Civil and Administrative Tribunal

New South Wales

Case Name:	Professional Construction Service Pty Ltd v The Owners - SP 92156
Medium Neutral Citation:	[2023] NSWCATAP 323
Hearing Date(s):	30 October 2023
Date of Orders:	06 December 2023
Decision Date:	6 December 2023
Jurisdiction:	Appeal Panel
Before:	D Charles, Senior Member R C Titterton OAM, Senior Member
Decision:	1. To the extent that the appeal raises questions of law, the appeal is dismissed. 2. To the extent that the appeal raises other errors, leave to appeal is refused. 3. Any party seeking its costs of the appeal may file and serve its written submissions on that issue only (no more than 5 pages) within 14 days of the date of these orders. 4. A costs' respondent is to file and serve any written submissions in response to the issue of costs only (no more than 5 pages) within 28 days of the date of these orders. 5. A costs' applicant may file and serve a written submission (no more than 3 pages) strictly in reply to a costs' applicant's submission within 35 days of the date of these orders.
Catchwords:	BUILDING AND CONSTRUCTION – appeal –

	adequacy of reasons – s 48MA of the Home Building Act 1989 (NSW)
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 28, 60, 80; cl 12 of Sch 4 Civil and Administrative Tribunal Rules 2014 (NSW), rr 38, 38A Home Building Act 1989 (NSW), ss 18B, 18E, 48MA
Cases Cited:	Anderson Stuart v Treleaven (2000) 49 NSWLR 88; [2000] NSWSC 283 Calderbank v Calderbank [1976] Fam Law 93; 3 All ER 333; 3 WLR 586 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 Crystele Designer Homes Pty Ltd v Wood [2023] NSWCATAP 242 Flynn v PPK Mining Equipment Pty Ltd (No 2) [2022] NSWSC 1640 House v The King (1936) 55 CLR 499 Naish aka Khosroabadi v NSW Land and Housing Corporation [2023] NSWCATAP 99 NSW Land and Housing Corporation v Orr [2019] NSWCA 231 James v NSW Land and Housing Corporation [2020] NSWCATAP 64 Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23 Leung v Alexakis [2018] NSWCATAP 11 Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin [2020] NSWCA 358 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Tudor Capital Australia Pty Ltd v Christensen [2017] NSWCA 260 Westerweller v The Owners Strata Plan No 18482 [2023] NSWCATAP 113
Texts Cited:	None Cited
Category:	Principal judgment
Parties:	Professional Construction Service Pty Ltd, Appellant The Owners SP 92156, Respondent

Representation:	Counsel:
	Appellant: D Smith Respondent: P Horobin
	Solicitors:
	Appellant: MRM Lawyers Respondent: Chambers Russell
File Number(s):	2023/00275898
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	[2023] NSWCATCD
Date of Decision:	1 May 2023
Before:	K Ross, Senior Member
File Number(s):	HB 21/51775

REASONS FOR DECISION

Introduction

1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal (**Tribunal**) on 1 August 2023 in matter HB 21/51775 (**Decision**).

2 For the reasons given in the Decision, the Tribunal ordered appellant (**Builder**) to pay the respondent (**Owners Corporation**) the sum of $234,046.56 on or before 31 August 2023.

3 The Builder has raised five grounds of appeal.

4 For the following reasons:

(1) insofar as the appeal raises questions of law, we have decided to dismiss the appeal;

(2) insofar as the appeal raises other errors, we have decided to refuse leave to appeal.

The Grounds of Appeal

5 The Builder's grounds of appeal are set out in an annexure to its Notice of Appeal filed 29 August 2023.

6 In summary, the grounds of appeal, are as follows:

(1) **Ground One**: in holding at [17] of the Decision that the Builder had an obligation to "investigate the source and cause of water leaks and trace the water leaks in order to rectify them the Tribunal erred in law by failing properly to construe a contractual obligation to "Trace and make good water leaks to enclosed terrace around columns and fixed frames". The Builder submits that, properly construed, the obligation was limited to the enclosed terrace around columns and fixed frames;

(2) **Ground Two**: in holding at [40] to [41] of the Decision that the Builder "did not adequately address the water ingress issues" in respect of item 3, the Tribunal erred in law in the following respects:

(a) it failed to identify and apply the relevant contractual obligation, being to trace and make good water leaks to enclosed terrace around columns and fixed frames;

(b) it so held in the absence of evidence as to the source of water ingress;

(c) it so held in the absence of evidence as to what the Builder was required to do, but failed to do, to rectify the water leaks;

(d) it failed to impose the burden of proof on the Owners Corporation;

(3) **Ground Three**: in holding that the Builder was required to pay damages in the amount of $22,600 by reference to item 2, the Tribunal erred in law in the following respects:

(a) it failed to consider the difference between the costings of the parties' experts:

(b) it held that the difference in the costings of the parties' experts was partly due to a difference in rates where there were no rates in the Owners Corporation's evidence;

(c) it failed to consider the cost for replacement of the wall tiles (being the only difference in scope of works between the parties);

(d) it failed to impose the burden of proof on the Owners Corporation;

(4) **Ground Four**: in holding at [43] of the Decision that the Builder was required to pay damages in the amount of $150,000 by reference to item 3, the Tribunal erred in law in the following respects:

(a) it so held despite having made the errors identified in paragraphs (a), (b) and (c) of Ground Two, in which circumstances the identity of the defects and the scope of work required to rectify them was unknown;

(b) it so held without evidence of costings;

(c) it accepted as evidence quotes from untested sources, not alleged to be expert opinion, and failed properly to calculate the average costings in those quotes;

(d) it failed to impose the burden of proof on the Owners Corporation.

