.]
>>
>> 29.2 The owner may, before the end of the defects liability period, give the builder a list of defects in the building works that appear after the date of practical completion.
>>
>> 29.3 The builder must rectify defects that are the builder's responsibility and which are notified to the builder during the defects liability period.

> [102] Clause 14 of Schedule 1 specifies that Tender No 2277 dated 22 January 2009 (the Tender) forms part of the contract. The Tender (at page 194 of the Hearing Bundle) specifies that the basic tender price includes the Council Development Application and Inspection Fees. The tender price does not include provision of the FOC. The Tender specifies the work to be completed by the owners prior to the issue of an occupation certificate: items 18, 19 and 20 which concern lighting and the installation of outdoor and indoor clothes lines."

168 After setting out the relevant provisions, the Appeal Panel provided its construction of the relevant clauses in the 2009 contract at [103]-[107]:

> "[103] We are of the view that the Tribunal misinterpreted the contract when it concluded that the builder was responsible for obtaining the FOC as part of the works to be carried out and that the works were therefore not complete until the FOC was provided to the owners
>
> [104] First, cl 27 clearly states that the builder is not responsible for obtaining the FOC. The contract (including the Tender) does not otherwise provide that the builder is responsible for doing so. This is so notwithstanding Item 11 of Schedule 1 of the contract.
>
> [105] Second, a FOC is not a building or planning approval. For the purposes of this decision, it is unnecessary to go into the statutory basis for the issue of a FOC set out in the *Environmental Planning and Assessment Act 1979*. Suffice to note that, as stated by Moore J in *Toplace Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 121 at [16]:
>
> > 'A Final Occupation Certificate can be issued when all aspects of an approved development have been finalised and no further interaction between the developer and the consent authority is required concerning that development.'
>
> [106] An FOC certifies that the completed building (or part of the building) is suitable for occupation or use. It is a certification of completed building works, not a part of the building works. This is supported by the wording of cl 27, which refers to a certificate 'relating to the building works'. A certificate that relates to building works cannot, in our view, be part of the building works. It is also supported by the definition of building works in cl 1; that is, the building works to carried out, completed and handed over to the owner. In this contract, the owners were required to undertake works prior to an occupation certificate being issued. The building works 'handed over' to the owner could not, in such circumstances, include the provision of the FOC.
>
> [107] We conclude that the date of the FOC is not the date on which the building works were completed and from which the statutory warranty period ran.
>
> [108] Furthermore, we do not accept that the definition of building works includes the rectification of defects in the building works notified during the defects liability period.
>
> [109] First, such a conclusion does not accord with the definition of building works in cl 1 of the contract; that is, works that are 'carried out, completed and handed over to the owner'. Second, it does not accord with the definition of practical completion in cl 1, which is 'when building works are complete except for minor omissions and defects that do not prevent the building works from

being reasonably capable of being used for their usual purpose'. Third, it does not accord with cl 29.1, which states that the defects liability period commences 'on and including the date of practical completion' or with cl 29.2, which states that before the end of the defects liability period the owner may give the builder 'one list of defects in the building works that appear after the date of practical completion'. Together these clauses support a construction of the contract that differentiates between the building works, the completion of the building works and defect rectification which occurs after the building works are completed and handed over to the owner."

169 The final finding of the Appeal Panel (which forms the basis of ground 4) concerned the construction of ss 3B and 48K of the HB Act insofar as they provide for the time limit for bringing proceedings of this nature. The Appeal Panel set out the relevant legislation at [110]-[113] as follows:

> "[110] Section 48K(7) and 3B of the HB Act are also relevant to the date of completion of the works.
>
> [111] As at the date of the contract, s 48K(7) stated:
>
>> (7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim was lodged is more than 7 years after:
>>
>> (a) the date on which the residential building work the subject of the claim was completed, or
>>
>> (b) if the work is not completed:
>>
>> (i) the date for completion of the work specified or determined in accordance with the contract, or
>>
>> (ii) if there is no such date, the date of the contract.

