Civil and Administrative Tribunal

New South Wales

Case Name:	McIntosh v Lennon
Medium Neutral Citation:	[2023] NSWCATAP 83
Hearing Date(s):	30 January 2023
Date of Orders:	29 March 2023
Decision Date:	29 March 2023
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member D Fairlie, Senior Member
Decision:	(1) The appeal is dismissed. (2) Leave to appeal is refused. (3) If any party desires to make an application for costs of the appeal: (a) that party is to inform the other party of that application within 7 days of the date of this decision; (b) the applicant for costs is to lodge with the Appeal Registry and serve on the respondent to the costs application any written submissions of no more than five pages, and any evidence relied upon, on or before 7 days from the date of this decision; (c) the respondent to any costs application is to lodge with the Appeal Registry and serve on the applicant for costs any written submissions of no more than five pages, and any evidence relied upon, on or before 14 days from the date of this decision; (d) any reply submissions limited to three pages, and any evidence in reply, are to be lodged with the Appeal Registry and served on the other party within 21 days of the date of this decision; (e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not

	consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.
Catchwords:	BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — owner – father purchases property in the name of his daughter - resulting trust – presumption of advancement rebutted – beneficiary of resulting trust within the definition of “owner” in the Home Building Act BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) – owner-builder – owner-builder undertakes residential building work without an owner-builder permit – definition of owner-builder in the Home Building Act – proper interpretation of definition of owner-builder – legal meaning differs from literal meaning – definition includes owner-builders who undertake residential building work without a permit – alternatively, permissible to read definition as if it contained additional words – principles to apply when reading additional words into statute
Legislation Cited:	Home Building Act 1989 (NSW), ss 18B(1), 18C(1), 18D(1),18E(4), 32AA, 95, 127A, Sch 1, Sch 4 cll 121, 131 Home Building Amendment Act 2014 (NSW), Sch 1 cl 87
Cases Cited:	Allianz v Waterbrook [2009] NSWCA 224 Bosanac v Commissioner of Taxation [2022] HCA 34; [2022] 405 ALR 424 Collins v Urban [2014] NSWCATAP 17 Gardez Nominees Pty Ltd v NSW Self Insurance Corporation [2016] NSWSC 532 Gunn & Anor v Steain & Ors [2003] NSWSC 1076 Koprivnjak v Koprivnjak [2023] NSWCA 2 Marshall v Watson (1972) 124 CLR 640; [1972] HCA 27 Metwally v University of Wollongong [1985] HCA 28; (1985) 59 ALJR 481 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Sorbello & Donnelly v Whan [2007] NSWSC 951 Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531; [2014] HCA 9 The Owners – Strata Plan 81837 v Multiplex Hurstville

	Pty Ltd [2018] NSWSC 1488
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Alan Patrick McIntosh (Appellant) Stephen Mark Lennon (First Respondent) Glenda Lennon (Second Respondent)
Representation:	Counsel: C Simpson (Appellant) A Crossland (Respondents) Solicitors: Shields Legal (Appellant) Attwood Marshall Lawyers (Respondent)
File Number(s):	2022/00305702
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	15 September 2022
Before:	G Ellis SC, Senior Member
File Number(s):	HB 21/07682

REASONS FOR DECISION

1 This an appeal from a decision of the Tribunal which found that the appellant was an owner of land who had undertaken owner-builder work as defined in the *Home Building Act 1989* (NSW) (the "HBA") on a particular residential property situated at Kingscliff, NSW ("the property").

2 The Tribunal found that the appellant was liable to the respondents for breach of the statutory warranties contained in s 18B of the HBA and was ordered to pay the Respondents the sum of $95,199.15.

3 The main issues on the appeal were:

(1) Was the appellant an owner of the property for the purposes of the HBA notwithstanding that his daughter was the sole registered owner of the property?

(2) Was the appellant an owner-builder within the definition of that term in the HBA notwithstanding that he did not obtain an owner-builder permit and the HBA defined an "owner-builder" as:

> *owner-builder* means a person who does owner-builder work under an owner-builder permit issued to the person for that work.

4 In relation to those main issues it is our opinion that:

(1) the appellant was an owner of the property as a result of a resulting trust under which the appellant's daughter held 100% of the equity of the property on trust for the appellant;

(2) the legal meaning of the definition of "owner-builder" in the HBA includes owner-builders who (in breach of the HBA) do not obtain owner-builder permits;

(3) alternatively, the definition of "owner-builder" in the HBA should be read as if the words "or is required to do" were inserted in the definition after the word "does" so that the definition would read:

> "*owner-builder* means a person who does, *or is required to do,* owner-builder work under an owner-builder permit issued to the person for that work."
>
> (Emphasis for convenience)

5 Our reasons for those opinions, and for deciding the other issues on the appeal, are set out below.

Background

6 The background facts relevant to the issues on this appeal are substantially taken from the Tribunal's comprehensive and concise findings of fact.

7 Late in 1995, the appellant decided to purchase the property. At that time there was an existing house on the land. His evidence was that:

> "I bought the house (meaning the land) in the name of my daughter …"

8 On 20 December 1995, the appellant's daughter became the registered owner of that property but:

(1) did not contribute to the purchase price;

(2) never lived in the house on the property;

(3) did not pay for rates, utilities, or maintenance costs; and

(4) never received any of the proceeds of sale when it was sold.

9 In 2012, the appellant's son moved into the house on the property and paid the appellant rent of $150 per week.

10 In late 2012 or early 2013, and in response to a request from his son, the appellant agreed to "pull down the old house" and "build a new house" on that land for his son and his wife.

11 The appellant sought and obtained building plans for the proposed new house and paid for those plans from his own funds.

12 The appellant approached a geotechnical company and engineers in the second half of 2013 for the purpose of the proposed construction. He said he did so "as I was building the house for my son and his family".

13 The appellant said he approached a builder for a quote but was subsequently told by this builder that he would not provide a quote due to workload and health concerns.

14 The appellant said he then:

> "… decided that I would build the house myself as an Owner/Builder and as I had built houses before as an Owner/Builder."

15 On 18 December 2013, the appellant lodged a development application (the "DA") with the Tweed Shire Council:

(1) showing the appellant as the applicant;

(2) showing his daughter as the owner;

(3) showing an estimated contract price of $355,000; and

(4) indicating that the builder's details were "to be advised".

16 The appellant paid the fees for the application himself and "assumed I was making the application as Owner/Builder". He also applied for "all the required permits", and "other requirements" to demolish the existing house and build a new house.

17 On 6 March 2014, the DA was approved for the demolition of the existing house and construction of a new house on conditions which included:

(1) obtaining a construction certificate; and

(2) supply of either:

(a) the name and licence number of the builder and the name of the home warranty insurance ("HOWI") insurer; or

(b) the name of the owner-builder and, if the owner-builder was required to hold an owner-builder permit, the number of that permit.

18 The appellant's evidence was that:

> "At all times, I submitted every required application to the Tweed Shire Council in my own name, as either the 'owner' or the 'applicant'."

19 The appellant said:

> "After receiving approval to commence building work I began the process of emloying various tradesmen to undertake the building works as I thought I was undertaking the build as an Owner/Builder."

20 At about this time the appellant lodged an application for HOWI in the builder's name but without the builder's knowledge or consent.

21 On 10 April 2014, a certificate certifying that HOWI insurance had been granted was issued by the NSW Self Insurance Corporation. That certificate showed that the builder would be carrying out the work and the appellant and his wife were noted as the "Building Owner/Beneficiary".

22 The appellant said:

> "I built the house … and paid for the construction of the house from the A P McIntosh Family Trust."

23 The A P McIntosh Family Trust was a trust in which the appellant had some role, although the evidence did not disclose precisely what his involvement was. Inferentially, given the evidence quoted above, the appellant was either a trustee of the trust or a director of the corporate trustee of that trust (if there was one).

24 On 23 April 2014, a Construction Certificate was issued to the appellant and named the Tweed Shire Council as the Principal Certifying Authority.

25 On 24 April 2014, the appellant signed a Notice of Commencement (of building work) in which he described himself as "Owner'.

26 The work commenced and was completed.

27 On 16 June 2016, a Final Occupation Certificate was issued by the Tweed Shire Council to the appellant.

28 Later in 2016, the appellant decided to sell the property. His evidence was that his daughter (the registered owner of the property) wouldn't mind as:

> "… she always knew the house wasn't built for her, and she understood that … there was no reason for me to keep the house."

29 On 6 December 2016, Ms Carberry and Ms Clark purchased the property.

30 In early 2020, Ms Carberry and Ms Clark decided to sell the property.

31 In May 2020, the respondents inspected the property.

32 On 8 May 2020, a pre-purchase property and timber pest inspection of the property was carried out on behalf of the respondents. A report dated that same date was issued to the respondents and identified certain defects.

33 On 25 May 2020, in an email copied to the appellant, the vendor's real estate agent said that the "homeowner warranty" was still valid.

34 On 29 May 2020, the real estate agent, the first respondent, Ms Clark's husband and the appellant met at the property. During that meeting, the real estate agent, Mr Cardillo, told the first respondent that the vendors would not accept less than the listed price.

35 Also during that meeting, the appellant made representations about the alleged defects identified by the respondents to the effect that:

(1) there were no major defects in the property;

(2) the dampness in the stairwell was due to recent heavy rain;

(3) waterproofing had been done;

(4) he would contact the contractor who did the waterproofing;

(5) he would find receipts for the waterproofing;

(6) he would look at solutions for the problem with the stairwell;

(7) the steel frame touching the ground was a minor defect that could be fixed by putting some fibro underneath the steel to lift it off the ground;

(8) the house was built to council specifications and had been approved by council;

(9) any cost of rectification would not be significant; and

(10) he did not want to involve the builder.

