



Civil and Administrative Tribunal  
New South Wales

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Case Name: Brown v Commissioner for Fair Trading

Medium Neutral Citation: [2023] NSWCATOD 171

Hearing Date(s): 4 April 2023

Date of Orders: 22 November 2023

Decision Date: 22 November 2023

Jurisdiction: Occupational Division

Before: D Dinnen, Senior Member

Decision: The respondent's decision of 18 May 2022 is set aside.

Catchwords: ADMINISTRATIVE REVIEW - Home Building Act 1989  
- Disciplinary proceedings – statutory warranties –  
improper conduct – evidence relied upon to establish  
defects by building inspector – defences – actual  
knowledge – influence

Legislation Cited: Administrative Decisions Review Act 1997  
Civil and Administrative Tribunal Act 2013  
Evidence Act 1995  
Home Building Act 1989  
Home Building Regulation 2014  
Occupational Health and Safety Act 2000

Cases Cited: Briginshaw v Briginshaw (1938) 60 CLR 336  
Calandra v Director General Department of Finances  
and Services [2012] NSWADT 144  
Chevalley v Industrial Court of New South Wales (2011)  
82 NSWLR 634  
Dassouki v Department of Fair Trading [2019]  
NSWCATOD 14  
Designbuild NSW Pty Ltd v Commissioner for Fair  
Trading [2016] NSWCATOD 69  
Drake v Minister for Immigration and Ethnic Affairs

[1997] AATA 179; (1979) 46 FLR 409  
Hanna v Commissioner for Fair Trading [2021]  
NSWCATOD 198  
Higgins v NSW Land and Housing Corporation [2022]  
NSWCATAP 199  
Inspector James v Ryan [2009] NSWIRComm 215  
Inspector James v Sunny Ngai [2007] NSWIRComm  
203  
Jamal v Workers Compensation Nominal Insurer [2023]  
NSWCA 4  
Johnson v Youden [1950] 1 KB 544  
Liang v Inspector David Farmer [2010] NSWIRComm  
156; (2010) 199 IR 116  
McDonald v Director General of Social Security [1984]  
FCA 57; (1984) 1 FCR 354  
Pastrovic & Co Pty Limited v Department of Services,  
Technology and Administration [2012] NSWADT 177  
The Owners Strata Plan 62930 v Kell & Rigby Holdings  
Pty Limited & Ors [2010] NSWSC 612

Texts Cited:

None Cited

Category:

Principal judgment

Parties:

Regan James Brown (Applicant)  
Commissioner for Fair Trading, Department of  
Customer Service (Respondent)

Representation:

Counsel:  
A Jordan (Applicant)  
P Lowson (Respondent)

Solicitors:  
Birchgrove Legal (Applicant)  
Department of Customer Service (Respondent)

File Number(s):

2022/00227641

Publication Restriction:

none

## **REASONS FOR DECISION**

### *Background*

- 1 The object of the *Home Building Act 1989* (the Act) is to protect consumers of home building services. The decisions the subject of review in these

proceedings were made by the Commissioner for Fair Trading (the Respondent) pursuant to the disciplinary provisions of Part 4 of the Act, the objects of which include the protection of consumers, maintenance of appropriate standards and of public confidence in the home building industry, as well as the need to deter the particular licence holder and others from improper conduct.

- 2 Regan James Brown (the Applicant) was one of two directors of Rombro Constructions Australia Pty Ltd (RCA), and held a general building contractor licence, 195012C. The other director was Richard Romano (Mr Romano). RCA held Contractor Licence No. 256348C between 25 February 2013 and 10 November 2021, with Mr Romano as the nominated supervisor.
- 3 On 22 February 2019, RCA entered into a contract (the Contract) with Michael and Rochelle Sidoti (the Sidotis) for the construction of a residential dwelling at 27 Louisa Rd, Birchgrove (the Property). RCA commenced work at the Property shortly thereafter (the Project) and ceased working at the Property site on 21 January 2021.
- 4 On 18 January 2021, the Sidotis lodged a complaint with NSW Fair Trading, alleging incomplete and defective residential building works by RCA at the Property. An inspection was conducted by NSW Fair Trading on 9 March 2021 and a Rectification Order (RO) was issued to RCA on 15 March 2021 (first RO), requiring a list of incomplete works to be completed. An amended RO was issued on 26 March 2021 to RCA, requiring a site presence to be re-established by 31 March 2021 and compliance with the First RO by 17 May 2021.
- 5 RCA did not re-establish a site presence at the Property and did not comply with the First RO. On 29 April 2021, NSW Fair Trading Senior Building Inspector Pietro Scalise (Inspector Scalise) conducted a site inspection of the Property in the presence of the Sidotis. There were no representatives from RCA in attendance. At the time of the inspection, no documentation had been supplied by the Sidotis, and Inspector Scalise was only able to view those architectural and engineering plans which were made available to him by the Sidotis during the inspection. Inspector Scalise took photographs of the

relevant parts of the plans that were made available to him for viewing during the inspection.

- 6 Based on that site inspection, on 24 May 2021, a further RO was issued by Inspector Scalise to RCA (Second RO). The Second RO required RCA to rectify 22 items listed as 'Defective Work' at the Property by 30 June 2021.
- 7 RCA did not comply with the Second RO. Inspector Scalise then prepared a building inspection report dated 1 July 2021, based on the site inspection of 29 April 2021 (BIR). The BIR was emailed to RCA on 8 July 2021.
- 8 On 15 December 2021 NSW Fair Trading issued the Applicant with a Notice to Show Cause why disciplinary action shouldn't be taken against him on the basis that he was guilty of improper conduct under s 56(c) of the Act.
- 9 On 18 May 2022, the Respondent found that RCA had breached the statutory warranty under s 18B(1)(a) of the Act in carrying out residential building work at the Property, and the Applicant was therefore guilty of improper conduct within the meaning of s 51(1)(c) of the Act as an officer of RCA under s 54(1) of the Act. The Respondent:
  - (1) Disqualified the Applicant from holding any authority under the Act for two years and six months, pursuant to s 62(1)(g)(i) of the Act;
  - (2) Disqualified the Applicant from being a member of a partnership, or an officer of a corporation that is a member of a partnership, for two and half years, pursuant to s 62(1)(g)(ii) of the Act; and
  - (3) Disqualified the Applicant from being an officer of a corporation that holds an authority under the Act for a period of two and a half years, pursuant to s 62(1)(g)(iii) of the Act.
- 10 On 16 June 2022, the Applicant sought internal review of the decision. The decision was affirmed by the Respondent on 5 July 2022. The Applicant sought review in this Tribunal by application dated 2 August 2022.
- 11 The Applicant relies on the defences to improper conduct at s 54(3) of the Act to the effect that the improper conduct occurred without his knowledge, and/or that he was not in a position to influence the conduct of Mr Romano, so as to prevent the occurrence of the improper conduct. The Respondent contends that the defences are not available to the Applicant.