170 The Appeal Panel then set out s 3B of the HB Act (extracted above at [41]).

171 The Appeal Panel's conclusion as to the time limit and when 'completion' occurred are at [114]-[116] as follows:

> "[114] In our view, in accordance with s 3B(1) of the HB Act, the statutory warranty period commenced on completion of the building works within the meaning of the contract; that is, when the works reached practical completion. If the contract had not provided for when the building works were complete and s 3B(1) was not engaged, then s 3B(2) and s 3B(3) of the HB Act would apply. It is not in dispute that the owners took possession of the works on 13 July 2017. In this case, that would be the relevant date in accordance with s 3B(3)(a) of the Act. Issue of the FOC is not the completion date of the works under s 3B.
>
> [115] Overall, we conclude that the Tribunal erred in finding that the date of completion of the building works was 20 October 2010, when the FOC was issued. In making this finding, the Tribunal misinterpreted the contract and did not correctly apply sections 48K(7) and 3B of the HB Act. Ground 6 is established. In our view, if the completion date was not the date of practical

> completion (8 July 2010), it was the date on which the works were handed over the owners (13 July 2021).
>
> [116] If we have erred in finding that the Tribunal's finding in relation to completion date raises a question of law, then for the reasons set out above, we conclude that the Tribunal's finding in this regard is against the weight of evidence. We would grant leave to appeal on this ground because we consider that the Tribunal's finding concerning the completion date gives rise to an injustice to the builder which is reasonably clear."

172 Ground 3 had three sub grounds which were described in the summons as sub grounds (5)(a), (b) and (c).

Ground 3, sub ground 5(a)

173 Under ground 3 sub ground (5)(a), the plaintiffs contend that the Appeal Panel erred in its finding at [103] because it overlooked Schedule 1, item 11 which references cl 7 of the 2009 contract. It was submitted that without an FOC the residence could not lawfully be occupied. It was submitted that the Appeal Panel's finding was "bizarre". It was submitted that it was an error not to *expressly* refer to Schedule 1 item 11 in that context.

174 It was submitted that "practical completion" means when the "building works" are complete and that the definition of building works incorporates the definition of contract documents which incorporates the full general terms and conditions, special conditions, plans and specifications. This means, it was submitted, that "building works" for the purposes of the contract means all of the work set out in the contract, in the specifications, in the plans and the specific specifications. The error was said to be that cl 7 includes the phrase "planning and building approvals". It was submitted that regardless of what that phrase may mean in other contexts, that concept is embraced by item 11.

175 In response, the defendant submitted that no error is disclosed at [105] given the nature of the contract. It was noted that this contract was not a "turnkey" solution; certain works were excluded from the contract which needed to be done by the owners prior to an FOC issuing. There are other exclusions that are not included in the reasons of the Appeal Panel which reinforce this point. Those exclusions include driveways and paths.

Consideration: Ground 3, sub ground (5)(a)

176 The complaint under this sub ground as set out in the summons is that the Appeal Panel "overlooked" Schedule 1, item 11 in its finding at [103]. But counsel for the owners *accepted* in oral submissions that at [104] the Appeal Panel observed that this finding was made "notwithstanding item 11 of schedule 1". Any complaint that it overlooked that item cannot be sustained. The plaintiffs then submitted in the alternative that despite *that* express reference, the Appeal Panel did not include it in their reasoning process and the finding was "bizarre".

177 Not only am I satisfied that the Appeal Panel did not overlook Schedule 1, item 11, nor am I satisfied that it was ignored in the reasoning process. The fact remains that there is a *specific* reference to a certificate of occupancy or final inspection in cl 27 which provides that the builder is *not* responsible for obtaining "any certificate of occupancy or final inspection certificate" relating to the building work. There is no specific reference to those terms anywhere else in the 2009 contract. That is why the finding was made by the Appeal Panel "notwithstanding item 11 of Schedule 1 of the contract".

178 The Appeal Panel resolved the tension between cl 27 of the contract (which states the builder is *not* responsible for obtaining a final inspection certificate) and cl 7 which requires the builder to obtain "planning and building approvals" by finding the FOC is not a building or planning approval for the reasons stated at [105] which forms the basis of the second sub ground.