36 Later that day, the first respondent made notes of that meeting.

37 On 2 June 2020, contracts for the sale of the property were exchanged and the conveyance was completed on 24 July 2020.

38 On 27 July 2020, the respondents sent an email to the appellant indicating that certain defects had worsened and suggested that there should be rectification by the individual or company responsible for:

(1) the balconies not being waterproofed;

(2) the tiled area between the house and the pool not draining;

(3) high moisture levels in the stairwell and blocks not being waterproofed; and

(4) the steel frame being in direct contact with the ground.

39 On 31 July 2020, the appellant replied that he was "still trying to locate my waterproofing guy without success".

40 Soon thereafter, the first respondent met with Paul Cain (the water proofer) who said he had only waterproofed the internal bathrooms and laundry, not the balconies. He confirmed that fact by providing the first respondent with a copy of his tax invoice, issued to the appellant for that work.

41 On 3 August 2020, the appellant told the first respondent:

(1) that he had been unable to contact his water proofer;

(2) to put his request in writing;

(3) that the appellant had nothing to do with the building work; and

(4) that he (the appellant) was not going to help him.

42 Around this time, the appellant unsuccessfully sought to have the HOWI insurance transferred into his name. Presumably this was because, as we later explain, at the time of this work s 95 of the HBA provided that an owner-builder was prohibited from entering into a contract for the sale of the property on which owner-builder work had been done unless a contract of insurance that complied with the HBA was in force in relation to the work if that work was completed within six years of the contract for sale. There are certain other exceptions which need not be mentioned.

43 The first respondent subsequently obtained quotes for rectification of the identified defects.

44 Between 26 August 2020 and 11 February 2021, the respondents had rectification work carried out at their expense.

45 In a letter dated 28 August 2020, the respondents sought to recover the cost of the rectification of major defects from the appellant.

46 Prior to that letter being sent, and on a date not specified, the appellant told the respondents that he was the person responsible for the building work.

47 On 18 February 2021, the respondents commenced these proceedings in the Tribunal.

48 On 3 March 2021, the appellant wrote to the Tribunal and said, amongst other things:

> "As explained in my statement dated 20.8.20 (copy attached) I built the house under a homeowner (owner builder) …
>
> … All Applications for approvals and certificates were issued to me by the Tweed Shire Council as the owner/builder …"

The Tribunal's Decision

49 The Tribunal said that due to the effluxion of time the only defects for which the respondents could recover damages from the appellant were those that fell within the definition of "major defects" in the HBA.

50 The Tribunal held that:

(1) the appellant was an "owner" of the property (at [78]-[87] of its reasons);

(2) the appellant was a builder and "therefore fulfilled the role of owner-builder" (at [88]), and was an unlicensed builder who contracted with the registered owner to build the house on the property (at [95]-[105]);

(3) the appellant was an owner-builder for the purposes of the HBA (at [89]-[94]);

(4) the HBA s 18B(1) warranties could be enforced against the appellant either because he was an owner-builder or because he was a builder (at [106]);

(5) the respondents could recover damages against the appellant for breach of the s 18B(1) warranties because Ms Carberry and Ms Clark were successors in title to the appellant pursuant to s 18C(1) [and could therefore enforce the statutory warranties against him pursuant to that section] and the respondents were successors in title to Ms Carberry and Ms Clark and could therefore enforce the statutory warranties against the appellant pursuant to s 18D(1) of the HBA (at [107]-[117]);

(6) the loss or damage suffered by the respondents was caused by a breach of the statutory warranties and not by their decision to purchase the property despite knowing of some of the breaches which gave rise to that loss (at [118]-[151]);

(7) there was defective work which amounted to "major defects" as defined in the HBA; and

(8) the Tribunal calculated the reasonable cost to rectify those defects (at [152]-[209]).

51 In substance, the appellant challenges each of those findings. The Tribunal's reasons for those findings will be described later in these reasons in relation to each ground of appeal.

The Grounds of Appeal

52 Grounds 1 and 2 asserted that the Tribunal erred in finding that the appellant owned the land.

53 Ground 3 asserted that the Tribunal erred in finding that Ms Carberry and Ms Clark were successors in title to the appellant for the purposes of s 18C(1) of the HBA in that the appellant was not an owner-builder for the purposes of that section.

54 Ground 4 asserted that the Tribunal erred in finding that there was an implied owner-builder contract between the appellant and the registered owner of the property to which the statutory warranties attached.

55 Grounds 5 and 6 asserted that the Tribunal erred in finding that Ms Carberry and Ms Clark were successors in title to the appellant for the purposes of s 18C(1) of the HBA.

56 Ground 7 asserted that the Tribunal erred in finding that the respondents did not have full knowledge of the existence of the defects by reason of their pre-purchase report.

57 Ground 8 asserted that the Tribunal erred in finding that the issues with the external spiral staircase amounted to a major defect.

58 Ground 9 asserted that the Tribunal erred in finding that the issues with the discharge of the swimming pool backwash amounted to a major defect.

The Relevant Provisions of the HBA

59 It is first necessary to identify the relevant provisions of the HBA which apply to this case and are particularly relevant to the task of interpreting its provisions. They are:

(1) the definition of "owner";

(2) the definition of "owner-builder";

(3) ss 18B, 18C and 18D;

(4) s 32AA

(5) s 95; and

(6) s 127A.

60 The form of the HBA as it stood between April – June 2014 when the work was done was different to its form after the commencement of the *Home Building Amendment Act 2014* (NSW) (the "amending Act"). Various provisions of the amending Act commenced on 12 December 2014, 31 December 2014, 15 January 2015 and 1 March 2015.

61 Part 20 of Sch 4 of the HBA contains the savings and transitional provisions applicable to the amending Act including the dates on which the various amendments took effect.

62 Clause 121 of Sch 4 of the HBA says that except as otherwise provided by Part 20 of Sch 4 or the regulations, an amendment made by the amending Act extends to:

(1) residential building work commenced or completed before the commencement of the amendment (which is the case here);

(2) a contract to do residential building work entered into before the commencement of the amendment (including a contract completed before that commencement);

(3) a contract of insurance entered into before the commencement of the amendment; and

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

63 The result is that some amendments contained in the amending Act apply to the facts of this case, and some do not. We set out below which amendments apply, which do not, and why.

64 In 2014 the definitions in the HBA were contained in s 3. Upon the commencement of the amending Act they moved to Sch 1. Clause 121 of Sch 4 of the HBA says that we apply the Sch 1 definition as there is no other provision of the Part or the regulations which say otherwise.

65 Therefore, the applicable definition of "owner" is:

> *owner* of land means the only person who, or each person who jointly or severally, at law or in equity—
>
> (a) is entitled to the land for an estate of freehold in possession, or
>
> (b) is entitled to receive, or receives, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise.

66 The applicable definition of "owner-builder" is:

> *owner-builder* means a person who does owner-builder work under an owner-builder permit issued to the person for that work.

67 Section 18B was amended slightly by the amending Act, but s 18C and s 18D not at all. Cl 121 says we apply the terms of those sections as they now appear.

68 Section 18B says:

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

for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

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

69 Section 18C says:

18C Warranties as to work by others

(1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

(2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

70 Section 18D says:

18D Extension of statutory warranties

(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

(1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.

(1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.

(2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

71 Section 32AA has remained unamended since its insertion in 2004. It says:

32AA Unlicensed contracting

(1) The holder of an owner-builder permit must not contract with another person for that person to do any residential building work (or any part of the

work) for the holder unless the person is the holder of a contractor licence to do work of that kind.

Maximum penalty—200 penalty units.

(2) The holder of an owner-builder permit is not guilty of an offence under this section if the holder establishes that the holder did all that could reasonably be required to prevent the contravention of this section.

72 Section 95 is in a different category. Clause 87 of Sch 1 of the amending Act amended s 95 of the HBA. Clause 87 commenced on 15 January 2015. Clause 131 of Sch 4 of the HBA says that s 95 as in force before being amended by the amending Act continued to apply to and in respect of:

131 Insurance obligations of owner-builders

…

(a) a contract of insurance or a contract for the sale of land entered into before the commencement of the amendment of section 95,

(b) a contract for the sale of land entered into after that commencement if a contract of insurance that complies with this Act is in force in relation to the work concerned when the contract is entered into.

73 The reference to a "contract of insurance" is a reference to the fact that at the time this work was done, being mid-2014, s 95 required owner-builder work to be insured if the property was to be sold within six years of the completion of the work (or some other exception applied). That was the case here, the property having been sold to Ms Carberry and Ms Clark within six years of the completion of the work. The effect of the amendments to s 95 (commencing on 15 January 2015) removed that requirement.

74 At the time the work was done, s 95 said:

95 Owner-builder insurance

(1) An owner-builder must not enter into a contract for the sale of land on which owner-builder work is to be or has been done by or on behalf of the owner-builder unless a contract of insurance that complies with this Act is in force in relation to the work or proposed work.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(2) An owner-builder must not enter into a contract for the sale of land on which owner-builder work is to be or has been done by or on behalf of the owner-builder unless a certificate of insurance evidencing the contract of insurance, in a form prescribed by the regulations, is attached to the contract.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(2A) A person who is the owner of land, and to whom an owner-builder permit was issued under Division 3 of Part 3 after the commencement of this subsection and not more than 6 years previously must not enter into a contract for the sale of the land in relation to which the permit was issued unless the contract includes a conspicuous note:

(a) that an owner-builder permit was issued under Division 3 of Part 3 to the person in relation to the land, and

(b) that the work done under that permit was required to be insured under this Act.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(3) This section does not apply:

(a) to a sale of the land more than 6 years after the completion of the work, or

(b) if the reasonable market cost of the labour and materials involved does not exceed the amount prescribed by the regulations for the purposes of this section, or

(c) if the owner-builder work is of a class prescribed by the regulations.