12 The Tribunal conducted a hearing in person on 4 April 2023. The Applicant relied on his affidavit sworn 15 November 2022. The Respondent relied on a large bundle of documents filed pursuant to s 58 of the *Civil and Administrative Tribunal Act 2013* (CAT Act), Statements of Inspector Scalise dated 19 October 2021, 8 March 2022 and 9 December 2022, an iCare Home Building Compensation Fund Loss Notification form signed by Rochelle Sidoti on 18 June 2021, and a building investigation report prepared by Inspector Scalise dated 1 July 2021. Both the Applicant and Inspector Scalise gave oral evidence at the hearing and were cross examined. Following the conclusion of the hearing the parties each filed and served written closing submissions.

### **Legal Principles**

- 13 Section 83B(3)(b) of the Act and cl 71(d) of the *Home Building Regulation 2014* (the Regulation) relevantly provide that a person aggrieved by a decision made by the Secretary to disqualify the holder of a contractor licence from being the holder of a contractor licence may apply to the Tribunal for an administrative review of that decision under the *Administrative Decisions Review Act 1997* (NSW) (the ADR Act).
- 14 The Tribunal's role in these proceedings is to conduct an administrative review of the disciplinary decision under s 63 of the ADR Act. That requires the Tribunal to decide what the correct and preferable decision is having regard to the material then before it, including any relevant factual material and any applicable written or unwritten law: *Dassouki v Department of Fair Trading* [2019] NSWCATOD 14 at [10]. The Tribunal makes its own decision in place of that of the Respondent's and there is no presumption that the Respondent's decision was correct: *McDonald v Director General of Social Security* [1984] FCA 57; (1984) 1 FCR 354 at 357. In considering an application for review, the Tribunal is not restricted to a consideration of the material that was before the Respondent but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* [1997] AATA 179; (1979) 46 FLR 409.
- 15 The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of

natural justice: s 38(2) of the CAT Act. Although not bound by the rules of evidence, the Tribunal must base its decision on “*probative evidence*”: *Hanna v Commissioner for Fair Trading* [2021] NSWCATOD 198 at [20].

- 16 There is no legal principle that an administrative tribunal is bound to apply the standard in *Briginshaw v Briginshaw* (1938) 60 CLR 336 to fact finding where potential findings are grave or serious, in circumstances where the rules of evidence do not apply. However, it is not impermissible for NCAT to rely on the principle in *Briginshaw* supplemented by s 140 of the *Evidence Act 1995* (NSW). The potential of the adverse findings to cause the Applicant financial hardship should attract the operation of the *Briginshaw* principle supplemented by s 140 of the *Evidence Act* given its likely consequences for the Applicant: *Higgins v NSW Land and Housing Corporation* [2022] NSWCATAP 199 at [58].

- 17 Section 18B(1)(a) of the Act provides:

The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—

- (a) 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 ...

- 18 Section 51 of the Act relevantly provides:

(1) A holder of a contractor licence who is authorised by the contractor licence to contract to do residential building work or specialist work, or a holder of a supervisor or tradesperson certificate, is guilty of improper conduct if the holder—

...

- (c) breaches a statutory warranty...

...

(3) It is a sufficient defence to a complaint that the holder of a contractor licence has been guilty of improper conduct as referred to in subsection (1)(b), (c) or (d) in connection with work undertaken by the holder, if the holder proves to the satisfaction of the Secretary that the holder did all that could reasonably be required to ensure that a nominated supervisor for that work would exercise such degree of control over the doing of the work as would be necessary to prevent the occurrence of the improper conduct.

- 19 Section 54 relevantly provides:

(1) An individual who is a member of a partnership or an officer of a corporation that is the holder of a contractor licence is guilty of improper conduct if the holder does any of the things referred to in section 51 or 52.

...

(3) It is a sufficient defence to a complaint that an individual who is a member of a partnership, an officer of a corporation that is a member of a partnership or a director of a corporation (being a partnership or corporation that is the holder of a contractor licence) has been guilty of improper conduct if the individual proves to the satisfaction of the Secretary that—

(a) the improper conduct occurred without the individual's knowledge, or

(b) the individual was not in a position to influence the conduct of the other members of the partnership or other officers of the corporation, of which the individual was a member or an officer, so as to prevent the occurrence of the improper conduct, or

(c) the individual, being in such a position, used all due diligence to prevent the occurrence of the improper conduct.

- 20 Section 56(c) of the Act provides that the Secretary may take disciplinary action under s 62 against the holder of a contractor licence on the ground that the holder is guilty of improper conduct. Section 62 sets out the disciplinary action that may be taken against the holder of an authority/officer of a corporation. The minimum is to take no further action against the holder. The maximum penalty is to disqualify the holder from being any one or more of: (a) the holder of any authority; (b) a member of a partnership that is the holder of an authority; (c) an officer of a corporation that is the holder of an authority.

### **Issues for Determination**

- 21 Initially the Applicant accepted, by his 13 January 2022 response to the Notice to Show Cause dated 15 December 2021, that RCA was guilty of improper conduct under s 51(1)(c) of the Act for breach of a statutory warranty. He also accepted there that as a former director of RCA he was guilty of improper conduct unless the defence in s 54(3) of the Act applied. He relied on the defences at s 54(3)(a) and (b), namely that the improper conduct occurred without his knowledge, or that he was not in a position to influence the conduct of Mr Romano to prevent the occurrence of the improper conduct.
- 22 By hearing, however, the Applicant submitted to the effect that RCA was not guilty of improper conduct because not all of the defects identified by Inspector Scalise were, in fact, defects and therefore did not amount to breaches of the statutory warranty.

