Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Noori Homes Pty Ltd v Patel [2023] NSWCATAP 149**
Hearing dates:	22 May 2023
Date of orders:	06 June 2023
Decision date:	06 June 2023
Jurisdiction:	Appeal Panel
Before:	G Blake AM SC, Senior Member G Burton SC, Senior Member
Decision:	(1) Leave to appeal is refused. (2) The appeal is otherwise dismissed. (3) The appellant is to pay the respondent's costs of the appeal as agreed or assessed under the applicable costs legislation.
Catchwords:	APPEALS — Appeal on question of law – Scope of question of law APPEALS — From exercise of discretion — Acting on the wrong principle APPEALS — From exercise of discretion — Regard to irrelevant considerations APPEALS — Leave to appeal — Principles governing – leave to appeal refused BUILDING AND CONSTRUCTION — *Home Building Act 1989 (NSW)* — Building dispute – where the builder breached statutory warranties – money order made against the builder
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 36, 62, 80, 81, Sch 4, cl 12 Civil and Administrative Tribunal Rules 2014 (NSW), r 25 Home Building Act 1989 (NSW), ss 48MA, 48O Home Building Amendment Act 2014 (NSW)
Cases Cited:	Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419; [2019] NSWCA 61

Bimson, Roads & Maritime Services v Damorange Pty Ltd [2014] NSWSC 734
Brennan Constructions Pty Ltd v Davison [2018] NSWCATAP 210
Collins v Urban [2014] NSWCATAP 17
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55
Galdona v Peacock [2017] NSWCATAP 64
House v The King (1936) 55 CLR 499; [1936] HCA 40
Jain v Dr N Kalokerinos Pty Ltd [2023] NSWCATAP 141
John McDonald Building Services Pty Ltd v Gusa [2022] NSWCATAP 60
Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23
Leung v Alexakis [2018] NSWCATAP 11
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24; [1986] HCA 40
Moody v M K Building Services Group Pty Ltd [2022] NSWCATAP 212
Nationwide Builders Pty Ltd v Le Roy [2019] NSWCATAP 220
New South Wales Land and Housing Corporation v Orr (2019) 100 NSWLR 578; [2019] NSWCA 231
Thomas and Naaz Pty Ltd (ACN 101 491 703) v Chief Commissioner of State Revenue [2022] NSWCATAP 220
Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCA 40

Texts Cited: None cited

Category: Principal judgment

Parties: Noori Homes Pty Ltd (Appellant)
Mithilesh Patel (Respondent)

Representation: Counsel:
P Tiliakos (Appellant)
M Birch, solicitor (Respondent)

Solicitors:
Fortis Law (Appellant)
Birch Partners (Respondent)

File Number(s): 2023/00067068

Publication restriction: Nil

Decision under appeal **Court or tribunal:** Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 01 February 2023

Before:	H Woods, Senior Member
File Number(s):	HB 21/13119; HB 21/17292

REASONS FOR DECISION

Overview

1 This is an internal appeal from the decision of the Consumer and Commercial Division of the Tribunal made on 1 February 2023 in two proceedings under the *Home Building Act 1989* (NSW) (HB Act) concerning a dispute between the respondent, Mithilesh Patel (the owner) who together with his wife Sneha Patel (the owners when referred to together) are the owners of a property at Caddens in New South Wales (the property), and the appellant, Noori Homes Pty Ltd (the builder), which is the builder that carried out building work at the property. The Tribunal relevantly dismissed the claim of the builder and ordered the builder to pay to the owner the sum of $120,088.45 within 28 days.

2 We have decided to refuse leave to appeal, otherwise dismiss the appeal and order the builder to pay the owner's costs of the appeal.

The factual background

3 At all relevant times Abdullah Noori (Mr Noori) was the director of the builder.

4 In January 2019, the owners and Noori Constructions Pty Ltd (which was the previous name of the builder) entered into a contract for the construction of a new home on the property for the price of $342,140.00 including GST.

5 On 20 December 2019, the builder obtained an occupation certificate.

6 The parties fell into dispute about the quality of the work carried by the builder and outstanding amounts said to be owing by the owners.