(5) **Ground** 5: in holding that a money order should be made instead of a work order the Tribunal erred in law in the following respects:

(a) by failing to give effect to the principle mandated by s 48MA of the *Home Building Act 1989* (NSW) (**HB Act**);

(b) by taking into account irrelevant considerations, namely that:

(i) the Builder denied responsibility for the defects;

(ii) the bare fact that the Builder was responsible for the defects;

(iii) the Builder had complied with previous rectification orders from Fair Trading which did not concern the alleged defects;

(c) it failed properly to exercise its discretion and to give reasons for doing so.

7 In addition to these grounds, the Builder seeks leave to appeal the Decision in relation to Grounds 2, 3, 4, and 5 in the event we decide that no question of law is raised.

8 The Builder filed lengthy written submissions on 10 October 2023. The Builder's counsel Mr Smith amplified these submissions in oral submissions during the course of the hearing. Similarly, we had the benefit of written submissions from the Owners Corporation which were amplified by its counsel Mr Horobin.

Reply to Appeal

9 The Owners Corporation filed a Reply to Appeal. The Owners Corporation supports the order made by the Tribunal for the reasons given in the Decision.

10 In summary, in its Reply to Appeal, the Owners Corporation submits:

(1) in relation to Ground One, no error arises, as the Tribunal correctly construed the Builder's obligation;

(2) in relation to Ground Two, Three, Four and Five, each challenges findings of fact for which leave is required and a grant of which is opposed.

11 The Owners Corporation also filed detailed written submissions, which were addressed during the appeal hearing by Mr Horobin.

Nature of an appeal

12 Section 80 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**) sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

A question of law

13 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing a question of law giving rise to an appeal as of right. These include, but are not limited to:

(1) whether the Tribunal provided adequate reasons;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

(7) whether there was no evidence to support a finding of fact; and

(8) whether the decision was legally unreasonable.

Leave to appeal

14 Clause 12 of Sch 4 of the NCAT Act provides that, in an appeal from a decision of the Consumer and Commercial Division of the Tribunal, an Appeal Panel may grant leave to appeal only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:

(1) the decision of the Tribunal under appeal was not fair and equitable; or

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

(3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

15 The principles to be applied by an appeal panel in determining whether or not leave to appeal should be granted are well settled. In *Collins v Urban* [2014] NSWCATAP 17 the Appeal Panel conducted a review of the relevant cases at [65]-[79] and concluded at [84](2) that:

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

16 Even if an appellant establishes that they may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the NCAT Act. An appellant must demonstrate something more than that the Tribunal was arguably wrong: *Pholi v Wearne* [2014] NSWCATAP 78 at [32].

The Decision

17 Before considering the grounds of appeal it is convenient to first summarise the Decision. As noted above, the Tribunal's ultimate conclusion was to order the Builder to pay the Owners Corporation the sum of $234,046.56.

18 The Decision commences by setting out the background to the dispute between the parties, noting at [2] that the Owners Corporation had alleged that the work carried out by the Builder breached the statutory warranties in s 18B of the *Home Building Act 1989* (NSW) (the **HB Act**) in respect of 5 items; namely the Unit 12 bedroom window leak (**Item 1**); the Unit 11 ensuite leak

(**Item 2**); the Unit 11 water ingress to lounge room, dining room, bathroom (**Item 3**); the water ingress through the first bedroom 1 sliding door (**Item 4**), and fire penetrations (**Item 5**).

19 At [4] the Decision states:

> It is not disputed that the work which was carried out by the respondent involved the conversion of a commercial lot into two residential units. The respondent tendered for the work and entered into the Contract. The tender document included a scope of work, relevantly including:
>
> > **Restaurant area**
> >
> > Check water penetration windows and column along front façade.
> >
> > Allow to rectify water ingress underneath windowsills and columns.
> >
> > **New Work to Construct to (sic) New Units**
> >
> > Form new openings in the external walls for insertion of new aluminium window frames to bedrooms and bathrooms.
> >
> > Provide waterproofing to all wet areas to comply with the BCA.
> >
> > Note: All new penetrations in the concrete floors are to be fire rated in accordance with the requirements of the PCA.
> >
> > All redundant penetrations in the existing concrete floor are to be filled with concrete.
> >
> > Trace and make good water leaks to the enclosed terrace around columns and fixed frames.
> >
> > Supply and instal new wall tiles to ensuites bathroom and new laundry.
> >
> > (underlining added for the purposes of these reasons – see [26] below)

20 At [5], the Decision records that, as a result of the work carried out, the commercial lot which had been used as a restaurant was converted into two residential units. Part of the space that had been a balcony area had previously been enclosed to form part of the restaurant. At some time, an extra layer of tiles was laid over part of the floor, and the experts agreed that this was contributing to the water ingress issues. The Builder denied laying that extra layer of tiles. The Owners Corporation asked the Tribunal to find, on the balance of probabilities, that it did.