- 23 The improper conduct alleged by the Respondent rests entirely on breaches of statutory warranty identified in Inspector Scalise's BIR of 1 July 2021. It is Inspector Scalise's opinion that RCA "failed to carry out work at the Property with due care and skill and in accordance with the plans and specifications set out in the Contract, as indicated by the 22 defective items outlined in his BIR".
- 24 It serves therefore for the Tribunal to examine the following:
- (1) Whether not RCA was guilty of improper conduct:
    - (a) What were the defects identified in the BIR of 1 July 2021;
    - (b) Which of those defects amount to a breach of the statutory warranty pursuant to s 18B(1)(a) of the Act;
  - (2) Whether the Applicant, as a director of RCA, should also be the subject of disciplinary action, or whether either of the defences available applies to him; and
  - (3) If disciplinary action against the Applicant is warranted, what is the appropriate disciplinary action in the circumstances.

#### **Applicant's evidence**

- 25 In addition to his affidavit of 15 November 2022, the Applicant made a statutory declaration on 13 January 2022 which was included in the Respondent's s 58 documents. That statutory declaration was made in response to the Notice to Show Cause issued to the Applicant on 15 December 2021.
- 26 The Respondent cross examined the Applicant at length but ultimately did not make any submissions that the Tribunal could not accept his evidence. The Tribunal found the Applicant to be a straightforward witness. He was willing to take responsibility for matters which were within his control and clearly regretful that he had trusted Mr Romano in circumstances where the professional and personal relationship had deteriorated to his and RCA's clients' detriment. There was no affidavit or statement evidence from any individual contradicting the Applicant's evidence with respect to his involvement in RCA, his involvement with the project at the Property, or his disputes with Mr Romano. The Tribunal therefore accepts the Applicant's evidence.
- 27 The Applicant's evidence is that he and Mr Romano started working together as "Rombro" in 2011, and in 2013 started trading as RCA. Mr Romano was RCA's nominated supervisor. RCA's shares were owned by two companies in



a 50/50 split: Solidus Group Pty Ltd, and Bull Holdings Pty Ltd. Solidus Group Pty Ltd is Mr Romano's company, and Bull Holdings Pty Ltd is the Applicant's company. At all relevant times until 15 April 2021, the directors of RCA were the Applicant and Mr Romano. The Applicant resigned his directorship on 15 April 2021.

- 28 The Applicant and Mr Romano split the day-to-day management and supervision of the projects undertaken by RCA on a project-by-project basis. This was outlined on the company's website and in tender submissions:

...all projects undertaken by Rombro Constructions Australia are conducted under the direct control of one of the company Directors...

- 29 The usual practice was for each director to consult with the other before entering into a contract for building work. The directors met at the beginning of each year to plan the year's work in a "kickstart meeting", and met monthly to review current projects.

- 30 The Applicant's evidence was that the Sidotis were friends with Mr Romano and his wife. In early 2019, Mr Romano priced and entered RCA into a building contract with the Sidotis. This was done without the Applicant's knowledge or approval. The first time the Applicant heard that RCA was involved in the Project at the Property was when he telephoned Mr Romano to find out the location of one of the company's trailers and was told it was at the Property. "I asked what was happening there?" This was the first "big" job that Mr Romano had entered into on behalf of RCA without discussing it with the Applicant. Once he became aware that RCA had commenced construction work on the Project, he "looked into it". He checked the insurance and saw "it was signed up already, what could I do?" He reviewed Mr Romano's costing spreadsheet and questioned him about it, asking "if we have subby coverage", to which Mr Romano said "yes". He noted that there were three difference sets of architectural drawings and he wasn't sure which set were being worked off, and tried to have the leading hand explain it to him.

- 31 Mr Romano was the nominated supervisor of RCA and managed the Project at the Property full-time. The Applicant worked full-time on other projects. Mr Romano was the Sidotis' point of contact at RCA in respect of the Project at the Property. The Sidotis always conferred directly with Mr Romano. The

Sidotis never corresponded with the Applicant in relation to the Project and he was not copied into any emails about the Project.

- 32 Nevertheless, the Applicant attended the Property on a number of occasions during the Project. He first attended the site in late May 2019, while Mr Romano was overseas and was uncontactable. The project was in demolition stage, although some building had started. The Applicant was confused by there being 3 sets of architectural drawings for the Project – an original DA set, an amended DA set, and a hand marked-up set. “I could not really work out what was going on and had not seen anything like it before... I did not have the information or the answers as Mr Romano was away and not on the phone, so I closed the job and waited for Mr Romano to return in a week”. When Mr Romano returned, the Applicant met him on site on 5 June 2019 and raised concerns with him about the use of timber LVLs instead of the steel beams specified in the original plans. They had the following conversation:

Mr Romano said: Fuck off, I will teach you how to build a house. Go back to Darling Street and run that job.

Applicant: Yeah whatever. Get the engineer to confirm everything and claim the new floor joists as a variation if you need to. Get the client to update the drawings, why should we waste our time trying to work to these hand marked up drawings...

- 33 The Applicant did not return to the site until July 2020, and was not further involved in the Project at the Property. Mr Romano forwarded the Sidotis periodic payment claims without copying in the Applicant. At the annual kickstart meeting on 21 January 2020, Mr Romano reported that the Sidotis were very difficult clients, and some items had not been constructed properly, requiring them to be fixed or replaced, which had resulted in the job spending more money than usual:

I know during Will's time on site he built walls out of square/plumb and some floors out of level. I acknowledge that which is why I spent thousands with new carpenters fixing everything, but it was never good enough for the client. I went through different groups of carpenters which either would not come back or the client literally sacked on site. I was rebuilding things 3 times in some instances, some being fair enough and others because I couldn't have the client blowing up that its 4mm out. I was afraid to have anything 2mm out. They would constantly walk around the house with laser measurers, levels, set squares blowing up at me.

- 34 Mr Romano assured the Applicant that “most of the defects have now been rectified” and he expected to complete the job in 3 to 4 months.
- 35 On 15 July 2020 the Applicant’s wife Tracy, who was in RCA’s accounts team, sent an email to the Applicant and Mr Romano regarding outstanding accounts. The Sidotis had \$97,211.39 owing at that time and “had not paid a cent since November 2019” despite payment claims being issued to them. The email stated:

I am baffled why we are currently on site at 27 Louisa Rd, this client has made no payments since November last year. We are currently paying and covering the cost of \$294,355.72 plus our overheads making ZERO profit. This truly is unacceptable with such a delicate client. We are not in a position here to be throwing this company away and have many debts and issues arising. This needs URGENT attention and a management decision needs to be discussed.