The two proceedings between the parties in the Tribunal

7 On 22 March 2021, the owner as the applicant commenced proceedings HB 21/13119 against the builder as the respondent by filing an application claiming the amount of $250,000 for breach of statutory warranty in respect of incomplete work, defective work and financial loss.

8 On 20 April 2021, the builder as the applicant commenced proceedings HB 21/17292 against the owners as the respondents by filing a home building application claiming the amount of $30,000 for unpaid work, damages for delay and an order that it did not have to pay the amount of $250,000 to the owners.

9 On 11 November 2021 and 23 May 2022, the Tribunal heard the two proceedings. At the conclusion of the hearing, the Tribunal made procedural orders for written

submissions by the parties and reserved its decision.

10 On 1 February 2023, the Tribunal relevantly made the following order which was corrected on 27 February 2023 (the money order) together with an order dismissing the application in proceedings HB 21/17292 and procedural directions with respect to the costs of the two proceedings, and published reasons for its decision (the Tribunal Decision):

> "(1) In matter HB 21/13119, the respondent, Noori Homes Pty Ltd is to pay the applicant, the sum of $120,088.45 within 28 days."

The Tribunal Decision

11 In the Tribunal Decision, the Tribunal relevantly:

(1) summarised the respective claims of the owner and the builder, and found that the Tribunal had jurisdiction to determine these claims (at [1]-[10]);

(2) set out the issues in the two proceedings (at [11]-[13]);

(3) set out the nature of the documents of the parties comprising evidence, documents defining the facts in agreement and in dispute, and submissions (at [14]-[19]) and noted the builder's Amended Points of Defence was filed following the first day of hearing (at [18]);

(4) made findings as to the contract (at [20]-[26]);

(5) made findings as to the claimed items of defective or incomplete work and the cost of rectification or completion, being 47 items at a total cost of $120,088.45 (at [27]-[104]);

(6) rejected the owner's claim for removal and rental costs and additional inspections (at [105]-[108]);

(7) set out s 48MA of the HB Act, referred to *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 (*Kurmond Homes*) at [31], and dealt with the issue of whether a money order or work order should be made (at [109]-[115]) including summarising the submissions of the parties (at [111]-[112]) and making findings (at [114]-[115]):

> "111 The Homeowner submits that a money order as opposed to a work order should be made because, according to the Homeowner, the Builder has not proven it is ready, willing, and able to comply with its obligations pursuant to the Contract or that it can complete the Contract Works to an acceptable standard and the Homeowner has lost all confidence in the Builder being able to comply with its obligations pursuant to the Contract or the Tribunal's orders.
>
> 112 The Builder submits that a work order ought to be made because it is the preferred outcome, the Builder is ready, willing, and able to remedy any defective work, the Builder has conceded much of the alleged defective work, the Builder is licensed, and the work has otherwise been completed and most of the defects works are relatively minor."
>
> "114 Although the Builder submits that it is ready, willing and able to attend to the rectification work, it has not provided evidence as to how the work, which on the face of the work will involve several different trades, would be attended to so that the Tribunal could be satisfied that that the Builder has the resources to have the work performed and more importantly to ensure the work is supervised and inspected so that the Tribunal can be satisfied that it would be carried out with due care and skill and in a timely fashion.

> 115 Given the large number of defects, even though many are relatively minor, and the lack of evidence as to how the work would be attended, I am not confident that if a work order was made that the work would be carried out with due, care and skill and in a timely fashion. I therefore I decline to make a work order."

(8) rejected the builder's claim for unpaid monies (at [116]-[121]);

(9) rejected the builder's claim for delay damages (at [122]-[128]);

(10) dismissed the builder's application (at [129]-[131]).

The history of the appeal

12 On 28 February 2023, the builder as the appellant commenced proceedings 2023/00067068 against the owner as the respondent by filing a notice of appeal (the notice of appeal) containing the following details:

(1) in section "5 GROUNDS FOR APPEAL:

(a) under the subheading "A ORDERS CHALLENGED ON APPEAL", the money order;

(b) under the subheading "B GROUNDS OF APPEAL":

> "(1) The Tribunal erred in law in finding that the preferred outcome set out in s 48MA of the Home Building Act 1989 (HB Act) should not be applied and that a work order should not be made.
>
> (2) The Tribunal erred in law by making a money order."