(4) Subject to subsection (4A), if an owner-builder contravenes subsection (1) or (2A) in respect of a contract, the contract is voidable at the option of the purchaser before the completion of the contract.

(4A) A contract is not voidable as referred to in subsection (4) if:

(a) the owner-builder obtained a certificate of insurance evidencing a contract of insurance that complies with this Act in relation to the work or proposed work before entering the contract concerned, and

(b) before completion of the contract, the owner-builder served on the purchaser (or an Australian legal practitioner acting on the purchaser's behalf) a certificate of insurance, in the form prescribed by the regulations, evidencing that contract of insurance.

(5) (Repealed)

75 From 15 January 2015 s 95 said:

95 No insurance for owner-builder work

(1) A contract of insurance under this Part cannot be entered into in relation to owner-builder work carried out or to be carried out by a person as an owner-builder.

Note. Insurance under the Home Building Compensation Fund cannot be offered or obtained for owner-builder work done by an owner-builder. This does not affect the requirement of section 92 for insurance to be obtained for owner-builder work done under a contract.

(2) A person who is the owner of land in relation to which an owner-builder permit was issued must not enter into a contract for the sale of the land unless the contract includes a conspicuous note (a consumer warning) stating:

(a) that an owner-builder permit was issued in relation to the land (specifying the date on which it was issued), and

(b) work done under an owner-builder permit is not required to be insured under this Act unless the work was done by a contractor to the owner-builder.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(3) The requirement for a contract of sale to include a consumer warning does not apply:

(a) to a sale of land more than 7 years and 6 months after the owner-builder permit was issued, or

(b) if the reasonable market cost of the labour and materials involved does not exceed the amount prescribed by the regulations for the purposes of this section, or

(c) if the owner-builder work carried out under the owner-builder permit is of a class prescribed by the regulations.

(4) The requirement for a contract of sale to include a consumer warning applies to a person as the owner of land whether the person is the person to whom the owner-builder permit was issued or a successor in title to that person.

(5) If a person contravenes this section in respect of a contract, the contract is voidable at the option of the purchaser before the completion of the contract.

Note. Prior to its amendment by the Home Building Amendment Act 2014, section 95 required an owner-builder to obtain insurance under this Part before selling the land concerned. Schedule 4 provides for the continued application of the previous requirements of section 95 to sales of land before the amendment to that section.

76 As mentioned earlier, the appellant applied for a HOWI contract of insurance in the name of a builder, and such insurance was issued, but that application was a deceit on behalf of the appellant and did not comply with the HBA (per s 95) in relation to the owner-builder work subsequently undertaken by the appellant.

77 Arguably, by a literal reading of cl 131 of Sch 4 of the HBA, the amended s 95 applies to this case because, even though it was required, no contract of insurance that complied with the HBA was in force in relation to the work concerned when the contract for sale to Ms Carberry and Clark was entered into. Hence, strictly speaking cl 131(b) did not apply and so the amended s 95 applies to this case.

78 In our view nothing turns on whether the original or the amended s 95 apply to this case in terms of requiring insurance because s 95 is only relevant insofar as it impinges on the task of interpreting the definition of owner-builder. Either

provision assists that task equally in the sense that either version of the provision is part of the protective scheme of the HBA. More relevant is that both versions required a “conspicuous note” or “consumer warning” respectively. For convenience we shall assume for the balance of these reasons that the amended s 95 applied, not least because both parties adopted that position and argued their cases on the basis of that assumption.

79 Section 127A has been amended several times since the work the subject of this dispute was done. However, as it is only relevant in terms of the general scheme and protective provisions of the Act, we need only note its current form which is in substantially the same terms as it was in 2014. Sub-sections 127A(1) and (2) say:

> **127A Power to request name and address of persons undertaking residential building work or specialist work**
>
> (1) An authorised person may request the person who has control over the carrying out of the doing of any residential building work, or specialist work, at a building site to state the name and residential address of each person who has contracted to do the work or any part of such work.
>
> (2) An authorised person may request the holder of an owner-builder permit to state the name and residential address of each person who has contracted to do any residential building work for the holder.

Grounds 1 and 2 – Was the appellant the owner of the land

80 The Tribunal found that the appellant was an owner of the property because the A P McIntosh Family Trust was the source of funds for the building work and those funds gave the trust an equitable interest in the property. The Tribunal drew an inference that the appellant was a beneficiary of that trust and was thereby an owner by reason of the definition of owner in the HBA.

81 Grounds 1 and 2 of the appeal challenged the correctness of that reasoning. The respondents correctly and properly conceded that grounds 1 and 2 should succeed but argued that the Tribunal had arrived at the correct finding (that the appellant was an owner of the land) albeit by an incorrect route. Were this matter in the Court of Appeal this issue would have been raised by a Notice of Contention. Such notices do not exist in the Tribunal and the parties correctly adopted the course that the respondents were entitled to raise that argument, it having been notified to the appellant in sufficient time for the appellant to meet

the point and it not being dependent on additional evidence or giving rise to any unfairness in the conduct of the hearing at first instance.

82 The respondents submitted that the appellant was an owner because his daughter, the registered owner, held the property on a resulting trust for the appellant and any presumption of advancement had been rebutted.

83 In reply, the appellant submitted that to say that the appellant was an owner of the property was contrary to the evidence. The appellant submitted that the presumption of advancement was only relevant if there was evidence or a finding that the appellant personally provided the purchase funds. If the family trust provided the funds, then there is no presumption of advancement.

84 The appellant submitted that it was irrelevant that the appellant described himself as the "owner" in various documents or made statements that "I bought the property" and "I decided I would sell the house". The appellant submitted that those statements were all made in circumstances where the appellant was, with his wife, in control of the trustee of the family trust that possibly appeared to have been the beneficial owner of the property.

Resulting Trust

85 The subject of resulting trusts and the presumption of advancement were recently considered and described by the High Court in *Bosanac v Commissioner of Taxation* [2022] HCA 34; (2022) 405 ALR 424.

86 Kiefel CJ and Gleeson J said at [12] (footnotes omitted):

> "A trust of a legal estate in property taken in the name of another is taken to "result" to the person who advances the purchase money. The categories of resulting trust include trusts arising from A's payment for the conveyance of rights to B; .... The term "resulting trust" states a legal response to proved facts."

87 Such a case, where funds are contributed toward the purchase or real property, are sometimes referred to as "purchase money resulting trusts" (see Gordon and Edelman JJ at [94]). That was an apt description for the original purchase of the property in this case.

88 The question whether a resulting trust arose is determined by intention. That is, in the absence of express words, what intention may be gleaned from the

circumstances as to the intention of the person contributing the funds for the purchase of a property.

89 Kiefel CJ and Gleeson J said at [32] (footnote omitted):

> "The question of intention is entirely one of fact, and concerns the intention manifested by the person or persons who contributed funds towards the purchase of the property. In *Martin*, it was observed that for the most part it can be assumed that proof of intention will be made out by the circumstances."

90 Gageler J explained the issue at [44] as follows (footnotes omitted):

> "In *Hepworth v Hepworth*, Windeyer J made the point that '[a]n intention, proved or presumed, that a trust should exist is at the base of every trust'. The intention to which his Honour referred is an objectively manifested intention that property be held in whole or in part for the benefit of another. His Honour observed that 'spouses, living together, may express their intention clearly enough one to another without resorting to the language of conveyancers' and that '[t]hus it sometimes happens that property which is held in the name of one spouse but which they enjoy together, belongs beneficially to both jointly or in common'."

91 Put another way, a resulting trust sometimes describes a trust that was objectively intended by the transferor of property (see Gordon and Edelman JJ at [93]).

92 Subsequently, in *Koprivnjak v Koprivnjak* [2023] NSWCA 2, decided shortly after the hearing of this appeal, Griffiths AJA, with whom Leeming and Mitchelmore JJA agreed, said at [19]:

> "In brief, as to resulting trusts, the primary judge relied upon the statement of the relevant principles by Ward CJ in Eq (as her Honour then was) in *Amit Laundry Pty Ltd v Jain* [2017] NSWSC 1495 at [161]–[168] (from which an appeal was dismissed in *Jain v Amit Laundry Pty Ltd* [2019] NSWCA 20). The central points may be summarised as follows (without reference to relevant authorities):
>
> > '(1) where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it;
> >
> > (2) once the primary fact giving rise to the presumption of a resulting trust is established, the burden falls on the party disputing the existence of a resulting trust to rebut the presumed fact on the balance of probabilities;
> >
> > (3) consequently, the presumption of resulting trust is the starting point of a factual enquiry about the intention of the party (or parties) who provided the funds for the relevant purchase;

> (4) the search for the intention of the relevant party (or parties) is as to proof of a "definite", and not "nebulous", intention, as opposed to a subjective uncommunicated intention;
>
> (5) the relevant intention is to be found as at the date of purchase (or immediately thereafter), although evidence of later acts and declarations is admissible as admissions against interest; and
>
> (6) for the presumption of resulting trust to apply, the purchase price must have been provided by the purchaser in their capacity as purchaser and not, for example, by way of loan.'"

93 Applying those principles, in our opinion the factual conclusion to be drawn from the evidence to which we shall now refer is that the appellant contributed the whole of the purchase money for the property when it was purchased in 1995 and a resulting trust arose in favour of the appellant.

94 The appellant's evidence was that:

> "I bought the house (meaning the land) in the name of my daughter …"

95 The words "I bought" refer to the appellant himself (rather than the family trust) and the words "in the name of my daughter" evince an intention that she was doing nothing other than lending her name to her father.

96 The appellant's daughter became the registered owner of that property but did not contribute to the purchase price, never lived in the house on the property, did not pay for rates, utilities, or maintenance costs, and never received any of the proceeds of sale when it was sold in 2016 to Ms Carberry and Ms Clark.

97 On those facts the presumption of a resulting trust arose, and the burden fell on the appellant to rebut that presumed fact on the balance of probabilities. He did not do so.