- 36 On 16 July 2020 the Applicant spoke to Mr Romano and offered to take over the job at the Property, which Mr Romano agreed to. The Applicant stated:

It was agreed that Richard [Romano] was to be still involved in the project when I took over. I was going to take over to push the project to completion. Richard was going to continue working on the existing issues and get them resolved.

- 37 The following day, on 17 July 2020, the Applicant and Mr Romano went to the site and Mr Romano ran him through the project. None of the 22 items identified by the client in the BIR were identified by Mr Romano to the Applicant at that time.

- 38 On 20 July 2020 Mr Romano forwarded to the Applicant a certificate dated 22 May 2020 from a structural engineer, Nikolai Koloff (Mr Koloff), which certified the Property as structurally sound and the Project works compliant with Australian Standards. This certificate had been provided to the Sidotis on 29 June 2020.

- 39 The Sidotis were unhappy with the Applicant being involved on the project and sent various emails to Mr Romano about their concerns, most of which were not copied or forwarded to the Applicant. The Applicant met with the Sidotis at the property on 20 July 2020, following which the Sidotis sent an email to Mr Romano, not copying in the Applicant, which stated:

... From discussions onsite this morning Regan appeared to have limited understanding of key issues, including the errors/structural issues and

departures which have marred the job to date and persisted. To be fair Regan did indicate that he was still getting across these although that should not come at the expense of further disruption to us.

- 40 The Applicant “stepped in” from 20 July 2020 to try to have the project at the Property completed. He was “kicked off” site after 2 days but continued to work behind the scenes, making arrangements with various engineers to obtain a structural certificate so that the Sidotis would agree to making their outstanding payments. He said:

Mr Romano went back on the job and he reassured me that it was being fixed, he was resolving the issues. I tried to use everything in my power as a director to help resolve the issues. As a director it is my responsibility.

- 41 When it was put to the Applicant in cross examination that he should not have been willing to accept Mr Romano’s assurances, he said

I’m not sure what else I’m supposed to do after being kicked off the job... I said I was trying to help. The Sidotis could be quite aggressive. They made it clear that I couldn’t stay on site.

- 42 On 23 July 2020 Mr Romano forwarded the Applicant a copy of the sub sill drawings. The Applicant responded on 27 July 2020 to Mr Romano and the site supervisor urging them to resolve issues with the drawings with the architect.

- 43 Sometime between 21 and 24 July 2020 the Sidotis raised concerns with Mr Romano that he had “crossed out” the liquidated damages clause in the building contract. On 27 July 2020 the Applicant emailed Mr Romano, asking:

Can you confirm if there was any correspondence leading up to the signing of the contract?

- 44 Mr Romano did not provide a response to the Applicant. Instead, on 24 July 2020 Mr Romano met with the Sidotis and noted:

On 24/7/20 client wanted to meet myself at the café where they advised they will not have Regan on the job and demanded I had to come back which the way they basically fely (sic) was their right and I had no choice

- 45 At that meeting, it appears that the Sidotis obtained Mr Romano’s agreement to rectifications of various defects, variations to the Contract, and liquidated damages. The following day, on 25 July 2020 Mr Romano attended the Sidotis’ lawyer’s office in the city and signed a document setting out that agreement, for RCA. Again, the Applicant was not consulted and was only made aware of the agreement some days later:

I told Richard that if he signed something without my agreement, he'd be paying it... he told me he was forced to sign a piece of paper at the meeting.

- 46 The issue of structural certification was not resolved as the Sidotis would not accept Mr Koloff's certificate and their own choice of structural engineers, SDA Structures, would not issue a certificate. SDA Structures provided a "peer review report" on 25 August 2020 which stated that for them to provide structural certification they would need to be engaged to do a full design review of the installed structure, and anticipated modifications to the structure due to concerns about the ability of the building to withstand lateral wind forces. There were various discussions between Mr Romano and SDA Structures and the Sidotis which culminated in a letter being drafted by RCA's solicitors on 11 September 2020 proposing to the Sidotis:

We are instructed that our client has been unable to obtain structural engineering certification on the main structure; and as a result, demolition of the existing structure is required. You are welcome to obtain your own independent advice on this point.

We invite you or your solicitors to write to us and provide a schedule of claimed damages, with a view to the parties reaching an appropriate financial settlement.

- 47 The Tribunal notes that there is no evidence that draft letter was sent to the Sidotis. It supports a finding that as at 11 September 2020, the efforts of RCA to complete the Project at the Property had been so frustrated that the only option its directors could envisage was to demolish the Project completed by RCA, and pay the Sidotis damages. Under cross examination the Applicant agreed that Mr Romano would be paying for the proposed damages, and said that he wasn't involved in sending the letter, because "Richard was handling that matter":

It was the only possible outcome if we didn't find another engineer. We were happy with the certificate he [Mr Koloff] provided. The only solution is to knock the house down. What other options are there?

In the heat of the moment, this option was put on the table. Because we were unable to get a 3rd or 4th party engineer to sign off on the engineer's report. The client wasn't accepting the structural advice.

- 48 The Applicant emailed Mr Romano on 16 September 2020 asking for an update on the structural issues and did not receive a response. A few days later the Applicant became aware that RCA was back on site at the Property,

despite doing “everything in my power to get Richard off site”. He recounted the following conversation:

Applicant: I just heard that you’re back on site at Louisa. What the fuck is happening?

Mr Romano: Mike and Rochelle [Sidoti] talked me around to coming back and finishing the job. Ill be on site full time going forward and Nick [Koloff] will sign off on the job

Applicant: This is bullshit. I’m not paying for the losses on this job. It’s all on your shoulders.

- 49 Under cross examination the Applicant agreed that it was not just Mr Romano on the site. Company employees and subcontractors continued working at the Property, and Mr Romano was “forgoing his monthly entitlements to pay them”. There was a series of email exchanges to that effect through the remainder of 2020. By 26 December 2020 RCA had still not received payment from the Sidotis of the outstanding payment claims and had not obtained an engineer’s structural certificate. Tracey wrote to Mr Romano and the Applicant:

27 Louisa Rd – Richie can you please advise the status of this??? Invoicing?? When are we going to receive a payment?? When is the apparent sign off happening that we have been told about most of this year?? At current you have no legal right to stop the home owners moving in so unsure what your plan is but currently it isn’t working. I am stopping any payments leaving our accounts for 27 Louise Road. Is it a joke??