21 At [6], the Decision records that the Owners Corporation submitted that the Builder was responsible for the water ingress issue because it had a contractual obligation to investigate and rectify them. In addition, the Owners Corporation submitted that as the contract required the conversion of a non-habitable space into a habitable space (namely the balcony space), the

Builder's obligations extended to ensuring that the work it did complied with the statutory warranties, and resulted in a dwelling which would be fit for that use.

22 At [7], the Decision records that the Builder submitted that it was not responsible for any defects in the "base building" because that work was carried out by Steve Nolan Constructions Pty Ltd (which we understand was the developer of the strata scheme), and the Owners Corporation had already been compensated for those defects which had been the subject of a separate claim.

23 At [8], the Tribunal set out the issues for determination as follows.

24 The first issue was whether the Builder laid the second layer of travertine tiles. At [11], the Tribunal concluded that it was not satisfied the Owners Corporation had proved that the Builder had laid the second layer of tiles.

25 The second issue, and the one of importance for the Builder's appeal, was what responsibility the Builder had in respect of water ingress issues.

26 After referring to those parts of the scope of works underlined above at [20], and then referring at some length to *Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin* [2020] NSWCA 358, the Tribunal concluded:

> 17 The Builder's obligation was to carry out the scope of work required by the Contract. That required that the Builder to investigate the source and cause of water leaks and "trace" the water leaks in order to rectify them. In doing so the Builder had an obligation to carry out any additional work incidental to that work. This would include installing flashings. However, I do not accept the applicant's submission that the Builder's obligation extended:
>
> > "to ensure that there was no water penetration into the internal areas of the residence even if that requirement was not expressly stated".
>
> 18 This would be to extend the operation of the warranties beyond "the extent of the work carried out".

27 At [20] the Tribunal stated that it did not accept the Builder's argument that *Oikos* could be distinguished, finding that the facts were "actually quite similar".

28 After setting out the definition of "major defect" found in the HB Act in s 18E(4), the Tribunal then went on to determine which if any of the items in dispute were major defects.

29 For the reasons given at [25] to [27] of the Decision, the Tribunal found that Item 1 was a major defect.

30 For the reasons given at [28] to [32] of the Decision, the Tribunal found that Item 2 was a major defect.

31 As to Item 3, the Tribunal does not make a finding in terms that Item 3 was a major defect. This may have been an oversight as it was clear that the Tribunal considered that all the water ingress issues raised major defects, finding at [41] that the Builder had failed to rectify the water ingress issues and was in breach of the contract and the statutory warranties.

32 For the reasons given at [44] to [45] of the Decision, the Tribunal found that Item 4 was a major defect.

33 As to Item 5, there was no finding whether or not the item was a major defect. But in any event, the claim for compensation in the amount of $12,353.00 was rejected for lack of evidence (Decision, at [50]).

34 After dealing with the amount of Builder's margin to be allowed (the Tribunal finding that the margin should be 20%:Decision at [52]) and whether there should be any "uplift" for inflation (answering that question in the negative: Decision at [53]), the Tribunal then turns to the issue of whether a money order or a work order should be made.

35 The Tribunal decided to make a money order for the following reasons (Decision at [43]):

> The Builder has at all times argued that he is not responsible to rectify the defects complained of, because he did not undertake the original work. Whilst he now seeks that the Tribunal make a work order, I have no confidence that this would result in a just, quick and cheap resolution of the real issues in dispute. The Builder had the opportunity initially to rectify the water ingress issues but the work he carried out was unsuccessful. He had a further opportunity to carry out rectification pursuant to the Department of Fair Trading Rectification Order, but the issues remain. I am satisfied that this is a matter in which the preferred outcome is not appropriate.

Consideration of Ground One

36 We accept that Ground One raises a question of law, namely the construction of a contract. As the Appeal Panel stated in Crystele Designer Homes Pty Ltd v Wood [2023] NSWCATAP 242 at [41]:

> The interpretation of a statute or contract is directed to the ascertainment of the document's actual and true meaning. When the document is properly construed, there is only one correct meaning. It is for this reason that the proper construction of a statute or contract is a question of law: *Bianco Walling Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2020) 275 FCR 385; [2020] FCAFC 50 (*Bianco Walling*) at [66] (Flick, White and Perry JJ).

The Builder's submissions

37 The Builder submits that the Tribunal's statement at [17] of the Decision (set out above), was not an accurate statement of its contractual obligations, as the Tribunal's statement was wider than the actual contractual obligation. While the Builder accepts that there was a duty to trace water leaks in the "existing structure", it submits that this obligation was limited to the enclosed terrace area around window sills and columns.