98 The appellant's evidence of later acts and declarations was admissible as admissions against interest (per *Koprivnjak* quoted above*)*. Such admissions included the difference between his evidence that "I bought the (property)" in 1995 with his evidence the trust (rather than himself) paid for the construction of the new house, namely:

> "I built the house … and paid for the *construction* of the house from the A P McIntosh Family Trust."
>
> (Emphasis ours)

99 There was no evidence the family trust provided funds for the *purchase* of the property.

100 That conclusion is further corroborated by the appellant's many statements (admissions) which we have outlined above, and which were expressed in language which objectively indicated that the appellant considered himself to be the owner of the property. For example, the appellant's evidence was that "I was building the house for my son and his family" and that he "decided that "I would build the house myself as an Owner/Builder". There was no reference to him seeking his daughter's permission to build the house on the property registered in her name, and there was no evidence that the provision of the purchase money was by way of loan from the appellant to his daughter.

101 Therefore, in our view the appellant's daughter held the whole of the estate in the property on a resulting trust for the appellant.

Advancement

102 The next question is whether there was a presumption of advancement and whether that presumption was rebutted. We need only to refer to what was said about that presumption in *Bosanac.*

103 Kiefel CJ and Gleeson J said at [14]-[15] (footnotes omitted):

> "[14] The presumption of advancement allows an inference as to intention to be drawn from the fact of certain relationships. It applies to transfers of property from husband to wife and father to child ….
>
> [15] On one view, the presumption of advancement is not strictly a presumption at all. It may be better understood as providing "the absence of any reason for assuming that a trust arose". At an evidentiary level, it is no more than a circumstance which may rebut the presumption of a resulting trust or prevent it from arising. It too may be rebutted by evidence of actual intention."

104 Their Honours said that this presumption is especially weak these days. At [22] they said (footnotes omitted):

> "The presumption of advancement, understandably, is especially weak today. In *Pettitt*, Lord Hodson considered that when evidence is given it will not often happen that the presumption will have any decisive effect. In the same matter, Lord Upjohn considered that given both presumptions are but a mere circumstance of evidence, they may readily be rebutted by comparatively slight evidence."

105 Gageler J said much to the same effect at [65]-[67] (footnotes omitted):

> "[65] The counter-presumption of advancement is not really a presumption at all. The existence of a relationship within a category recognised as triggering the counter-presumption is no more than a "circumstance of evidence". Considered alone, the circumstance of such a relationship is enough to negative the presumption which arises from the bare fact of contribution to the purchase price. However, the circumstance of such a relationship will not be considered alone if other evidence going to intention is adduced and will then simply be weighed in the overall evidentiary mix.
>
> [66] Whether any, and if so what, inference is then to be drawn about the actual intention of the contributor and the purchaser falls to be determined as an ordinary question of fact on the balance of probabilities. "It is the intention of the parties in such cases that must control, and what that intention was may be proved by the same quantum or degree of evidence required to establish any other fact upon which a judicial tribunal is authorized to act." Just as the standard of proof of intention is the ordinary civil standard, there are no special rules about proving intention. No predetermined weight is to be given either to the fact of a contribution having been made or to the categorisation of the relationship between the parties. The significance of each of those circumstances falls to be assessed within the totality of the circumstances of the case.
>
> [67] Where evidence relevant to intention is adduced, the presumption and the counter-presumption are therefore of practical significance only in rare cases where the totality of the evidence is incapable of supporting the drawing of an inference, one way or the other, on the balance of probabilities about what contributors and purchasers actually intended when they participated in the purchase transaction."

106 Gordon and Edelman JJ said at [115] (footnote omitted):

> "First, the 'presumption' of advancement is not a 'presumption' at all, but is, instead, one circumstance of fact in which the presumption of resulting trust does not arise."

107 On the same evidence which persuaded as that there was a resulting trust, and to which we referred to above, we also find that there was no advancement by the appellant to his daughter. Most particularly we rely on the fact that the daughter did not receive any of the proceeds of sale. Had the appellant intended to advance all or a portion of the estate in the property to his daughter, one would have expected her to receive all or a portion of the sale proceeds when they were received. She received none.

Was the appellant an owner of the property for the purposes of the HBA

108 The next question is whether, under those circumstances, the appellant was an owner of the property within the meaning of that term in the HBA.

109 Stevenson J examined this definition in *The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd* [2018] NSWSC 1488 ("*The Owners – Strata Plan 81837*"). His Honour said:

> "[89] There are two limbs to the definition of "owner" in the HBA. The first limb (sub-par (a)) is directed to entitlement "to the land for an estate of freehold in possession". The second limb (sub-par (b)) is directed to entitlement to receive rents and profits of the land.
>
> [90] The authorities make clear that the second of these limbs is to be seen as an aspect of the first.
>
> **A person at law or in equity entitled to the land for an estate of freehold in possession**
>
> [91] The term "owner" "prima facie connotes entire dominion" over the land (per Griffith CJ in *Union Trustee Co of Australia Ltd v Federal Commissioner of Land Tax* (1915) 20 CLR 526; [1915] HCA 68 at 530)
>
> [92] A person entitled to an estate of freehold in possession is one who has a "present right of beneficial enjoyment" (per Griffith CJ in *Glenn* at 498) or a "right of present enjoyment" (per Isaacs J in *Glenn* at 501). The party must have "the right to deal with the property as one's own" (*Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2007) 23 VR 474; [2007] VSCA 140 at [68] (Redlich JA with whom Ashley JA and Bell AJA agreed)).
>
> [93] Such a right may involve actual physical possession of the land.
>
> [94] It may also involve being "in receipt of the rents and profits in respect of the land"; for example see *Trust Company of Australia Ltd v Valuer-General* (2008) 101 SASR 110; [2008] SASC 169 in which Bleby J (with whom Duggan and Anderson JJ agreed) cited with approval the following passage from the judgment of the primary judge:
>
> > "There is substantial authority, therefore, for the proposition that the expression 'an estate in fee simple in possession' refers to an estate in fee simple where the owner of the estate is in physical possession as well as to an estate in fee simple where the owner is not in physical possession but is in receipt of the rents and profits in respect of the land. It is a corollary of that proposition that the receipt of rents and profits is evidence of ownership of the fee simple: Best on Evidence (12th ed, 1922) para 366 cited in *Allen v Roughley* (1955) 94 CLR 98; [1955] HCA 62 at 108 per Dixon CJ."
>
> [95] In order to be a person entitled to an estate of freehold in possession, a party must demonstrate that it has the ability to obtain an order for actual possession of the land or receipt of the rents and profits. …"

110 In this case, by reason of the resulting trust over the whole of the property, the appellant had entire dominion over the property. He had a right, in equity, to obtain an order for actual possession of the land, to enjoy and deal with the property as his own. Indeed, the evidence we have outlined earlier in these reasons demonstrates that he did enjoy and deal with the property wholly as his own. He was also in receipt of the rent for the property from his son.

111 For those reasons we find that the appellant was the owner of the land within the definition of "owner" in the HBA.

Ground 3 – Was the appellant an owner-builder within s 18C(1)

112 Ground 3 asserted that the Tribunal erred in finding that Ms Carberry and Ms Clark were successors in title to the appellant for the purposes of s 18C(1) of the HBA in that the appellant was not an owner-builder for the purposes of that section.

113 The Tribunal held that the appellant was an owner-builder. We are of the same view although we arrive at that conclusion by a different route to that taken by the Tribunal.

114 The submission rests on the definition of "owner-builder" which was:

> "*owner-builder* means a person who does owner-builder work under an owner-builder permit issued to the person for that work."

115 For convenience, the previous definition of that term, considered in *Gunn & Anor v Steain & Ors* [2003] NSWSC 1076 ("*Gunn*"), a decision to which we shall shortly come, was:

> "*owner-builder* means a person who does owner-builder work (within the meaning of Part 6) and who is issued an owner-builder permit for that work."

116 The short point made by the appellant, and a potent one, is that the plain words of the definition convey that for someone to be an owner-builder they must have been issued with a permit. If there was no permit, the person concerned could not be an owner-builder for the purposes of the HBA.

117 The appellant rightly refers to statements in the plurality's judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 ("*Project Blue* Sky") at [71] to the effect that when construing a statutory provision we must strive to give meaning to every word of the provision and that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.

118 The appellant submitted that the words "under an owner-builder permit issued to the person" should not be treated as superfluous, or insignificant, and we should strive to give meaning to them. The appellant submitted that we should

read those words with their ordinary grammatical meaning, with the words "is issued" meaning that a permit had actually been issued to the person concerned.

119 But the legal meaning of words may differ to their grammatical meaning. In *Project Blue Sky* the plurality said at [78] (footnote omitted):

> "However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction56 may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In Statutory Interpretation, Mr Francis Bennion points out:
>
> > 'The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that parliament intended to deal with [footnotes omitted].'"

120 It seems to us that there are four possibilities.

121 The first is that the appellant is correct, and parliament did not intend to include owner-builders who undertook residential building work without a permit within the protective scheme provided to successors in title by the statutory warranty provisions. In a general sense, that would be a plainly unjust result for obvious reasons.

122 Second, although we must strive to give meaning to all the words of the definition, the rule is not that we *must* give meaning to all the words. Similarly, we are not to treat the words as superfluous or insignificant *if by any other*

construction they may all be made useful and pertinent. That is, it is open to treat certain words as being superfluous or insignificant if there is no other construction by which they may be made useful and pertinent.

123 Third, the legal meaning we give to (all of) the words may differ from their grammatical meaning. That is, we do not treat any words as superfluous or insignificant, but the legal meaning we give to the words differs from their ordinary, grammatical meaning.

124 Fourth, we interpret the words of the definition as if they contained additional words with the effect of expanding its operation.