- 50 Between 2 October 2020 and 18 January 2021 Mr Romano worked on site full time as the supervisor. On 18 January 2021 Mr Romano informed the Applicant that RCA had been “kicked off the site”. The police were called to the Property to ensure that Mr Romano and the site supervisor (and, presumably, any tradespersons) left the Property.

- 51 On 21 January 2021 the Applicant met Mr Romano for their monthly meeting. The Applicant stated:

I told Richard I was resigning as a director. This was the only option available to me in circumstances where Richard was making business decisions without my knowledge or approval.

- 52 The Applicant sent an email to Mr Romano on 26 January 2021 which outlined the issues he raised with Mr Romano on 21 January 2021. That lengthy email covers a number of topics, including 27 Louisa Rd, Loughlin St, Lilli Pilli, Boat, Trailers, Tools, Defects, Invoicing. It is clear from that email that the Applicant was ending his professional relationship with Mr Romano as he refers to

dividing up their tangible assets and makes claims on Mr Romano for payments owed by him to RCA. In relation to the Property, the Applicant stated:

Richie,

As discussed in our meeting you and I had at Riverview Hotel last Thursday.

27 Louisa Rd

Currently you await Nick Koloff to provide further Engineering models to SDA so SDA can complete their design comparison of the asbuilt design from Nick and their original contract design. You advised that Nick will provide the design certificate for the project, SDA will provide certification that Nicks design is equal to or better than theirs from their assessment. You hoped this will be to SDA next week, so they can complete their assessment.

The site is currently closed as Rochelle and Mike called the police last Monday and kicked you off site. You have engaged Chris Maley from Maclarens Lawyers to act on behalf of Rombro and yourself in relation to the project. Chris has provide a simple letter to Rochelle and Mike advising he acts for Rombro and all correspondence is to go through him in relation to the project.

(Please ensure all correspondence is passed onto myself also when received or issued from Chris or the Sidoti's. I would also Like to attend any meetings that are held with Chris in relation to this project).

We are yet to meet with Chris and discuss Rombros position. You have suggested this will happen next week.

As discussed the projects costs to date are \$1,179,579 + Gst (December till now invoices are not included in this figure).

The Contract Price is \$1,101,577.48 + gst

Sidoti has paid \$423,105.50 + gst

The Sidoti's claimed that the LD's stated in the contract of \$400/day (that were crossed out by you, but not countersigned by them) stood.

You took it upon yourself to sign another agreement with them to pay them LD's as stated in the contract. However you have agreed to pay these LD's yourself.

The LDs' start from the contract date 24 Jan 20 = \$146,800 as at today.

You have paid \$60,00 (December & Jan management fees)

You need to pay to Rombro a further \$86,800 (as at today) so we can pay some of the subbies that are screaming. As Rombro is not paying anything further on this job till funds come in.

As I have said, I am not paying for any losses on this job. This job and the way it has turned out is on your shoulders. I advised you early on not to pull all the structural steel out of the job and that the drawings were not sufficient to build the house. To this you literally told me to fuck off and that you would teach me how to build a house.

You also need to put in the money that Sidoti's are not paying (as there is no accepted structural certificate for the project). It is not fair that the subbies

don't get paid as you continued to make them rip out and redo works there long after we told them the job needed to be pulled down due to the structure.

This figure is \$756,474 + gst (not including Decembers till now invoices)

...

It is really disappointing that it has all come to this. From what was once a good friendship and business, it has now been totally fucked up. I have been dealing with the pain of being ripped off by what I thought was my best mate for two years now, from the very first time I hit you up about your involvement in Loughlin St (we were driving down Louisa Rd at the time as I still remember it like yesterday).

Your comment that I have let you suffer last year at 27 was a bit rough. Despite everything, I put it all aside and said I would take over the job (without you asking), however this did not last long and you accepted getting pushed over by the client to take the job on again. I advised you multiple times that you can't let them on the job whilst the subbies are there, but nothing was ever done about it. The subbies suffered and so did you because you decided not to put your foot down with them and manage the job as you should have.

I have tried to be open and hard working in all that I have set out to do with Rombro over the years. It is disappointing that you have not listened to some of the advice I have tried to give and put forward over the years, as I believe we would be in a different situation if you had of. You never did respect my business opinions or advice. You made contractual business decisions on my behalf and never even bothered to consult me. The contract you signed up to at 27 is a joke, you know I would have never let Rombro sign that if you had brought it to my attention. Yet before I ever put in a price or contract I would walk you through it and discuss it and agree it before signing.

I reserve my rights in relation to any other claims that are made against Rombro or myself arising from any projects you have managed.

It is up to you now to do the right thing and make what you have done wrong, right. Subbies need to be paid for what they have done on 27 and the only way this will happen is if you put in.

53 Under cross examination the Applicant said:

I did everything in my power to stop company going back on site. Then I started to take steps to remove myself as director.

54 On 16 February 2021 the Applicant emailed Mr Romano to the effect that his \$30,000 monthly management fee for RCA was being used to pay subcontractors for the Property.

55 On 9 March 2021 the Respondent's Senior Building Inspector Andrew Kerin (Inspector Kerin) conducted a site inspection at the Property at 7am. Inspector Kerin did not include the Applicant in his notification of the inspection. The Applicant was not made aware that this had occurred or was to occur until Mr Romano forwarded him an email at 9.15pm.



- 56 On 17 March 2021 the Applicant and Mr Romano agreed that the Applicant would “leave RCA at the end of the month”. Ultimately the Applicant formally resigned his directorship on 16 April 2021 by lodging a notice with ASIC.
- 57 On 23 March 2021 the Applicant was copied into an email which attached a Rectification Order issued by Inspector Kerin dated 15 March 2021. The First RO issued to RCA on 15 March 2021 required a list of ‘incomplete’ works to be completed. An amended RO was issued on 26 March 2021 to RCA, requiring a site presence to be re-established by 31 March 2021 and compliance with the First RO by 17 May 2021, and attached a Schedule for those works to be completed by 17 May 2021. The Applicant was assured by Mr Romano that the work would be completed by him by May 2021. Aside from being copied into one email by Inspector Kerin on 29 March 2021, the Applicant had no further knowledge or involvement in RCA’s project at the Property.

### **Respondent’s evidence**

#### *Mr Romano’s notes*

- 58 The Respondent relied on the notes of Mr Romano for the purpose of demonstrating the various issues it claimed plagued construction of the Project, and to demonstrate the lack of “care and skill” it alleged against RCA. The notes relied upon, which were included in the s 58 documents, comprise 7 typed pages of 72 items canvassing the period 17 October 2018 to 18 January 2021 and were sent by Mr Romano to his solicitor on 16 February 2021 with the following email:

Please see attached a running list of this project for you to read and give you a better understanding of the job. There is a lot more which I can go into later if required.