(c) under the subheading "C ORDERS SOUGHT":

> "(1) The Appeal is allowed.
>
> (2) The Decision under appeal be quashed and for another decision to be substituted for it (i.e., the preferred outcome set out in s 48MA of the HB Act should be applied and a work order should be made)."

(2) under the heading "6 LEAVE TO APPEAL" showed a cross in the box "Yes" adjacent to the question "Are you asking for leave?" and provided the following explanation under the heading "Decision not fair and equitable":

> "The Decision was not fair and equitable in that the Decision:
>
> (1) failed to weigh competing factors and evidence appropriately in determining whether an order should not be made in accordance with s 48MA of the HB Act [Decision at 111-112];
>
> (2) had regard to irrelevant considerations, namely the Builder's failure to provide evidence as to how the work would be attended to so that the Tribunal could be satisfied that the Builder had resources to have the work performed and to ensure the work was supervised and inspected so that the Tribunal could be satisfied that it would be carried out with due care and skill and in a timely fashion [Decision at 114-115]; and
>
> (3) failed to give appropriate weight to various facts, namely that there was no persuasive reason or evidence from the Homeowner to rebut the presumption in favour of a work order set out in section 48MA of the HB Act."

13 On 10 March 2023, the owner filed a reply to appeal in which he supported the money order for the reasons given by the Tribunal and containing the following details in section "3 REPLY TO GROUNDS FOR APPEAL under the subheading "B REPLY TO APPELLANT'S GROUNDS OF APPEAL":

> "(1) It is not a question of law when the Tribunal determines whether to exercise its discretion whether or not to invoke the preferred outcome set out in s 48MA of the Home Building Act, 1989.
>
> (1)(a) In the alternative to (1), the Tribunal did not err at law in finding that the preferred outcome set out in s 48MA of the Home Building Act, 1989 should not be applied and that work order should not be made.
>
> (2) The Tribunal did not err in law by making a money order."

14 On 15 March 2023, the Appeal Panel constituted by a Principal Member granted the parties leave to be legally represented, made an order staying the money order until the earlier of a further order of the Tribunal or the finalisation of the appeal, and made procedural directions for the hearing of the appeal.

The hearing of the appeal

15 On 22 May 2023, we heard the appeal. The builder was represented by Mr P Tiliakos, a barrister. The owner was represented by Mr M Birch, a solicitor.

16 The parties provided documents comprising part of the record of the hearing before the Tribunal at first instance:

(1) two folders of documents containing:

(a) the joint tender bundle;

(b) the transcript;

(2) some of their submissions.

17 The builder relied on the following documents:

(1) Appellant's Outline of Submissions dated 27 April 2023 (the builder's appeal submissions);

(2) Appellant's Outline of Submissions in Reply dated 18 May 2023 (the builder's appeal submissions in reply).

18 The owner relied on Respondent's Submissions in Reply dated 8 May 2023 (the owner's appeal submissions).

19 Each of the builder and the owner made oral submissions in which they substantially repeated their written submissions.

20 The builder conceded that, if we did not set aside the money order and make a work order in its place, it should pay the owner's costs of the appeal.

21 We informed the parties that we would determine the appeal by way of a new hearing pursuant to s 80(3)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) if we decided that the Tribunal had made a material error. We formed the view that

to proceed by way of a new hearing would be the most appropriate course of action to give effect to the guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings pursuant to s 36(1) and (2)(a) of the NCAT Act.

22 At the conclusion of the hearing, we reserved our decision.

23 At our invitation the owner subsequently provided further documents which completed the record of the hearing before the Tribunal at first instance, being amended points of claim and defence and the remaining submissions of the parties.

The scope and nature of internal appeals

24 Internal appeals may be made as of right on a question of law and otherwise with leave of the Appeal Panel: s 80(2)(b) of the NCAT Act.

25 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Sch 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(1) the decision of the Tribunal under appeal was not fair and equitable (cl 12(1)(a)); or

(2) the decision of the Tribunal under appeal was against the weight of evidence (cl 12(1)(b)); 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) (cl 12(1)(c)).

26 The Appeal Panel may decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances: s 80(3)(a) and (b) of the NCAT Act.