125 The first of those possibilities is the one for which the appellant contends. In its favour are the plain meaning of the words, and as has been said in the authorities, the process of interpretation begins and ends with the words used.

126 Against that possibility is the fact of plainly unjust results in the broad sense. That is, where owner-builders do not do the correct thing and obtain owner-builder permits, any successors in title to those owner-builders under s 18C(1) would be deprived of the benefits of the statutory warranties as would any purchasers from those successors in title pursuant to s 18D(1). If that were correct, then a significant and obvious objective of the HBA would not be achieved, as Price J pointed out in *Sorbello & Donnelly v Whan* [2007] NSWSC 951 referred to later below. No logical or rational reason for excluding those successors in title and subsequent purchasers from the benefit of the statutory warranties is discernible in the Explanatory Notes, second reading speech, the text of the HBA as a whole or the context of the provisions we have mentioned.

127 Mr Simpson, who skilfully said all that could be said in support of a grammatical interpretation, suggested that such successors in title and subsequent purchasers would still have the benefit of any statutory warranties which endured for the benefit of the appellant under any contracts he entered into with contractors who undertook some of the work. He also submitted that a property on which owner-builder work was done by an owner-builder without a permit would be unsaleable, and this fact would “protect” successors in title and subsequent purchasers in the sense that properties on which owner-builders did work without permits could not be sold to them.

128 The last submission is overstated. Such properties were and are saleable, as is evidenced from the fact that this property was in fact sold. Nothing *prevents* such properties being sold. Of course, had the appellant obtained an owner-builder's permit, he would have been required to have included a consumer warning in the contract for sale to Ms Carberry and Ms Clark per s 95(2). As that section is directed to an owner of land "in relation to which an owner-builder permit was issued", the appellant's position (and that of the registered owner, his daughter) would presumably have been that he (and she) were not required to include that consumer warning in the contract for sale because no permit was issued and so s 95(2) did not apply.

129 As to the first of those submissions, it would be correct so far as the submission goes, but grave practical problems would arise for any successors in title.

130 First, they would need to find out, presumably from the owner-builder, who those contractors were. If the owner-builder would not or could not co-operate, the successor in title would have a significant difficulty. Rights exist under s 127A(2) for an authorised person (who is not a successor in title) to request the holder of an owner-builder permit to state the name and residential address of each person who has contracted to do any residential building work, but this would be of little comfort or practical use to a successor in title. And, again, someone such as the appellant would say that s 127A(2) would not apply to him because he was not the holder of such a permit.

131 Second, and as Mr Crossland submitted, the terms of the contracts between the owner-builder and the contractors might prove an obstacle. In this case, for example, one of the alleged defects related to waterproofing and the balcony. The water proofer told the respondents that he was not asked to waterproof the balcony. If the absence of such waterproofing was a breach of the warranties so far as the entirety of the owner-building work was concerned, but the contractor had not been contracted to waterproof the area the subject of the defect claim, prima facie the contractor would not be liable.

132 The appellant submitted that purchasers would be protected because they could undertake searches (presumably of council files) before a conveyance

and such searches would protect them. There was no evidence of usual conveyancing practice in that regard, or what searches might reveal. Accordingly, we do not attach any weight to that submission.

133 The appellant submitted that purchasers would be protected because a contract for sale was voidable pursuant to s 95(5) before completion of the contract if the relevant consumer warning was not attached to the contract. That may be so, but that would require the purchasers acquiring that knowledge and there was no evidence of the usual conveyancing searches which were customary to make at that time which would produce that information. And, of course, just as the appellant has argued here, so would he have argued then that no such consumer warning was required because s 95(2) only applied when a permit had actually issued.

134 The second of the four possibilities we mentioned, that is, to treat the words "under an owner-builder permit issued to the person for that work" as superfluous or insignificant is unattractive. The words are there, they can be given meaning and they can be given a construction which is pertinent.

135 Further, words employing the same general concept, namely that of an owner-builder with a permit, appear in s 127A(2) ("may request the holder of an owner-builder permit"), s 32AA ("(T)he holder of an owner-builder permit") and s 95(2) ("who is the owner of land in relation to which an owner-builder permit was issued"). To treat the identified words in the definition of owner-builder as superfluous or insignificant would presumably apply to like sections.

136 The third possibility is that the legal meaning of the words may differ from their grammatical meaning. That is, should the legal meaning we attribute to the definition of owner-builder be that owner-builders who do not obtain a permit when required to do so are included.

137 This is the approach adopted in *Gunn* where Master Harrison, as her Honour then was, said at [14]-[18]:

> "[14] The definition of owner-builder is contained in s 3 of the HBA which states:
>
> > "owner-builder means a person who does owner-builder work (within the meaning of Part 6) and who is issued an owner-builder permit for that work."

> [15] The applicants submitted that they did not fall within the definition as they had not been issued with an owner-builder permit. Thus according to the applicants, regulation 8(f) of the Home Building Regulation 1997 does not apply so that the supervisory work carried out by the defendant on the pool was not in fact exempt from the HBA. A person supervising owner-builder work for no reward or other consideration is declared to be excluded from the definition of residential building work pursuant to Reg(8)(1)(f)(ii).
>
> [16] In this regard, the Tribunal Member said:
>
> > "Coming to this finding I am not convinced that anything turns on the fact that the applicants did not have owner-builder permits and that definition of "owner-builder" in s 3 refers to someone "who is issued an owner-builder permit for that work". I take this qualification to be a deeming provision and not a pre-requisite to what constitutes an owner-builder. To do otherwise would lead to an absurd result whereby people, could elect not to obtain such a permit so as to avoid the legislative requirements as to insurance, education and the disclosure provisions in sale contracts (ss 31(2)(d) 95, 95(2A) of the HB Act)."
>
> [17] The Tribunal Member's finding that the applicants' were owner-builders accords with the legislative spirit of the HBA. In Minister Fay Lo Po's second reading speech to Parliament on 30 October 1996 regarding amendments, of which the definition of "owner builder" was a part, she emphasised at 55412 the importance of the requirement for insurance, particularly with respect to owner builders. Part of the reason for this was to provide protection for subsequent purchasers.
>
> [18] As the Tribunal Member said, to interpret the definition of owner builder in s 3 as a pre-requisite to what constitutes an owner builder would potentially result in persons electing not to obtain permits so as to avoid legislative requirements in the HBA as to insurance (s 95) and also education (s 31(2)(d)), and disclosure provisions in sale contracts (s 95(2A)). Such an interpretation would frustrate the purpose of the legislation. Where there is ambiguity surrounding Parliamentary intention in a statute, a court should prefer the construction which appears to achieve the legislative purpose rather than one that appears to defeat or frustrate that purpose: *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, Kirby P at 319."

138 As to interpretation generally the plurality in *Project Blue Sky* said at [69] (footnotes omitted):

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."

139 It seems that her Honour implicitly applied that general approach in *Gunn* in that her Honour accepted the Tribunal's reasoning that the words "who is issued an owner-builder permit" were a "deeming provision" and not a pre-

requisite to what constituted an owner-builder because to hold otherwise would frustrate the purpose of the legislation.

140 We are not bound by the decision in *Gunn*, it concerning a since repealed definition, but her Honour's reasoning retains persuasive value. We are not sure, in this context, what is meant by the expression "deeming provision", but the intent was clear. The definition was to be read in a way that included owner-builders who were not issued with a permit in order to achieve an object of the legislation.

141 The issue arose tangentially in *Sorbello & Donnelly v Whan* [2007] NSWSC 951. In that case Price J was hearing appeals from a decision of the Consumer, Trader and Tenancy Tribunal (the "CTTT"). The appellants had purchased adjacent properties from the respondents. They commenced proceedings in the CTTT alleging the respondents were liable to arrange for the repair of pump-out systems on each of the properties.

142 The appellants contended before the CTTT that the first respondent (Mrs Whan) was liable to remedy the defects in the pump-out systems by reason of the statutory warranties found in s 18B of the HBA. The appellants argued that Mrs Whan was an owner-builder and they, as immediate successors in title to the owner-builder, were entitled to the benefit of the statutory warranties because of the operation of s 18C of the HBA. Mrs Whan had not obtained an owner-builder permit.

143 The CTTT referred to *Gunn* but distinguished it on the basis that the "deeming provision" could not apply to someone (Mrs Whan) who, had she applied for a permit, would not have obtained one (because what she constructed was not a permissible construction for owner-builders). That is, she was not eligible for an owner-builder permit.

144 Price J held that the CTTT was wrong in that conclusion. His Honour held at [25]-[26] that on the primary facts found an owner-builder permit *may* have been issued, and thus it was erroneous to find that Mrs Whan was ineligible for such a permit.

145 His Honour then turned to *Gunn* and said at [27]-[28]:

> "[27] The plaintiffs contend that the Member fell into error when he stated in the Reasons for Decision that:
>
> > 'In *Gunn v Steain* it was possible to deem the home-owner to be the holder of a permit, as had she chosen to apply for one she would have been eligible.'
>
> As the plaintiffs point out, the Associate Justice in her judgment did not consider the eligibility of the applicants in that case for an owner-builder permit.
>
> [28] It is evident why her Honour did not do so. An interpretation of the definition of owner-builder that imports a requirement of eligibility for an owner-builder permit would lead to consequences which could not have been intended by the Legislature. An individual who undertakes owner-builder work although ineligible for the grant of an owner-builder permit as a consequence of s 31 of the HBA would not be subject to the obligations imposed on the holders of a permit by the Act thereby depriving successors in title of the protections afforded by the legislation. A purchaser, for example, of a dwelling house constructed by an unqualified individual, who by reason of the failure to undertake an applicable education or training course approved by the Director-General was ineligible for an owner-builder permit, would not be entitled to the benefit of statutory warranties under s 18B of the HBA. The need for consumer protection in these circumstances is manifest. Notwithstanding that the work was in breach of s12 of the HBA, the unqualified and ineligible builder would benefit. As is stated in Pearce and Geddes: *Statutory Interpretation in Australia* (2006) 6th Edition at [2.37] p 61:
>
> > 'It is reasonably clear that the courts will resist strongly an interpretation of an Act that will permit a person to take advantage of his or her own wrong." See also, for example, *The Firm (Australia) Pty Ltd v South Sydney Council* [1999] NSWLEC 5 per Lloyd J at [7].'"