- 59 Mr Romano gave no evidence in the proceedings. It seems that Mr Romano drafted this document from a number of other sources which were not provided, including a number of references to “note book entry”, which was not included in the section 58 material. From its contents, including a focus on client meetings, references to bullying by the Sidotis and a long explanation about the issues encountered with obtaining an engineer’s structural certificate because of the Sidoti’s conduct, the purpose of this document seems to be Mr Romano informing his solicitor of how the relationship between him and the

Sidotis broke down, rather than necessarily focussing on a step by step chronology of the project development and construction, and itemisation of actual issues or defects with the Project. I also note that the document predates the completion of the Project, the involvement of the Respondent and the issuing of the first RO, second RO, or the BIR upon which the allegations of improper conduct were ultimately made.

- 60 In those circumstances I am not willing to place any weight on the document referred to by the parties as “Mr Romano’s notes” for the purpose of making any findings in relation to whether RCA did the work at the Project with “due care and skill”, as submitted by the Respondent.

*Inspector Scalise’s evidence*

- 61 Inspector Scalise provided three separate statements dated 19 October 2021, 8 March 2022 and 9 December 2022 which addressed his inspections of the Property, the Second RO issued on 24 May 2021, and the BIR of 1 July 2021. They also address each of the 22 defects which formed the basis for the Respondent’s submission that breached the Act’s statutory warranties.
- 62 As discussed above, RCA did not re-establish a site presence at the property and did not comply with the First RO. On 29 April 2021, Inspector Scalise conducted a site inspection of the Property in the presence of the Sidotis. There were no representatives from RCA in attendance. At the time of the inspection, no documentation had been supplied by the Sidotis, and Inspector Scalise was only able to view those architectural and engineering plans which were made available to him by the Sidotis during the inspection. Inspector Scalise took photographs of the relevant parts of the plans that were made available to him for viewing during the inspection.
- 63 Based on that site inspection, on 24 May 2021, a further RO was issued by Inspector Scalise to RCA (Second RO). The Second RO required RCA to rectify 22 items listed as ‘Defective Work’ at the Property by 30 June 2021.
- 64 RCA did not comply with the Second RO. Inspector Scalise then prepared a building inspection report dated 1 July 2021, based on the site inspection of 29 April 2021 (BIR). The BIR was emailed to RCA on 8 July 2021.

65 Under cross examination Inspector Scalise stated that he disagreed with Inspector Kerin’s findings to the effect that the issues raised at the Property amounted to “incomplete works” rather than “defective works”. He agreed that no documents had been provided to him for the purpose of undertaking his assessment and inspection, despite repeated requests. He had been shown some structural drawings by Mrs Sidoti. He was not provided with a copy of the contract and agreed that this was unusual. He had not specifically asked Mr Romano for the documents, but “he [Mr Romano] had an opportunity to do so with the space of time of the rectification order”. He didn’t follow Mr Romano up for any documents and did not see the structural certificates which had been issued by Mr Koloff. He agreed that the conclusions in his report were based entirely on his observations at the site inspection of 29 April 2021 and the select plans shown to him by the Sidotis. He also agreed in re-examination that had he seen the structural certificates issued by Mr Koloff, it would have changed his conclusions in the BIR because he “was after confirmation that SDA [Structures] was satisfied, not a third party”.

## **Consideration**

### *Whether the Company was guilty of improper conduct*

66 The Respondent found that RCA was guilty of improper conduct as a result of breaches of the statutory warranty under s 18B(1)(a) of the Act, which is:

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

67 I accept the Applicant’s submission that Inspector Scalise did not have consideration to the “plans and specifications set out in the contract” in conducting his assessment and preparing the BIR upon which the contraventions and breaches are founded. Inspector Scalise made those admissions under cross examination. The effect of that is that the relevant breach that must be found against RCA is that it failed to carry out the work “with due care and skill”.

68 Turning first to the structural and waterproofing defects, being Items 2, 9, 14(b), 14(e), 18(a), 18(b), 20(c). The Applicant submits that these defects were certified as structurally sound by Mr Koloff, and he is entitled to rely on that

certification, referring to *Pastrovic & Co Pty Limited v Department of Services, Technology and Administration* [2012] NSWADT 177 at [39]:

I agree that in regard to disciplinary proceedings a builder is generally entitled to rely on expert advice and the certification provided by specialist subcontractors in regard to those aspects of work where specialist qualifications and experience is required.

- 69 The Respondent submitted that the circumstances in which Mr Koloff was retained do not allow the Applicant to rely on the defence at s 18F of the Act.
- 70 The Applicant did not rely on the defence at s 18F of the Act. He relies on the certificates of Mr Koloff to counteract the evidence of Inspector Scalise, to support the submission that the Tribunal could not be satisfied on the basis of probative evidence that the structural defects alleged by Inspector Scalise exist.
- 71 Based on Inspector Scalise's evidence, in which he confirmed that he held no structural engineering qualifications, that a building inspector (such as himself) is not qualified in structural engineering principles, that he cannot override the Structural Certificate issued by Mr Koloff on 18 December 2020, and that he had not been provided with the correct structural drawings, I agree with the Applicant that the Respondent has not satisfied the Tribunal that the items identified in the BIR as structural defects were, in fact, structural defects. On the basis of his qualifications I afford the structural certificates of Mr Koloff considerable weight and find that these greatly outweigh the opinion of Inspector Scalise.
- 72 Items 6(b), 8, 10(b), 11(a), 11(c), 12(a), 13, 14(a), 14(d), 17(a), 20(b) were works yet to be completed as at the time of Inspector Scalise's inspection. The Applicant submitted that because RCA had been removed from the building site on 18 January 2021 and the First RO was subject to the condition that the Sidotis "[p]ay any due progress payments as per the contract conditions", Inspector Scalise was in the position of inspecting a building site where work was incomplete: see *Calandra v Director General Department of Finances and Services* [2012] NSWADT 144 at [21] and that even if the works had been completed, clause 21 of the Contract provided for a "defects liability period" of 26 weeks from the date of practical completion. The program of works attached

to the final payment claim listed the works that RCA intended to complete. According to the Respondent's evidence, Mr Romano informed the Commissioner that RCA was "willing and able to return to site" on the condition that "[o]utstanding monies are paid" and again on 9 June 2021, that RCA would return to the site after "[p]ayment for items which are not defects ... prior to starting on site". I agree that this position was reasonable in circumstances where the Sidotis had made no payments to RCA since late 2019, RCA had a contractual right to suspend works for non-payment, and the Respondent had earlier recognised RCA's entitlement to be paid by imposing a condition for payment on the First RO. In those circumstances I agree with the Applicant that the reliance on incomplete works as "defects" is inappropriate.