27 The Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including but not limited to an orders that the appeal is to be allowed or dismissed: s 81(1)(a) of the NCAT Act.

28 Rule 25(4)(c) of the Civil and Administrative Tribunal Rules 2014 (NSW) (NCAT Rules) relevantly provides that, in the case of an appeal from a decision of the Tribunal, an internal appeal must be lodged within 28 days from the day on which the appellant was notified of the decision to be appealed or given reasons for the decision.

The issues

29 We are satisfied that the appeal was commenced within the time of 28 days prescribed under r 25(4)(c) of the NCAT Rules.

30 The following issues arise for determination in this appeal or may arise for determination depending on the outcome of anterior issues:

(1) issue 1: whether the notice of appeal raises a question of law;

(2) issue 2: whether the Tribunal made an error of law in making the money order, and if so whether that order should be set aside;

(3) issue 3: whether the builder should be granted leave to appeal against the money order, and if so the appeal should be allowed and that order should be set aside;

(4) issue 4: whether, if the money order is set aside, a money order or a work order should be made in its place;

(5) issue 5: the costs of the appeal.

31 Issue 4 arises only if issue 2 or issue 3 is answered in favour of the builder.

32 Before dealing with these issues, it appropriate to set out the applicable statutory provisions.

The applicable statutory provisions

HB Act

33 Part 3A Division 4 (ss 48K-48MA) contains the provision dealing with the jurisdiction of the Tribunal in relation to building claims. Section 48MA deals with the preferred outcome in proceedings, and 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.

34 Part 3A Division 5 (ss 48N-48U) contains provisions dealing with the powers of the Tribunal in relation to building claims. Section 48O deals with the orders which the Tribunal may make, and relevantly provides:

> **48O Powers of Tribunal**
>
> (1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate—
>
> (a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
>
> …
>
> (c) an order that a party to the proceedings—
>
> (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or
>
> …

NCAT Act

35 Part 5 Division 5 (ss 56-63) contains provisions dealing with the determination of issues and proceedings in the Tribunal. Section 62 deals with the requirement for the Tribunal to give notice of any decision and provide written reasons on request, and relevantly provides:

> **62 Tribunal to give notice of decision and provide written reasons on request**
>
> …
>
> (2) Any party may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not already been provided to the party. The statement must be provided within 28 days after the request is made.
>
> (3) A written statement of reasons for the purposes of this section must set out the following—
>
> > (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,
> >
> > (c) the reasoning processes that lead the Tribunal to the conclusions it made.
> >
> > …

Issue 1: whether the notice of appeal raises a question of law

Introduction

36 In the builder's appeal submissions, the builder relevantly contended the grounds of appeal in the notice of appeal raise a question of law and made the following submissions in section 5 entitled "Work Order rather than Money Order":

> "G. With this said, the Tribunal was then to consider whether to make a work order in the circumstances.
>
> The relevant principles that ought to have been applied by the Tribunal for this deliberation include:
>
> > i. The assessment about whether the preferred outcome should be ordered is an objective one.
> >
> > ii. The question of appropriateness of a work order turns on the facts of each case.
> >
> > iii. The Tribunal is obliged to consider the operation of s 48MA in determining a building claim involving an allegation of defective residential building work, but section 48MA does not make the preferred outcome mandatory.
> >
> > iv. A failure to acknowledge that works have been defective is a consideration in making a work order.
> >
> > v. Other relevant factors include the effectiveness of the defects and whether the relationship between the parties has broken down.
> >
> > vi. The making of a rectification order need not be an all or nothing proposition and it may be appropriate to make a money order in relation to some portion of the defective works the subject of the claim.

> H. The Builder submits that the Learned Member failed to adequately apply in part or in whole a number of the afore noted principles during the course of deliberations on this point." (footnotes omitted)

37 In the owner's appeal submissions, the owner contended that the grounds of appeal in the notice of appeal do not raise a question of law.

38 In the builder's appeal submissions in reply, the builder rejected the owner's submission that the grounds of appeal are not based upon a question of law. It contended that the Tribunal 's failure adequately to apply in part or in whole the principles outlined in the builder's appeal submissions at [5G] is clearly an error of law.