146 His Honour's conclusion is at [29] wherein his Honour said:

> "The Member, I am satisfied, misdirected himself by importing into the definition of owner-builder a requirement of eligibility for an owner-builder permit and thereby made an error of law."

147 Although his Honour's focus in the second sentence of [28] was on eligibility, the balance of the passage speaks more broadly to the situation where an owner-builder undertakes owner-builder work without a permit. It is clear from the first sentence of [28] that his Honour considered that *Gunn* had been correctly decided.

148 In the present case the wording of the definition is slightly different. The substantive change was from "who is issued an owner-builder permit" to "under an owner-builder permit issued to the person". We do not see any substantive difference between the two wordings. Both refer to owner-builder permits and both use the word "issued", grammatically speaking, in its past tense.

149 In our opinion the proper interpretation of the definition of owner-builder in Sch 1 of the HBA, that is, the legal meaning that should be given to those words as distinct from their grammatical meaning, is that they include owner-builders who do owner-builder work without, in breach of the HBA, being issued an owner-builder permit for that work.

150 We would not, with respect, adopt the reasoning of the Tribunal Member in *Gunn* that the words "who is issued an owner-builder permit" are deeming words. Rather, in applying the statements of principle set out in *Project Blue Sky* at [69] and [78], we have concluded that the meaning of the words in the definition include owner-builders who do owner-builder work without, in breach of the HBA, having applied for and been issued with an owner-builder permit for that work.

151 We consider that the legal meaning of the definition as we believe it to have is consistent with the purpose of the provisions of the HBA, namely, to provide a form of protection for successors in title to owner builders who undertake owner-builder work, including owner-builders who breach the HBA and do not obtain owner-builder permits. Both Harrison AJ and Price J referred to the frustration of the purposes of the HBA if owner-builders who did not obtain permits were excluded from the then definition, and the manifest need for consumer protection in circumstances where owner-builders undertake work without obtaining permits.

152 The appellant submitted that the legislation here is relevantly fundamentally different to that considered in *Gunn*. The appellant submitted that the Court in *Gunn* had observed the importance of the requirement of insurance particularly in relation to owner-builders. However, the submission went, the 2014 amendments changed that position so that the HBA now prohibited the obtaining of insurance by owner-builders. A person purchasing from an owner who has done owner-builder work would not have the benefit of an insurance policy regardless of whether a permit was obtained.

153 In our view the absence of insurance strengthens the case to read the definition as we believe it should be read. In the second reading speech of the

Home Building Amendment Bill 2014 the Minister said that consumer protection was one object of the amendments. The Minister said:

> "This reform process was undertaken to ensure home building laws reflect current practice and reduce any unnecessary red tape for industry while providing consumers with appropriate protection. It is essential that consumers are adequately protected from risks associated with such a big investment as building a home or undertaking major renovations."

154 And:

> "There are more than 50 changes contained in the bill that will ensure appropriate levels of consumer protection are maintained and, where appropriate, enhanced."

155 The removal of the requirement for insurance for owner-builders came about because of the well-known difficulties with insurance in the construction industry and the withdrawal of insurers from that market. In relation to insurance the Minister said:

> "While owner-builders are currently required to take out home warranty insurance, the bill makes them ineligible to obtain home warranty insurance under the statutory scheme before onselling their home. This is to focus home warranty insurance on the licensed building sector, and to make a clear distinction between homes that are built by qualified licensed builders and those built by owner-builders. To safeguard subsequent purchasers of properties, contracts for the sale of all properties on which owner- builder work has been carried out in the last six years will be required to include a consumer warning that the work has been undertaken by an owner-builder and that the owner-builder is not providing statutory insurance."

156 That passage underscores parliament's intention that, in light of the removal of insurance in relation to owner-builder work, subsequent purchases would be "safeguard(ed)" by the requirement for a consumer warning to be included in any contract for sale.

157 In relation to that safeguard, should the definition be read literally, neither the appellant nor his daughter, the registered owner, were required to include that consumer warning when the property was sold to Ms Carberry and Ms Clark and thus the safeguard would not be available to them or the respondents.

158 The appellant submitted that under the current legislation no policy purpose is served by imposing on owners who do work without a permit the obligations of the statutory warranties. We disagree. The policy purpose is to provide the same protection to subsequent purchasers of properties on which owner-

builder work was done without a permit as exists for those who purchase a property on which owner-builder work was done with a permit.

159 It is true, as the appellant submitted, that it is an offence by owners to do most work without an owner-builder permit. But that is of little comfort to subsequent purchasers.

160 Logic would suggest that the legal meaning of ss 32AA, 95(2) and 127A would also differ from their grammatical meaning in order to achieve the same objective, that is, to provide protection to subsequent purchasers of property on which owner-builder work was done without a permit. So, consistently with what we have said above, in:

(1) s 32AA, the words "[t]he holder of an owner-builder permit" should logically be read as "an owner-builder undertaking owner-builder work" or similar;

(2) s 95(2), the words "(a) person who is the owner of land in relation to which an owner-builder permit was issued" should logically be read as ""(a) person who is the owner of land in relation to which an owner-builder permit was or should have been issued" or similar; and

(3) s 127A(2), the words "the holder of an owner-builder permit" should logically be read as "an owner-builder undertaking owner-builder work" or similar.

161 Of course, how those sections should be read is not at issue in this case other than insofar as they are relevant to the interpretation of the definition of owner-builder. But we mention them for completeness sake because they are the only other sections of the HBA which we have identified which, if read grammatically, exclude owner-builders without permits from compliance with various provisions of the HBA otherwise directed to the protection of successors in title.

162 We should note s 95(1) which, in contradistinction to the definition of owner-builder and ss 32AA, 95(2) and 127A, does not include the requirement of a permit. It says:

> A contract of insurance under this Part cannot be entered into in relation to owner-builder work carried out or to be carried out by a person as an owner-builder.

163 That is, on its face, one cannot take out HOWI insurance whether a permit is obtained or not. In our view this seems to support the view that the general

scheme of the HBA is to treat owner-builders without permits the same as owner-builders with permits.

164 In our view, per *Project Blue Sky*, our interpretation of the definition of owner-builder is consistent with the purpose of the provisions of the HBA viewed as a whole. In particular we note that express provision was made in situations where a contractor did not have, but should have had, a licence. So in s 18B, for example, it is said that the warranties are implied in every contract to do residential building work by a contractor "or a person required to hold a contractor licence". Thus the HBA foresaw the possibility of contractors doing the wrong thing and not holding a licence. So also, in the interpretation we ascribe to the definition of owner-builder, does the HBA contemplate circumstances where owner-builders do the wrong thing and fail to obtain a permit. To interpret the definition otherwise would allow the appellant to take advantage of his own wrong.

165 In our view the the context, the general purpose and policy of the owner-builder provisions, their consistency and their fairness are surer guides to the legal meaning of owner-builder than its grammatical or literal meaning. Giving the definition its literal meaning would not remedy a mischief that parliament intended to deal with.

166 The appellant submitted that if we gave the definition the meaning we have outlined then it would have the consequence that there would be superfluous words in s 18C(1). That section says:

> A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

167 The appellant submitted that if an owner-builder is any owner who does work on land, with or without an owner-builder permit, then all of those additional categories (a holder of a contractor licence, a former holder or a developer) would be unnecessary because they must all have been owners if the persons seeking redress under the statutory warranties are successors in title to them. We do not accept this submission, at least wholly.

168 First, it is a necessary implication in s 18C(1) that the owner-builder, holder of a contractor licence, former holder of a contractor licence or a developer was an owner of the land because the section refers to the immediate "successor in title". Hammerschlag J examined the term "successor in title" in *Gardez Nominees Pty Ltd v NSW Self Insurance Corporation* [2016] NSWSC 532 ("*Gardez*"). His Honour said at [42], [50], [52]-[53]:

> "[42] 'Successor in title' is not a term of art: *Souglides v Tweedie* [2013] Ch 373 at 376. It is protean. Its meaning in any given case will depend on the specific context in which it is used.
>
> …
>
> [50] In its general meaning, 'successor in title' connotes no more than a person who holds title after another. The Oxford Australian Law Dictionary definition is, unexceptionally:
>
> > 'The party that comes later in time than another, as the holder of an estate or interest in property.'
>
> …
>
> [52] The Act does not expressly state what title it has in mind. However, the mechanism for transmission of the benefit of the warranties and insurance, both where the owner contracts with the contractor and where the owner does not contract, is transmission of the owner's title to the successor.
>
> [53] Thus, determination of whether party B (Gardez) is the successor in title to party A (Railway) requires identification of the relevant title held by party A at the time of the warranties, and assessment of whether that title passed to party B."

169 In this case, the title held by the appellant was as the owner (in equity). That title was transmitted to Ms Carberry and Ms Clark when the latter purchased the property.

170 The appellant submits that if the definition of owner-builder included owner-builders without permits, then that (expanded) definition would also cover holders of contractor licences, former holders of contractor licences or developers because, for example, a holder of a contractor licence who did residential building work on their own land could do so under the HBA without a permit, and thus could be said to fall within the definition as we would read it.