- 73 Items 3, 6(d), 7, 16, 18(c) were identified as "defects" by the Respondent on the basis of information provided to Inspector Scalise by the Sidotis. As discussed above, that information was not complete or ultimately an accurate reflection of the Project agreed to between RCA and the Sidotis.
- 74 The Respondent made no submissions directly relevant to the Tribunal's consideration of each of the alleged defects, preferring to address them only at a broad, generalised level with the assumption that each of the defects alleged was supported by sufficient (but unspecified) evidence. Allegations that works are defective to the extent that they become the subject of breaches of the statutory warranty at s 18B(1)(a) of the Act and findings of improper conduct pursuant to s 51(1)(c) of the Act requires sufficient evidence for the Tribunal to be satisfied *at least* to the civil standard on the balance of probabilities. Because of the serious nature of the allegations and the impact on the Applicant, as discussed above at [18], the appropriate standard of satisfaction would more appropriately be the Briginshaw standard. The evidence and submissions provided by the Respondent do not, in my view, even satisfy the civil standard of proof.
- 75 Mr Scalise emailed Mr Romano on 12 May 2021 inviting him to provide his comments on the 22 items of defects identified by Inspector Scalise at his inspection of the Property. The email did not request Mr Romano to provide detailed evidence or documentation to support his "comments". On 19 May

2021, Mr Romano emailed Inspector Scalise providing his comments, a number which were to the effect that “this was agreed to by the client” or “certification has been provided”. Inspector Scalise did not respond to Mr Romano and did not request copies of the certificates or agreed variations referred to by Mr Romano. In his statements, Inspector Scalise rejected the information provided to him by Mr Romano.

- 76 The BIR was provided to RCA on 8 July 2021, several weeks after the Applicant had formally resigned his directorship. The Applicant’s inability to respond to items in the BIR as a result of not having been involved in the construction of the work, not having access to all of RCA’s business records following his resignation and not being in a position to ask Mr Romano for information, following the breakdown of that relationship cannot be used by the Commissioner to make up a deficiency in the Commissioner’s evidence: cf. *The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Limited & Ors* [2010] NSWSC 612 at [163].
- 77 I agree with the Applicant’s submission that it is the Respondent’s onus to prove that the works identified are defective, not the Applicant’s onus to prove that they are not. On the evidence before me, given the basis of Inspector Scalise’s opinions as expressed in the BIR and his failure to obtain, review and consider the contract, the variations to the contract, the Structural Certificates issued by Mr Koloff and all the architectural drawings upon which RCA relied, I cannot find that RCA breached the statutory warranty expressed in s 18B(1)(a) of the Act in relation to any of the 22 alleged defects.
- 78 It follows therefore that if there are no breaches of the statutory warranty by RCA, there is no improper conduct within the meaning of s 51(1)(c) of the Act.

#### *Defences*

- 79 Even if the Tribunal were able, on the evidence before it, to make findings that RCA breached the Act’s statutory warranty with respect to any of the 22 items identified by Inspector Scalise, there remains the issue of whether and to what extent the Applicant can rely on the defences to s 51(1)(c) of the Act.
- 80 What is essential under s 54(3)(a) of the Act is that the Applicant did not have knowledge of the facts that gave rise to the contraventions (i.e. the “improper

conduct”, being the relevant defective items of work): *Johnson v Youden* [1950] 1 KB 544 at 546; *Jamal v Workers Compensation Nominal Insurer* [2023] NSWCA 4 (Jamal) at [57]. “Knowledge” in s 54(3)(a) refers to actual knowledge of the improper conduct. Constructive knowledge or wilful blindness is not the equivalent of “knowledge” under s 54(3)(a): *Jamal* at [61]-[69].

81 The Applicant had no practical involvement in the project until 20 July 2020. Between 20 July 2020 and January 2021 the Applicant had some involvement in pushing the project to completion by attempting to obtain a structural certificate from another engineer. This wasn’t because he had knowledge of any defects, or had been involved in the actual construction at the Project, but because the Sidotis were insisting that one be obtained from their chosen engineers before they would make required payments. RCA had already obtained structural certification from Mr Koloff. Mr Romano was concurrently still managing the day to day supervision of the Project. If there was any actual knowledge of any alleged defects by RCA in completing the Project, it rested solely with Mr Romano. The Applicant identified in detail the RCA issues he believed remained Mr Romano’s responsibility in his email of 26 January 2021. There was no reference to defects at the Property in that email, which demonstrates that he had no actual knowledge.

82 The Respondent submitted:

...the applicant’s involvement in the building works and attendance at the site in 2019 and 2020, together with his knowledge that the home owners had ceased making progress payments after January 2020, sufficiently informed him of Rombro’s failure to perform the work in accordance with the plans and specifications.

The applicant was aware that due skill and care was not being exercised from his attendance on site in May 2019, his attendance in July 2020, his view in September 2020 that the building work had to be demolished, and his attendance on site in December 2020.

83 I do not accept the Respondent’s submission that the Applicant’s involvement in the Project and the information he received from Mr Romano about its progression would amount to actual knowledge that the works were not being conducted with “due care and skill”. As I have found above, the Applicant had no practical involvement in the project until 20 July 2020 and the remainder of his involvement was limited. He relied on the assurances by Mr Romano that

the issues raised by the Sidotis were being dealt with and was realistically unable to do much further in circumstances where both the Sidotis and Mr Romano had made clear that they did not want the Applicant's involvement in the Project. The only actual knowledge that the Applicant had prior to his formal resignation as Director was that Inspector Kerin had inspected the Property on 9 March 2021 and issued the First RO on 15 March 2021, followed by an amended RO on 26 March 2021. The extent of the Applicant's knowledge is limited to the terms of that amended RO – that the works were incomplete, that RCA was required to re-establish a site presence by 31 March 2021, and complete the incomplete works by 17 May 2021. In my view that knowledge does not amount to knowledge of the facts which gave rise to the contraventions, or knowledge of the improper conduct.