179 Nowhere else in the contract is there a clause stating that the builder *is* to obtain any certificate of occupancy or FOC relating to the building works. Accordingly, as provided for by cl 27, it was not the builder's obligation to do so.

180 It was common ground that that when cl 7 was read with item 11 of Schedule 1, the builder was required to obtain and pay for "all building and planning approvals"; the dispute was as to whether an FOC is a building or planning approval. For the owners to succeed they must establish that the Appeal Panel erred in finding that an FOC is not a "building and planning approval" for the purposes of cl 7.

181 I do not accept that the reference to "building approval" is a specific reference to a FOC such that it is in fact stated elsewhere in the contract for the purposes of cl 27.

Ground 3, sub ground (5)(b)

182 Under Ground 3, sub ground (5)(b) the plaintiffs contend that the Appeal Panel erred in its finding at [105] as to the character of an FOC by reference to the EPA Act. Complaint was made that the Appeal Panel did not explain its reasons why a FOC was *not* a “building or planning approval” *and* that this finding was not forecast in the course of the appeal.

183 It was further submitted that Part 6 of the EPA Act embraces a sequence of certificates, including construction certifications, without which work cannot be done. In that context the Appeal Panel’s finding overlooks the role of the contract in determining the concept of completion for the purposes of s 3B(1) of the HB Act. It was submitted that it does not matter what “planning and building approval” means generally, it has been specifically defined in this contract in cl 7 which picks up item 11 on the Schedule at page 101.

184 In response, the defendant submitted that the plaintiff has not identified any authority to support the contention that the FOC is a planning or building approval. Nor has the plaintiff identified how the Appeal Panel failed to properly apply the principles governing construction of a written agreement. It was submitted that the Appeal Panel’s construction regarding the FOC was open on material before it.

Consideration: Ground 3, sub ground (5)(b)

185 The complaint under this ground was that the Appeal Panel erred in its finding that a FOC is not a building or planning approval by relying on a definition under the EPA Act at [105]. I am not satisfied any error is established.

186 I can see no error in the Appeal Panel noting the observations of Moore J in *Toplace Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 121 at [16]. His Honour held that an FOC can be issued when all aspects of an approved development have been finalised and no further interaction between the developer and the consent authority is required concerning that development. The plaintiffs accepted that definition to be correct in the context

of the EPA Act but contended that a different definition of FOC was stipulated by the parties in the 2009 contract. I do not accept that to be the case for the reasons already stated.

187 Further, I accept the defendant's submission that the tender stipulated that *included* in the tender price was "council development application and inspection fees" without any reference to any FOC.

188 Nor is there any definition of a "planning approval" in the 2009 contract. Although it is to be accepted that the definition is somewhat circular, what is clear is that a "planning approval" must be something separate and distinct from an "occupation certificate" because they are separate and distinct named items in the contract.

Ground 3, sub ground (5)(c)

189 Under Ground 3, sub ground (5)(c), the plaintiffs contend that the Appeal Panel erred in its finding at [108] as to the meaning of "building works" as it was "contrary to the plain wording of the Building Contract and contrary to authority and which extended to the rectification of defects in the original work pursuant to the defects liability period provisions in the Building Contract".

190 The defendant did not separately address this sub ground.

Consideration: Ground 3, sub ground (5)(c)

191 No error is established under this sub ground either.

192 As the Appeal Panel observed at [106], under the contract, the owners were required to undertake works prior to an occupation certificate being issued. This means that technically the FOC might not be able to be obtained until later. It could not be the case that the seven-year period could commence years after the owners moved in if they failed to undertake works that were required to complete before a FOC could be obtained. As the Appeal Panel found, the building works "handed over" to the owner could not, in such circumstances, include the provision of the FOC.