171 We do not agree with that submission in relation to developers. Developers would ordinarily contract the building work to contractors and so would not require an owner-builder permit. The appellant's submission is probably correct in relation to holders of contractor licences or former holders of such licences,

but there is a constructional choice presented in relation to the definition of owner-builder. The appellant's contention has the appeal of literal meaning and the avoiding of superfluous words. The constructional choice preferred by us has the appeal of reading the definition in a way which prefers the context, general purpose and policy of the provision, and its consistency and fairness, to the logic with which it is constructed. Inevitably that may cause some literal discomfort, but in our view some literal discomfort is to be preferred to that allowing a mischief that parliament intended to deal with.

172 The appellant submitted that to read the definition as we have held would be to:

> "… impose on lay person owners who involve themselves in significant renovation or repair work the same obligations that would be imposed on professional contractors who undertake that work. The legislature imposes those obligations on contractors who undertake the work (whether or not they are licenced). It imposes them on contractors who are licence holders or former licence holders who undertake work on homes they personally own. But it expressly (by the requirement that the work be done under a permit) does not impose those obligations on a lay person (i.e. someone who has never held a contractor licence or is not a developer) unless that person has obtained a permit and thereby undertaken the educational course that informs him or her of their obligations under the HBA."

173 It may be accepted that the HBA imposes the same obligations under the statutory warranties on owner-builders with permits as for contractors. That was parliament's clear will. But the real question is whether parliament intended not to apply the same obligations on owner-builders who wrongfully failed to obtain permits. We see no rational or logical reason why that would be so.

174 For those reasons we are of the opinion that the definition of owner-builder in Schedule 1 of the HBA includes owner-builders who do owner-builder work without a permit.

175 If we were wrong about our interpretation as outlined above, we would read words into the definition so as to include owner-builders who do owner-builder work without a permit.

176 It is permissible to read words into legislation in certain, limited circumstances. In *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014]

HCA 9 ("*Taylor*") the majority (French CJ, Crennan and Bell JJ) said at [37]-[38] (footnotes omitted):

> "[37] Consistently with this Court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction 'reads up' a provision, giving it an extended operation, or 'reads down' a provision, confining its operation, may be moot.
>
> [38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'."

177 To read words into a statute requires satisfaction of four conditions (see *Taylor* at [22]-[25]), namely:

(1) the identification of the precise purpose of the provision;

(2) satisfaction that the drafter and the parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose;

(3) identification of the words that the legislature would have included in the provision had the deficiency been detected before its enactment; and

(4) the modification must be consistent with the wording otherwise adopted by the draftsman.

178 The precise purpose of the definition of owner-builder is to identify the class of person who will be subject to various obligations under the HBA. That purpose is then given operative context when read with the statutory warranty provisions.

179 We are satisfied that the draftsman and parliament inadvertently overlooked the eventuality present in this case, namely that an owner-builder who undertook residential building work without obtaining an owner-builder permit. Given the complete absence of any rational or logical reason why successors in title of an owner-builder who did not obtain a permit should be denied rights granted to successors in title of an owner-builder who did obtain a permit, and

the manifest injustice in discriminating between the two, it is our opinion that this eventuality (the failure to obtain a permit) was inadvertently overlooked and the eventuality must be dealt with if a significant purpose of the HBA's owner-builder provisions is to be achieved.

180 The words that parliament would have included had the deficiency been detected before its enactment are "or is required to do" if inserted in the definition after the word "does" so that the definition would read:

> **"***owner-builder* means a person who does, *or is required to do,* owner-builder work under an owner-builder permit issued to the person for that work."
>
> (Emphasis for convenience)

181 We had originally suggested to the parties that the inserted words might be "or is required by this Act to do", but on reflection the words "by this Act" are unnecessary and removing them makes the inserted words more consistent with the wording of s 18B(1).

182 Lastly, that modification is consistent with wording otherwise adopted by the draftsman, such as that found in s 18B(1) which includes the words:

> … by the holder of a contractor licence, *or a person required to hold* a contractor licence …
>
> (Emphasis for convenience)

183 Our words "or is required to do" are consistent with the words "or a person required to hold" in s 18B(1).

184 In our view the addition of those words corrects a simple, grammatical drafting error which if uncorrected would defeat the object of the provision. The insertion is not too big, or too much at variance with the language used by the legislature.

185 In one sense any insertion of words, even to correct simple, grammatical drafting errors, fills gaps in legislation, but the sense in which the High Court used that expression, by reference to the judgment cited in support – *Marshall v Watson* (1972) 124 CLR 640 at 649 (Stephen J); [1972] HCA 27 ("*Marshall*") – is of a different order of magnitude.

186 In *Marshall*, it was held that there was neither express nor implied authority given to any person or class of persons by the *Mental Health Act 1959* (Vic) to

take to a psychiatric hospital a person whose admission to such a hospital had been duly requested and recommended under s 42 (1) of that Act. The Act dealt with the position before and after admission but did not expressly deal with the position in between i.e. the actual conveyance of the person to the institution. Stephen J described the legislated position as follows at 648:

> "With respect, I agree both with the reasoning and with the conclusion of the learned trial judge on this aspect. Section 42 concerns itself, it is true, with matters both before and after the conveyance of a person in the plaintiff's position to a psychiatric hospital. It contemplates prior medical examination of such a person followed by the completion of three documents, which will, no doubt, usually take place before conveyance to an institution; it also deals in some detail, in sub-ss. (4) to (10), with events on and after admission into the hospital. However it is silent as to the period from completion of the three documents until admission. It confers no express authority upon anyone to take any action for the physical conveyance to the hospital of the person whose admission has been recommended. In this respect s. 42 and also s. 43, which deals with admission as a patient in a mental hospital or private mental home as distinct from admission as a patient for observation in a psychiatric hospital, differ markedly from ss. 45 and following, which legislate for the apprehension and medical examination of persons appearing to be mentally ill or intellectually defective and who are in neglected circumstances, are suspected of having the purpose of committing a crime or are being ill-treated. In their case, detailed provisions for their apprehension and appearance before justices and for their removal to an appropriate mental institution is made."

187 In that case the question was about the existence or otherwise of a power to do something which was not found in the express terms of the Act in question. The presence or absence of such a significant power is no small thing.

188 In the present case it is not a question of the presence or absence of a power, but whether two different classes of successors in title should have different rights, and that difference being solely dependent on whether an owner-builder did or didn't obtain a permit. In that sense the present case concerns a simple, grammatical drafting error which, unless corrected, discriminates between successors in title from owner-builders who obtain permits from those successors in title from owner-builders who do not obtain permits. That is, the rights and remedies were already granted by parliament in the statutory warranty provisions (as distinct from a power to do something being absent in *Marshall*), the correction being a simple, grammatical one to prevent defeat of the object of those statutory warranty provisions.

189 The possibility of the applicability of *Taylor* to this case, and the suggestion of the words to be inserted, was only raised by the Appeal Panel. *Taylor's* case was brought to the parties' representatives' attention prior to but on the day of the day of the hearing of the appeal. The appellant was told during the hearing of the appeal that, given the short time he had had to consider the point, should he desire further time to consider it then leave would be granted to him to lodge and serve written submissions on the point subsequent to the hearing of the appeal. That invitation was expressly declined.

190 Subsequent to the hearing of the appeal the appellant, with the consent of the respondents, lodged written submissions in which it was submitted that whilst the appellant accepted that the Appeal Panel was to act expeditiously and with some informality, if the Appeal Panel was to consider the addition of words then that contention should have been put as a contention by the respondents in their response to the Notice of Appeal and in their written submissions. The appellant submitted that he had approached the appeal on the basis that the definition was to be construed by ignoring the words "under a permit" etc, consistently with *Gunn*, rather than by the insertion of further words.

191 The appellant also submitted that he was unable to deal adequately with the suggested addition of words given the appeal hearing was the first he had heard of it. He submitted that a contention that words should be inserted in legislation is different to a case that some words be ignored. In particular, the appellant submitted that was not able to consider the ramifications or interactions of the exact form of words to be inserted into the relevant definition, with all of the other provisions of the Act. In those circumstances, the appellant submitted it was not open to the Appeal Panel to consider the insertion of the words outlined above.

192 We do not accept those submissions. *Taylor's* case, and specifically [37]-[44] of that case, was brought to the parties' attention prior to the commencement of the hearing of the appeal. The appellant was told that if he desired to lodge further written submissions after the hearing of the appeal on that case and the matters raised in relation to it during the appeal then that leave would be granted. That invitation was declined. We accept that further reflection on the

matter may have caused the appellant to think of something which had not earlier occurred to him. If so, the remedy was to make an application whilst our decision was reserved to put those further submissions. But no such application was made.

193 It is true that the addition of words point was raised by us and not by the respondents. But where the interpretation of legislation is concerned our decision may or will impact parties beyond those involved in this dispute, and so it is appropriate for us to arrive at what we think is the correct decision even if it involves considerations not raised by the parties as long as procedural fairness is accorded to them, which in this case it was.

Grounds 4 and 6

194 The appellant properly accepted that if we decided that the appellant was an "owner" and an "owner-builder" for the purposes of the HBA, then grounds 4 and 6 fell away. As we have decided those issues against the appellant, we need not consider grounds 4 and 6.

Ground 5 – successor in title

195 The appellant contended that the Tribunal erred in finding that Ms Carberry and Ms Clark were successors in title to the appellant.

196 The appellant's submissions were directed to the Tribunal's findings which, the respondent conceded, were incorrect.

197 We have found above that the appellant was both an owner of the land and an owner-builder within the meaning of those terms as defined in the HBA. It follows, following *The Owners – Strata Plan 81837* and *Gardez* which we have referred to above, that Ms Carberry and Ms Clark were the immediate successors in title to the appellant. It follows that under s 18C(1) of the HBA they were therefore entitled to the benefit of the statutory warranties as if the appellant were required to hold a contractor licence and had done the work under a contract with Ms Carberry and Ms Clark.

198 It was not disputed that, in those circumstances, the respondents were persons who were successors in title to persons entitled to the benefit of a statutory

warranty per s 18D(1) and therefore entitled to the same rights as Ms Carberry and Ms Clark had in respect of the statutory warranties.