38 The Builder submits that, properly construed, the Builder's obligations in relation to water leaks were to check water penetration through windows and the column along the front façade, rectify water ingress underneath window sills and columns, and to trace and make good water leaks to the enclosed terrace around columns and fixed frames.

39 The Builder submits that, when considering Item 3 at [40], the Tribunal did not apply the construction it had identified at [17].

40 The Builder submits that the Decision at [40] exhibits further errors in the construction of the Builder's obligations in relation to the water leaks.

41 At [40] the Tribunal stated:

> However, the Builder was contractually required to address the water ingress issues which were apparent at the time of the tender. He was also required to ensure that any work which he carried out resulted in an area which was fit for habitation as a residence. He said that he had carried out the work he was required by the Contract to do because he checked the columns, but it is apparent the work he carried out did not adequately address the water ingress issues. Likewise, he may not have laid the second layer of tiles, but he was contractually obliged to "Trace and make good water leaks to the enclosed terrace around columns and fixed frames". If at the tender stage he could not identify what needed to be done, it was open to him to include a note to that effect, and to provide for a variation if other work was required. As was conceded by the respondent's expert under cross examination, when carrying out the work, the Builder's contractual obligations required that he undertake such investigation (including destructive investigation) as might be required in order to fulfil his contractual obligations.

42 As to the sentence, “However, the Builder was contractually required to address the water ingress issues which were apparent at the time of the tender", the Builder submits that it was not contractually obliged to address the water ingress issues as they appeared at the time of tender; rather its contractual obligation was to perform the Scope of Works.

43 As to the sentence, “He was also required to ensure that any work which he carried out resulted in an area which was fit for habitation as a residence", the Builder submits that it was not obliged to ensure that any work which it carried out resulted in an area which was fit for habitation as a residence. This the Builder submits is the very error which *Oikos* cautioned against, as it expands the scope of the contractual obligation by treating s 18B(1)(e) as amounting to a warranty that the end result is an area which was fit for habitation as a residence. The Builder submits that the correct approach is first to identify the work required to be done and to see if that work complied with the warranty. The Builder submits that this is “especially pertinent” when considering works in the nature of alteration or renovation.

44 As to the sentence, “Likewise, he may not have laid the second layer of tiles, but he was contractually obliged to 'Trace and make good water leaks to the enclosed terrace around columns and fixed frames", the Builder submits that the connection between the second layer of tiles and the columns and fixed frames does not appear.

45 Finally, as to the sentence, "If at the tender stage he could not identify what needed to be done, it was open to him to include a note to that effect, and to provide for a variation if other work was required”, the Builder submits that this imposes an obligation on the Builder to identify its own scope of work prior to entering into the contract, and to ensure that the scope of work will ensure that all water ingress will be prevented. The Builder submits that the correct approach is to construe the actual content of the Builder's contractual obligations.

46 The Builder submits that *Oikos* supports the manner in which the Tribunal has undertaken the task of construing the Contract.

The Owners Corporation's submissions

47 First, the Owners Corporation submits that the Builder's submissions omit the full scope of the subject contract when attempting to find fault with the Tribunal's construction. The Owners Corporation submits that, consistent with *Flynn v PPK Mining Equipment Pty Ltd (No 2)* [2022] NSWSC 1640 at [134], in order to understand the Builder's obligations, it is necessary to consider the genesis of the contract as well as the contract itself.

48 After referring to various clauses of the contract and what documents constituted the contract, the Owners Corporation submits that the scope of works specifies that the Builder was, in relation to water penetration issues, to:

(1) "check water penetration windows and columns along the front facade";

(2) "permit rectification of water ingress beneath window sills and columns"; and

(3) "trace and repair water leaks to enclosed terrace around columns and fixed frames."

49 The Owners Corporation further submits that the prerequisite to investigate water infiltration specifically identified photographs (No. 0043, 0044, 0045, and 0046) of the window sills and columns on pp 257 to 259.

50 Thus, the Owners Corporation submits that the Builder did not address this material and in so doing elides the context and object of the contract.

51 The Owners Corporation submits that the consequence of this was that the Builder was obligated to ensure that Units 11 and 12 met the requisite building standards for a class 2 building including, relevantly, Performance Requirement FPI4 in relation to water penetration.

52 In conclusion, the Owners Corporation submits that there was no error in the Tribunal's construction of the Contract and, as discussed in Ground 2, no error in the Tribunal's finding that the Builder had not complied with its obligations.

53 As to the Builder's submissions addressing the statutory warranties in the HB Act, the Owners Corporation submits the Builder's assertion that only one warranty, s 18B(1)(e) of the HB Act, was considered by the Tribunal (at [13]), is incorrect, pointing to findings of the Tribunal at [15] and [41].

54 As to the Builder's submissions in relation to *Oikos*, the Owners Corporation submits that:

(1) The Builder's submissions only partially extract the passages cited by the Tribunal at [16].

(2) While the Tribunal found at [14] "[t]he warranty does not expand the scope of the work required to be done", a point reiterated at [20], White JA stated in *Oikos* at [81] that "In some circumstances the operation of the warranties may expand the scope of work that a builder contracts to do".