193 The plaintiff took issue with [106] of the Appeal Panel's decision where it stated that an FOC is a certification of completed building works, not a part of the building works. They argued that obtaining an FOC is part of the "building

works”. But, as the Appeal Panel found, given that cl 27 refers to a certificate “relating to the building works”, a certificate that *relates* to building works cannot be part of those building works

194 Further, as the Appeal Panel held at [109] the definition of “building works” in cl 1 of the contract are those “carried out, completed and handed over to the owner”. That is inconsistent with the definition including the provision of an FOC. I am satisfied no error is established for the four reasons provided for by the Appeal Panel in [109].

Ground 4: Error in interpretation of s 3B of the HB Act

195 Under this ground it was contended that the Appeal Panel erred at [114-115] in its construction of s 3B of the HB Act and the application of those provisions to the building contract.

196 The plaintiffs’ written submissions in support of this ground, in their entirety were as follows (at [65]-[68]:

> “The error [that a FOC is not a planning or building approval] seems to lie in the Panel’s comment, at JAP [106] where it says that ‘It is a certification of completed building works, not a part of the building works.’ This is true on its face, but it overlooks the role of the contract in determining the concept of completion for the purposes of *HBA* s 3B(1).
>
> The parties are free to choose any concept or point that they like as part of their agreement as to when work is ‘complete’ for the purposes of the contract. There is no logical feature tethering that concept to any particular part of the work.
>
> The Appeal Panel identified a principle, and applied it in the wrong place, for the wrong purpose.
>
> To that extent, it is in error and its findings should be overturned.”

197 The defendant’s written submissions did not address this ground beyond a submission that the plaintiff had not properly identified the question of law in the summons or its submissions nor any error at all. Counsel for the defendant submitted at the hearing that this ground was “enmeshed” with ground 3 and turned on the finding of when there was “completion”.

198 During the hearing, the plaintiff’s counsel identified the separate error as being the construction of s 3B and its application to the 2009 contract, but the submissions went no further than a repeat of the arguments under ground 3. It was submitted that the finding at [114] is unreasonable because the conclusion

that "the issue of FOC is not the completion date of the works under 3(b)" could only be correct if the provision of the FOC was not “building works”. It was submitted that the reasoning did not “hang together”. It was further submitted under this ground that the Appeal Panel did not go through the reasons of the Senior Member and engage with them.

Consideration: Ground 4

199 This ground concerns [114]-[115] of the decision of the Appeal Panel.

200 The Senior Member held that completion was the date of the issue of the FOC. The Appeal Panel held that was an error and was satisfied (at [114]) that the contract provided that works reached practical completion when the owners took possession on 13 July 2017 and that *that* was the relevant date for the purposes of s 3B of the HB Act.

201 I am not satisfied that any separate error has been identified under this ground. It follows that I have reached the same result under ground 4.

Leave to appeal

202 As I recently observed in *McDonnell v The Owners – Strata Plan No 64191* [2022] NSWSC 1631 at [65], the principles regarding the granting of leave under s 83 of the NCAT to bring an appeal such as this were summarised by Gleeson JA (with whom Macfarlan and Payne JJA agreed) in *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28] as follows:

> “Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted: *Sharpe v Heywood* [2013] NSWCA 192 at [34]; *McMahon v Permanent Custodians Ltd* [2013] NSWCA 275 at [57]. Ordinarily, leave to appeal is will only be granted concerning matters which involve issues of principle, questions of *general public importance* or an injustice which is reasonably clear, in the sense of being more than merely arguable: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[38]; *The Age Company Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13].”
>
> (Emphasis added.)

203 I am not satisfied that this appeal involved any questions of general public importance. It is to be accepted that the owners are aggrieved; having won before the Senior Member they lost before the Appeal Panel. But most of the complaints in this court went no further than an underlying complaint that the

Appeal Panel should not have rejected their case that a new contract was formed in August 2017. It is to be accepted that some of the grounds, in part, raised some discrete questions of law but none of them have been established. Despite this, rather than go through each of the sub grounds in order to consider which of them went beyond being "merely arguable", I am prepared to grant leave to bring this appeal but would dismiss it.

ORDERS

204 Accordingly, I make the following orders:

(1) The summons is dismissed.

(2) The plaintiffs are to pay the defendant's costs.

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