Ground 7 – knowledge of defects

199 Ground 7 asserted that the Tribunal erred in finding that the respondents did not have full knowledge of the existence of the defects by reason of their pre-purchase report.

200 The Tribunal said that a question arose whether any loss or damage suffered by the respondents was caused by a breach of the statutory warranties or by their decision to purchase the property despite knowing of the breaches which gave rise to that loss.

201 The Tribunal cited *Allianz v Waterbrook* [2009] NSWCA 224 ("*Allianz*") in which Ipp JA, with whom Hodgson JA agreed on this point, said at [110]-[111]:

> "[110] ... a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects. In those circumstances, the builder's breach of statutory warranty could not be said to have diminished the successor's assets, nor increased its liabilities. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.
>
> [111] The observations in [110] are predicated on the "full knowledge" of the defects being not only knowledge of the existence of the defects but also knowledge of their significance. A party may know of the existence of defects (because they are patent), but may not appreciate - even acting reasonably - that major expenditure would be required to remedy them."

202 The Tribunal said that it was necessary to consider the nature and extent of the knowledge of the respondents, and that required consideration of what appeared in the pre-purchase property and timber pest inspection carried out on their behalf and what was said by the appellant at the meeting held on 29 May 2020.

203 The Tribunal then summarised the 26 items of alleged defective work, made findings whether each item was referred to in the pre-purchase report, noted that there were defects which were not recorded in the pre-purchase report and noted that that report had certain limitations, namely that:

(1) it was confined to a visual inspection;

(2) it only covered readily accessible areas;

(3) it did not raise any structural matter;

(4) it did not contain any costings; and

(5) it suggested verification in relation to waterproofing.

204 The Tribunal then turned to the meeting of 29 May 2020 and found that during that meeting the appellant said to the first respondent that:

(1) there were no major defects in the property;

(2) the dampness in the stairwell was due to recent heavy rain;

(3) waterproofing had been done;

(4) he would contact the contractor who did the waterproofing;

(5) he would find receipts for the waterproofing;

(6) he would look at solutions for the problem with the stairwell;

(7) the steel frame touching the ground was a minor defect that could be fixed by putting some fibro underneath the steel to lift it off the ground;

(8) the house was built to council specifications and had been approved by council;

(9) any cost of rectification would not be significant; and

(10) he did not want to involve the first respondent.

205 The Tribunal then said that it was comfortably satisfied that the respondents did not have full knowledge of the existence of the defects and their significance (per *Allianz*) because:

(1) some defects were not known from the pre-purchase report or otherwise;

(2) the limitations of the pre-purchase report, referred to above, had the effect that the respondents did not know the *significance* of the defects that they were aware of; and

(3) the appellant provided them with explanations and reasons which disguised the *significance* of the defects of which they were aware.

206 The appellant called the Tribunal's reasoning process a broad-brush approach and submitted that it was erroneous for the Tribunal to take that broad brush approach and "disregard the report in its entirety". The Tribunal should have considered each defect, the extent to which it was described in the pre-purchase report, and the effect of any subsequent discussions concerning it and whether, given those matters, the respondents had knowledge of the relevant defect.

207 We do not accept the appellant's characterisation of the Tribunal's reasoning process, nor that the Tribunal disregarded the pre-purchase report "in its entirety". Quite the opposite. The Tribunal went through the report and summarised its relevant findings. The Tribunal then noted the report's limitations and made findings of what was said by the appellant to the first respondent.

208 Those factual findings were critically important to the central question whether the respondents had "full knowledge" of the defects, being not only knowledge of the existence of the defects but also knowledge of their significance. Thus, the respondents knew of the existence of at least some of the defects but the Tribunal found they did not appreciate their significance or that major expenditure would be required to remedy them. The appellant's submissions overlook [111] of *Allianz* in that, in the examples the appellant sets out in his submissions, no attention is given to whether the respondents had *full* knowledge of the defects. That is, not only did they know of the existence of the defects but also knew of their *significance* and whether they appreciated that major *expenditure* would be required to remedy them.

209 It was not necessary in this case to undertake the detailed exercise submitted by the appellant. Or, rather, it was not erroneous for the Tribunal to approach the fact-finding task of deciding whether the respondents had full knowledge of the defects in the manner suggested by the appellant.

210 That is because the Tribunal held that the respondents were entitled to rely on what was said to them by the appellant, that the appellant told them there were no major defects (which the Tribunal held there was) and that the cost of rectification would not be significant (the Tribunal said the total cost was a little over $95,000 which is significant). Further, the respondents were not cross-examined to the effect that they knew of the "significance" of the defects, nor that rectification would require major expenditure, matters which needed to be put if the appellant desired to put an argument that the respondents had full knowledge of the major defects.

211 Therefore, we do not believe that the Tribunal's fact-finding process miscarried in any way which raises a question of law.

212 In the alternative, the appellant sought leave to appeal on the basis that the Tribunal's finding was against the weight of evidence.

213 Against the weight of evidence means that where the evidence in its totality preponderates so strongly against the conclusion found by the Tribunal that it can be said that the conclusion was not one that a reasonable Tribunal member could reach: *Collins v Urban* [2014] NSWCATAP 17 at [77].

214 That could not be so in this case not least because of the significant evidence that the appellant told the respondents there were no major defects and the costs of rectification would not be significant. That was potent evidence in favour of the respondents and against the appellant. Therefore, in its totality, the evidence did not preponderate so strongly against the conclusion found by the Tribunal that it could be said that the conclusion reached was not one that a reasonable Tribunal member could have reached.

Ground 8

215 Ground 8 asserted that the Tribunal erred in finding that the issues with the external spiral staircase represented a major defect.

216 The Tribunal said that the parties' experts agreed that the spiral staircase, as constructed, was a major defect as it created an unsafe condition.

217 The appellant correctly submitted that the definition of major defect found in s 18E(4) of the HBA required the defect to be in a "major element" of the building. "Major defect" is defined in that section as:

> **18E Proceedings for breach of warranty**
>
> (4) In this section—
>
> *major defect* means—
>
> (a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause—
>
> (i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
>
> (ii) the destruction of the building or any part of the building, or
>
> (iii) a threat of collapse of the building or any part of the building, or

> (b) a defect of a kind that is prescribed by the regulations as a major defect, or
>
> (c) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act.

218 "Major element" is defined as:

> *major element* of a building means—
>
> (a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or
>
> (b) a fire safety system, or
>
> (c) waterproofing, or
>
> (d) any other element that is prescribed by the regulations as a major element of a building.

219 The appellant submitted that the expert evidence was to the effect that the staircase was an external stand-alone staircase that was added as an addition to the approved plans to connect one of the balconies with the downstairs garden and played no load-bearing role in relation to the building.

220 The respondents submitted that the appellant adduced evidence, via his own expert, that this was a major defect and should not now be allowed to advance a different case. They submitted that the corroded components of the staircase were major defects in that they were "load bearing components" essential to the stability of the staircase, which was part of the building. The load they carried was human and other traffic.

221 We cannot find the argument now put having been put anywhere in the appellant's written or oral submissions to the Tribunal at first instance. No oral submissions were made on the point and the only written submission was that:

> "This was referred to in the NH Report, which noted, amongst other matters, corrosion to the metal. It was advised that a builder/carpenter be commissioned immediately to advise, rectify, and replace…"

222 We do not consider it appropriate to allow the appellant to now raise a point not raised before the Tribunal. In *Metwally v University of Wollongong* [1985] HCA 28 at 71; (1985) 59 ALJR 481, the High Court said:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument

> which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

Ground 9

223 Ground 9 asserted that the Tribunal erred in finding that the issues with the discharge of the swimming pool backwash represented a major defect.

224 The Tribunal said that the experts agreed that this item involved a major defect.

225 The appellant submitted that the fact that the swimming pool backwash discharged into the stormwater system and not the sewer system, as required by the development approval did not make it a defect in a major element of a building and, even if it was, it was not otherwise a major defect.

226 The respondent's expert said that this was a major defect because it failed to comply with the Building Code of Australia Part 3.1.2.3 and figure 3.1.2.2 Site Surface Drainage. The appellant's expert said that he acknowledged it was a major defect before remediation by the respondents. In the Joint Report the experts agreed that this was a major defect that required remedial action.

227 The respondent's expert opined that this was a major defect per the HBA definition (Appeal Book 519). It is not clear whether the appellant's expert applied the same definition because in his report (Appeal Book 543) he said that he did not regard the HBA definition of major defect to be applicable when assessing poor workmanship and/or non-structural elements of a building. Rather, he applied the definition of major defect taken from Australian Standard AS 4349.0–2007 which was a defect of sufficient magnitude such that rectification has to be carried out in order to avoid unsafe, conditions, loss of utility or further deterioration of the property.

228 It does not appear that the differences between the definitions was explored before the Tribunal, and we cannot see where the point now taken by the appellant was taken before the Tribunal. Accordingly, and on the basis of the passage from *Metwally* quoted above, we do not consider it appropriate to allow the appellant to raise this point for the first time on appeal.

Orders

229 We make the following orders:

(1) The appeal is dismissed.

(2) Leave to appeal is refused.

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

(a) that party is to inform the other party of that application within 7 days of the date of this decision;

(b) the applicant for costs is to lodge with the Appeal Registry and serve on the respondent to the costs application any written submissions of no more than five pages, and any evidence relied upon, on or before 7 days from the date of this decision;

(c) the respondent to any costs application is to lodge with the Appeal Registry and serve on the applicant for costs any written submissions of no more than five pages, and any evidence relied upon, on or before 14 days from the date of this decision;

(d) any reply submissions limited to three pages, and any evidence in reply, are to be lodged with the Appeal Registry and served on the other party within 21 days of the date of this decision;

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

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