55 In any event, the Owners Corporation submits that the Builder was contractually obliged to warrant that the converted units were reasonably fit for occupation as a dwelling. A principal object of the contract was to take a commercial space and make it fit for occupation. The Tribunal therefore was entitled to find on the evidence that this warranty (as well the other warranties in s 18B) was breached.

Conclusion

56 We see no error by the Tribunal. In our view, the Builder's submissions are misconceived.

57 As was noted in *Upton v Martin and Stein Antiques Pty Ltd* [2017] NSWCATAP 175 at [18], the role of the Appeal Panel is to examine the decision appealed from in a sensible and balanced way and not to go over the reasons for decision with a fine tooth comb and an eye keenly attuned to a perception of error: *Politis v Federal Commissioner of Taxation* [1988] FCA 446 at [14] per Lockhart J. This in our view is the approach the Builder is asking us to take in its submissions, in particular in its dissection of par [17] of the Decision.

58 It appears evident to us that the Tribunal properly construed the terms of contract, including its scope of works, and properly enunciated the Builder's obligations in relation to the scope of works.

59 Furthermore, we agree with the Owners Corporation that the Builder's submissions, overlooked and failed to treat with the tender documents, Part C of the Contract (which includes Enzhou studio plans, the SD masterplan marked up drawings, a document titled "Specification - Preliminaries" and a Scope of Works General Description) and Part D of the Contract (which

comprised the development consent dated 14 April 2015 authorising the conversion of the ground-floor commercial unit into two residential units). We accept that a proper understanding of these documents establishes that the scope of works required not only the remediation of water infiltration but also an investigation into its source.

60 In the result, we find that there was no error in the Tribunal's construction of the contract nor in its finding the Builder had not complied with its obligations.

61 Therefore, while we accept that the Builder has raised a question of law, we see no error by the Tribunal and would not allow the appeal in relation to Ground One.

Consideration of Ground Two

62 The Builder submits that the question of law arising on this ground is whether there was any evidence upon which the Tribunal could conclude that the Builder had breached its contractual obligations. We accept that this raises a question of law: *Prendergast* at [7].

63 The Builder further submits that the Decision also demonstrated a failure to give adequate reasons. We accept that this also raises a question of law: *Prendergast* at [1].

Submissions of the Builder

64 The Builder submits that its contractual obligation in relation to water ingress was delineated by reference to specific features of the existing structure. The Builder submits that the Owners Corporation bore the onus of establishing that the Builder had failed to do one or more of the following, and that the failure was a cause of water ingress:

(1) check water penetration through windows and the column along the front façade;

(2) rectify water ingress underneath window sills and columns;

(3) trace and make good water leaks to the enclosed terrace around columns and fixed frames.

65 The Builder submits there are "no findings" about these matters, and that none of the findings of breach is supported by any reasoning. This the Builder claims is a failure to explain the basis of a crucial finding of fact and thus an error of

law: *Tudor Capital Australia Pty Ltd v Christensen* [2017] NSWCA 260 at [387]-[388].

66 The Builder submits that the Owners Corporation needed to adduce expert evidence of what the Builder was required to do, but did not do. Instead, its expert approached his task as being to identify defects. The consequence was that there was:

(1) no direct evidence at all about what the Builder should have done to trace leaks to the enclosed terrace around columns and fixed frames compared with what the Builder did in that regard;

(2) no evidence about what sources of water leaks at those points the Builder would have identified and what damage has been caused by those leaks;

(3) no evidence of what the Builder would have been required to do to make good any water leaks so identified, how effective those works would have been, and what specific damage has resulted.

67 The Builder notes that there is some suggestion in the evidence that there are sources of water ingress other than the two layers of tiles, including that the face brick columns allowed moisture to migrate damaging fixed internal plasterboard linings. The Builder submits that there is no evidence at all about the scale of this problem as compared with the two layers of tiles, and what is required to remedy this issue.

68 Finally, the Builder submits that there is no evidence that the Builder was or should have been aware of these problems.

Submissions of the Owners Corporation

69 In summary, the Owners Corporation submits:

(1) this ground construes specific clauses regarding the identification and treatment of water ingress that leaves them devoid of any content and the Builder without any obligation to address it;

(2) while "no evidence" can constitute an error of law, this requires more than a mere assertion that there was an absence of evidence: *James v NSW Land and Housing Corporation* [2020] NSWCATAP 64 at [43];

(3) in truth, the Builder’s submissions are directed to the Tribunal's reasons and not the absence of evidence. The evidence was clear that there was water ingress that was to be addressed and that the Appellant had not done so;

(4) the Builder’s submissions overlook its own evidence;

(5) not only is it incorrect to say that there is "no evidence", the preponderance of evidence favoured the Owners Corporation's case.

Conclusion

70 The Builder notes in its submissions that the Tribunal's errors set out in Ground One had implications for Ground Two.

71 We see substance in the Owners Corporation's submission that the Builder's submissions are directed to the Tribunal's reasons and not to any lack of evidence.