- 84 Mr Romano never informed the Applicant of any of the 22 defects identified by Inspector Scalise in the BIR. The first time the Applicant became aware of the alleged defects was in the Notice to Show Cause issued to him by the Respondent on 15 December 2021, some 8 months after Inspector Scalise's inspection and after he had formally resigned as a director of RCA. I accept based on the Applicant's evidence that he had no actual knowledge of the 22 items of alleged defective work which formed the basis for the Respondent's allegation of improper conduct under s 51(1)(c) of the Act.
- 85 The other defence relied upon by the Applicant was that he was not in a position to influence the conduct of RCA so as to prevent the occurrence of the improper conduct, pursuant to s 54(3)(b) of the Act. This relies on the Applicant's inability to influence Mr Romano from acting in the way he did on behalf of RCA.
- 86 In *Chevalley v Industrial Court of New South Wales* (2011) 82 NSWLR 634 (Chevalley), the Court of Appeal held in relation to a similarly worded provision in s 26(1)(a) of the *Occupational Health and Safety Act 2000* (NSW) that whether a director is in a position to influence the corporation's conduct in relation to a contravention of legislation is a question of fact in each case which may depend upon the particular position held, the allocation of responsibilities within the company between directors, managers and other employees, and



the ability of the director in the circumstances in which he or she finds himself or herself, to take steps to influence the company's conduct. At [29]:

Section 26(1)(a) raises the issue of whether as a matter of fact the director or person concerned in management who has been charged was in a position to influence the conduct of the corporation in relation to the contravention. The answer to that question will depend both on the particular contravention and the particular position held by the defendant. The subsection assumes that in some cases both directors and particular persons concerned with management will not be in a position to influence the corporation in relation to the contravention. Each case will depend on its own facts, but it is self-evident that in relation to some contraventions the ability to influence the corporation will depend on the particular position held, for example, a works manager or a chief executive officer compared to a chief financial officer or a non-executive director.

- 87 Chief Justice Bathurst endorsed the reasoning and findings of Justice Staff in *Inspector James v Sunny Ngai* [2007] NSWIRComm 203 at [127] and Justice Marks in *Inspector James v Ryan* [2009] NSWIRComm 215 at [157] to [160], both of which were endorsed by the Full Bench of the Industrial Court in *Liang v Inspector David Farmer* [2010] NSWIRComm 156; (2010) 199 IR 116 at [36], [37]. Relevantly to these proceedings, and to directly quote Justice Marks at [159] and [160], it is clear that the intent and purpose of the provision is focussed on the position of the director in terms of influence over the conduct of the corporation in relation to the contravention. This in turn focuses attention on the individual circumstances of the director. Matters which must also be taken into account include an express assumption contained within the provision that the defence can be raised outside of, and is not constrained by reason of, the duties, obligations and responsibilities that attach by reason of the fact that the defendant holds the office of a director, and the manner in which subsection (b) is framed must reflect an acknowledgement that not all directors will be in a position to influence all of the conduct of the corporation solely because they hold the office of director.
- 88 As submitted by the Applicant, he and Mr Romano were RCA's only two directors, and he and Mr Romano each held 50% of the shares in RCA. Legally, Mr Brown and Mr Romano had joint-control and ownership of RCA. As a 50% shareholder, Mr Brown did not have the power to remove Mr Romano as a director of RCA: *Designbuild NSW Pty Ltd v Commissioner for Fair Trading* [2016] NSWCATOD 69 (Designbuild) at [56]. It was not possible for the

Applicant to outvote Mr Romano (in the event that any issues were put to a vote) due to their equal holdings. The only option available to Mr Brown in the circumstances was to resign as a director and forego the equity that he once owned in RCA, which is what he did in April 2021.

- 89 The evidence demonstrates that Mr Romano acted without the Applicant's involvement in relation to the Project from its very inception and excluded him from all decisions in relation to it which would or should have been decisions jointly made by the RCA directors. Mr Romano was the nominated supervisor for RCA's contractor licence and up until the suspension of the works on 18 January 202, and he worked full time on the site as the supervisor. As nominated supervisor, Mr Romano was responsible for ensuring all work was undertaken to required standard, and as nominated supervisor and onsite supervisor, Mr Romano exercised significant influence over the quality of RCA's work: *Designbuild* at [60], [63].
- 90 The Respondent put to the Applicant in cross examination that he could have "stood behind Mr Koloff's structural certificate" and pressed the point that the works were not defective. I accept the Applicant's submission that he is doing exactly this in the context of these proceedings, and was not given an opportunity to do so when the issues were being considered by Inspector Scalise, because he was no longer a director of RCA at that time. The Respondent suggested that the Applicant could have resigned earlier from RCA, which is correct, but I accept the Applicant's evidence that he was being reassured by Mr Romano that the Project works were being completed by him, and he had other obligations as a director in relation to other projects being undertaken by RCA which he responsibly wished to complete. It was also suggested to the Applicant that he could have gone to the Supreme Court and had RCA wound up. In my view the fact that this option was available to him and he did not pursue it does not demonstrate that he was able to influence RCA so as to prevent it from engaging in the improper conduct. The requirements of s 54(3)(b) do not require that level of action to demonstrate a director's lack of influence over a company at the time of the alleged improper conduct.

91 I accept that the Applicant was not in a position to influence the conduct of Mr Romano in relation to the Project and I accept therefore that the Applicant was not in a position to influence the conduct of RCA in the manner alleged by the Respondent. The Applicant's lack of involvement in the Project and his exclusion by Mr Romano from decision making relevant to the Project prevented him from being able to influence the conduct of RCA so as to prevent the occurrence of any alleged defects. There is no evidence that the Applicant was complicit in the occurrence of the alleged defects. The defence pursuant to s 54(3)(b) should therefore apply.

### **Conclusion**

92 The correct and preferable decision in circumstances where I have found that the Applicant is not guilty of improper conduct under s 51(1)(c) of the Act as an officer of RCA under s 54(1) of the Act, and even if he were, the defences at s 54(3)(a) and/or s 54(3)(b) apply, is that there is no basis for disciplining the Applicant pursuant to ss 62(1)(g)(i), (ii) or (iii) of the Act. The Respondent's decision of 18 May 2022 (as outlined at [9] above) must therefore be set aside.

### **Orders**

(1) The Respondent's decision of 18 May 2022 is set aside.

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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

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