72 We also see substance in the Owners Corporation's submission that it is not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons: *WALE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630, at [46]-[47]. Further, we accept that an inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons, but that is an inference not too readily to be drawn where the reasons are otherwise comprehensive, and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected: *Wale* at [47]

73 Finally, we accept that the Builder's submissions overlook the Builder's own evidence that it did not rectify or make good any of the water leaks and had conducted limited testing.

74 Therefore, while we accept that the Builder has raised a question of law, we see no error by the Tribunal and would not allow the appeal in relation to the "no evidence" ground of Ground Two.

75 As to the adequacy of the Tribunal's reasons on this issue, we consider that the reasons meet the minimum acceptable standard of the type described by the Court of Appeal in *NSW Land and Housing Corporation v Orr* [2019] NSWCA 231 (***Orr***). Bell P (as the Chief Justice then was) relevantly stated:

> 66. In the context of appellate review of the adequacy of reasons, the function of an appellate court is to determine not the optimal level of detail

> required in reasons for a decision but rather the minimum acceptable standard: Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33 at [48] (Resource Pacific). The standard is not one of perfection: Bisley Investment Corporation v Australian Broadcasting Tribunal (1982) 40 ALR 233 at 255 (Bisley).
>
> …
>
> 71. That having been said, even in the less formal setting of a tribunal which has significant powers the exercise of which is capable of affecting the lives of citizens in profound ways, there are certain minimum characteristics that a Tribunal's reasons must possess. These are really supplied, in relation to the Tribunal, by s 62(3) of the CAT Act which, as noted at [52] above, requires there to be set out in reasons (when requested by a party):
>
> > (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
> >
> > (b) the Tribunal's understanding of the applicable law, and
> >
> > (c) the reasoning processes that lead the Tribunal to the conclusions it made.

(emphasis added)

76 We consider that the reasons in relation to this ground of appeal satisfy the Court of Appeal's criteria in *Orr*.

Consideration of Ground Three

77 Ground 3 is concerned with quantification of the damages payable in respect of Item 2, assessed by the Tribunal at $22,000.

78 While the Builder submits that this raises a question of law, we disagree. In our view, leave is required.

Submissions of the Builder

79 The Builder claims that made a "glaring error" in its fact-finding exercise. Essentially, the Builder submits that the Tribunal erred in preferring the expert evidence relied on by the Owners Corporation (claimed by the Builder to be "extremely brief"), to its own expert who "by contrast, provide[d] comprehensive calculations over three pages setting out his quantification of loss".

80 The Builder submits that the Owners Corporation's expert has done no more than quote an indicative overall amount from Rawlinsons Cost Guide, then stated a conclusion unsupported by any calculations or critical analysis, and in doing so has reached a figure much higher than the figure reached by the

Builder's expert, where the Builder's expert used a transparent and scientific process.

81 The Builder notes that that the Tribunal might have preferred the Owners Corporation's expert evidence on the basis that it was supported by quotations and submits that those quotations appear as annexures to a separate report prepared by Broadscope which is dated 1 December 2021, a report which was not expert evidence. The Builder submits that the quotations were prepared by certain builders in circumstances where the instructions were provided to those builders and there was no scope to cross-examine these three builders.

82 The Builder submits that this evidence of "completely inadmissible hearsay and opinion evidence", should never have been admitted nor relied upon by the Tribunal, and was not expert evidence.

Submissions of the Owners Corporation

83 The Owners Corporation makes four principal submissions.

84 First, the quotations were admitted without objection.

85 Secondly, the Tribunal is not bound by the rules of evidence: *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2).

86 Thirdly, the quotations were not expert opinion. Mr Waddell was asked to opine on whether he thought any of the quotations were "fair and reasonable". Mr Waddell concluded that the quotation from Rescom Builders was "fair and reasonable" and reflected his own estimates, which he had revised down from an estimate given in October 2021. It was open to the Appellant to challenge Mr Waddell on his opinion that the quotation was "fair and reasonable".

87 Fourthly, as this issue was not raised at the Tribunal hearing, leave should not be given to indulge the argument now.

Conclusion

88 As noted, this ground requires a grant of leave. We would not grant leave.

89 This is because the point was not taken before the Tribunal and indeed the quotations were admitted without objection. That being the case the point cannot be raised now: *Naish aka Khosroabadi v NSW Land and Housing*

Corporation [2023] NSWCATAP 99 at [21], citing *Coulton v Holcombe* [1986] HCA 33. In *Coulton*, the plurality of the Court said at [8]:

> . . . in a recent decision of six Justices of this Court (*University of Wollongong v. Metwally* [No. 2]) the 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.

Consideration of Ground Four

90 Ground 4 is concerned with the assessment of damages in relation to Item 3.

91 The Builder submits the question of law arising is whether the Tribunal could conclude that the quantum of loss was $150,000 in the absence of expert evidence. We disagree. This ground also clearly raises factual issues.

Submissions of the Builder

92 The Builder's submissions are principally based on the same argument it raised in relation to Ground 3, namely the Tribunal's use of the three quotations. It submits that:

> [t]he evidence of quantum in relation to Item 3 is even more regrettable than the evidence of quantum in relation to Item 2. Whereas, in relation to Item 2, the "report" was said to corroborate the figure derived from Rawlinsons, in relation to Item 3 there is no evidence whatsoever of loss. To make a determination of the quantum of damages payable in the absence of evidence is an error of law.

93 The Builder further submits that it is not to the point that the Builder did not adduce its own evidence. It does not bear the onus of proof and was entitled to rely on the OC's failure to prove its loss.

94 Finally, the Builder submits that:

(1) averaging valuations is not permissible absent evidence that such an average would result in an accurate valuation: *Anderson Stuart v Treleaven (2000)* 49 NSWLR 88; [2000] NSWSC 283 at [100];

(2) the attempt at averaging the quotes also failed at the level of simple arithmetic: one figure included GST and builders' margin whereas the other did not.

Submissions of the Owners Corporation

95 In summary, the Owners Corporation submits:

(1) Ground 4 is described as a question of law, but it is in fact a challenge to a factual finding. It is simply incorrect to assert that there was "no evidence". As noted in the Decision, the Builder chose not to lead any quantum evidence;

(2) the Owners Corporation's expert Mr Waddell opined on the "fair and reasonableness" of the quotations, which provided a range of estimates for the work. There was no challenge to Mr Waddell's expertise to opine on what was fair and reasonable. The actual effect of the quotations was to revise down his own initial estimate;

(3) The Builder's expert did not opine on that revised cost.

96 In those circumstances, it is difficult to see how the Builder has suffered a clear injustice. In our view, the Builder should not now be allowed to depart from the case it ran at first instance.

Conclusion

97 This ground is based on the admission into evidence of three quotations to which no objection was taken at the time of the hearing.

98 We see no error by the Tribunal in respect of this ground and would not grant leave to appeal.

Consideration of Ground Five

99 This ground raises for determination the adequacy of the Tribunal's reasons in relation to s 48MA of the HB Act, including whether the Tribunal took into account irrelevant considerations and/or failed to take into account relevant considerations. While all issues raise questions of law, in our view, what the Builder is challenging, fundamentally, is the adequacy of the Tribunal's reasons.

The Builder's submissions

100 In summary the Builder submits:

(1) the Tribunal miscarried in the exercise of its discretion and thus *House v The King* ((1936) 55 CLR 499) principles are engaged;

(2) most of what is stated by the Tribunal at [54] of the Decision must be rejected;

(3) it is not to the point that the Builder had denied responsibility to rectify the defects. There is no suggestion that the case advanced by the Builder at first instance was devoid of merit, speculative or opportunistic. It was a bona fide claim that did not succeed. That is entirely usual, and it was in error to treat this as a factor tending in favour of a money order;

(4) the Tribunal's statement that the Builder had the opportunity initially to rectify the water ingress issues but the work carried out was unsuccessful, is incorrect. The Builder's Mr Jones gave unchallenged evidence that he attended and rectified the defects for which he agreed he was responsible. The Builder submits that it was content to, and did, return to the subject property to fix defects for which it accepted it was liable. The Builder submits that this evidence can only be treated as evidence in favour of a work order;

(5) the Tribunal's finding that the Builder had a further opportunity to carry out rectification pursuant to a Department of Fair Trading Rectification Order, but the issues remain, lacks any foundation in the evidence. The Builder explained that he was contacted by NSW Fair Trading, that he attended and performed the work required of him, and that the rectification order was complied with to the satisfaction of the Owners Corporation. This Builder again submits that this evidence can only be treated as evidence in favour of a work order.

101 In addition, the Builder submits that the Tribunal failed to take into account its unchallenged evidence that:

(1) it is solvent, has the capacity, and is ready, willing and able to perform rectification work;

(2) the Builder's director Mr Jones gave oral evidence that he would comply with a work order;

(3) there was no cross-examination of the Builder on this issue;

(4) a money order would be to the Builder's very serious disadvantage, given that $35,461 has been allowed as a builder's margin in the costings;

(5) there were serious shortcomings in the evidence quantifying loss as set out in Grounds Three and Four.

102 The Builder submits that, in the language of *House v The King,* the Tribunal allowed an extraneous or irrelevant matter to guide it and that it had mistaken the facts. The Builder submits that the end result is unreasonable and plainly unjust.

The Owners Corporations submission

103 In summary, the Owners Corporation submits that:

(1) ;here is no proper basis for the Builder to challenge the money order by the Tribunal given that there is no presumption, much less an entitlement of the Builder to a work order: *Crystele Designer Homes Pty Ltd v Wood* [2023] NSWCATAP 242 at [92]; *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [43];

(2) none of the matters raised by the Builder raise any basis for overturning the exercise of discretion by the Tribunal. None of the matters raised indicated that the Builder may have suffered a substantial miscarriage of justice. Even if the Builder had demonstrated that there may have been a substantial miscarriage of justice, the Appeal Panel should not exercise the discretion under cl 12(1) of Sch 4 of the NCAT Act to grant leave to appeal;

(3) the Builder's submissions misapprehend the Tribunal's reasons, and that the Tribunal's statement at [54] that "[t]he Builder had the opportunity to rectify the water ingress issues but the work he carried out was unsuccessful", was correct and followed from the Tribunal's findings regarding the Appellant's contractual obligations and its failure to perform them properly. It is not correct to say that issue had been rectified, as the Builder seems to assert.

104 The Builder's submissions are inaccurate. Mr Jones' evidence was that he told the Owners Corporation that the Builder would perform "reasonable" rectification work, which indicates some subjective assessment on his part, while also refusing to perform other rectification work.

Consideration

105 We note that included in the appeal papers were the post-hearing written submissions considered by the Tribunal, and a transcript of the Tribunal proceedings. We are satisfied that the s 48MA was raised at the hearing, as the transcript records the Member relevantly stating, in relation to the filing of written submissions:

> We also need to address on 48MA because I think that's still a little bit up in the air, as to what the [Owners Corporation's] position is about it, if that's where we land.

106 In its submissions of 17 April 2023, the Owners Corporation submitted:

> 104 The [Owners Corporation] does not seek a work order pursuant to s 48MA of the HBA because of its previous difficulties in having the [Builder] address rectification works. It also notes that the [Builder] opposed the making of a work order at hearing and the [Owners Corporation] would be reluctant to have the [Builder] carry out the work where it was reluctant to do so.
>
> 105 It is also relevant that the [Builder] declined to admit it was liable under the contract, declined to admit it was liable as a major defect, declined to admit the full scope of repair for each item initially and/or for the full period of dispute and a final contested hearing was required in order to reach an outcome, those issues themselves contributing to a situation where the relationship of the parties has deteriorated and is not conducive to a work order were not sought by the [Owners Corporation] and opposed by the [Builder] at final hearing.

107 In its submissions in response of 12 May 2023, the Builder submitted at [70]:

> Should, despite the above submissions, it be found that the Builder is liable for defective works, the Builder seeks and should be entitled to return to site to remedy any defects. It should be noted that the Builder complied with the OFT rectification order. There is no reason advanced why the preferred outcome should not apply.

108 In its submission in reply of 25 May 2023, the Owners Corporation submitted:

> 46. The owner opposes the making of a work order for the reasons submitted in opening:
>
> a. The builder has expressed reluctance to come back and do the scope of works sought by the owner;
>
> b. The fact that prior issues have had to be taken to New South Wales Fair Trading to be addressed, prior to the commencement of proceedings, and remains not adequately resolved.

109 Section 48MA of the HB Act provides:

> **48MA Rectification of defective work is preferred outcome in proceedings**
>
> A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the "responsible party") is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

110 As the Appeal Panel noted in *Kurmond* at [43], s 48MA is directed towards the remedy or "outcome" to be provided by the court or tribunal where a claimant establishes the responsible party has carried out defective residential building work or specialist work. In this sense, it is not properly described as a "presumption". Rather, it is a remedy to be "preferred" to other forms of order which the Tribunal might make. The section does not mandate a work order

111 The principle embodied in s 48MA is not in issue. What is in issue is whether the Tribunal made an error in respect of a question of law.

112 We have set out above [54] of the Decision.

113 Again, we consider that the reasons meet the minimum acceptable standard of the type described by the Court of Appeal in *Orr*.

Costs

114 The Builder has been unsuccessful. In this matter, by reason of r 38A of the Civil and Administrative Tribunal Rules 2014 (NSW), the costs rule that applied

before the Tribunal is the relevant costs rule. That means that r 38 applies, not s 60 of the NCAT Act.

115 If follows therefore that ordinarily in the exercise of the discretion as to costs, the Owners Corporation would be entitled to its costs of the appeal. Nevertheless, we have made directions as to costs' submissions in the event that the Owners Corporation seeks some special costs order or there are other matters such as Calderbank offers[1] of which we are unaware.

116 We propose to deal with costs on the papers (NCAT Act, s 50(2)) and without a hearing. If either party opposes that course, they should address that issue in their written submissions. In this regard, we note that in Westerweller v The Owners Strata Plan No 18482 [2023] NSWCATAP 113 the Appeal Panel stated at [85] that costs decisions in the Consumer and Commercial Division (unless dealt with at the time of the hearing) are routinely considered "on the papers", and without a hearing.

117 That said, the usual order we would be minded to make is that the Builder pays the Owners Corporation's costs as agreed or as assessed under the applicable costs' legislation.

118 If that parties agree on that order, they should notify the Registry.

Orders

119 The Appeal Panel orders:

(1) To the extent that the appeal raises questions of law, the appeal is dismissed.

(2) To the extent that the appeal raises other errors, leave to appeal is refused.

(3) Any party seeking its costs of the appeal may file and serve its written submissions on that issue only (no more than 5 pages) within 14 days of the date of these orders.

(4) A costs' respondent is to file and serve any written submissions in response to the issue of costs only (no more than 5 pages) within 28 days of the date of these orders.

(5) A costs' applicant may file and serve a written submission (no more than 3 pages) strictly in reply to a costs' applicant's submission within 35 days of the date of these orders.

[1] Calderbank v Calderbank [1976] Fam Law 93; 3 All ER 333; 3 WLR 586

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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