39 At the commencement of the hearing, we referred to the necessity to identify a question of law in a notice of appeal as explained in recent authority: *Thomas and Naaz Pty Ltd (ACN 101 491 703) v Chief Commissioner of State Revenue* [2022] NSWCATAP 220 at [58]-[59]; *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 (Thomas and Naaz CA) at [26] (Leeming JA) (with Meagher JA at [1] and Griffiths AJA at [75] agreeing).

40 The builder in response said he had nothing further to submit in additional to his appeal submissions, and did not seek to reframe the grounds of appeal in the notice of appeal as questions of law.

41 The owner submitted that the exercise of the discretion under s 48O of the HB Act does not raise a question of law.

42 We raised, as a possible question of law, whether an owner who seeks a money order under s 48O(1)(a) of the HB Act rather than a work order under s 48O(1)(c)(i) of the HB Act has an evidentiary onus to adduce some evidence that a work order should not be made.

43 The builder indicated that it also sought to rely on this question as a question of law.

Consideration

44 There is no decision of the Supreme Court of New South Wales which has addressed the scope of a question of law under s 80(2)(b) of the NCAT Act.

45 Recently the Appeal Panel has decided that a conclusion of mixed fact and law cannot be challenged on an appeal on a question of law under s 80(2)(b) of the NCAT Act except in the circumstances where it can be determined that the conclusion proceeded from a misdirection of law: *Jain v Dr N Kalokerinos Pty Ltd* [2023] NSWCATAP 141 at [91]. The Appeal Panel referred with approval to *Bimson, Roads & Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 (*Bimson*) at [38]-[53] where Beech-Jones J relevantly stated:

> "[38] In any event, the subject matter of the appeal is a question of law and a question of law alone (*Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [33] per French CJ) ("*Kostas*"). The plurality judgment in *Kostas* at [88] suggests that caution should be exercised in attempting to chart the outer boundaries of such a jurisdiction divorced from the circumstance of the particular case. Their Honours also stated that it is not useful to undertake an analysis which compares and contrasts the formulation in s 56(1) with other phrases such as "appeals on a question of law" or appeals "with respect to a question of law" (cf *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 at [83] ff per Basten JA).

[39] Bearing those observations in mind, three related propositions should be noted. The first is that an appeal on a ground that involves a question of law alone does not include a mixed question of fact and law (see *R v PL* [2009] NSWCCA 256 at [25] per Spigelman J ("*PL (No 1)*"). This distinction between a question of law alone and a mixed question of law and fact can often be difficult to identify, much less maintain.

[40] This leads to the second proposition, namely that, ultimately it is incumbent on the parties contending that a question of law was decided erroneously, to identify the question and to do so in abstract terms. Thus in *Williams v R* [1986] HCA 88; 161 CLR 278 at 287 ("*Williams*"), Gibbs CJ stated:

> "... there is 'a question of law alone' if the question of law can be stated and considered separately from the facts which it may be connected in a given case." (see also 314 per Wilson and Dawson JJ.)

[41] If that task is undertaken, then the consequential questions that will arise are whether the lower court or tribunal either answered that question or proceeded on an assumption concerning that answer, whether its answer or assumption was correct or incorrect, and whether that answer or assumption was material to the outcome, in the sense that it could have affected the outcome (see *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 per Mason CJ; Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013, at [4.270])).

…

[46] The third and related proposition is that to identify an "error" on the part of the Local Court in the exercise of its discretion in sentencing in terms that amount to an error of the kind identified in *House v R* [1936] HCA 40; 55 CLR 499 at 504 ("*House*"), does not of itself answer the question posed by s 56(1) of the Review Act as to whether that court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong.

…

[48] Clearly some of the errors in the exercise of a discretion identified in this passage are capable also of being agitated on appeal restricted to a question of law alone. Thus, if it was apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome.

[49] The position is less straightforward if it is only demonstrated that the lower court failed to take into account some material consideration, or allowed extraneous or irrelevant material to guide it. In such a case the reviewing court would have to consider whether it could be inferred from that circumstance that the lower court acted on an incorrect principle by a process similar to that undertaken by Bathurst CJ in *PL (No 2)*.

[50] The other form of error identified in the passage from *House*, namely, that based upon the facts a decision is "unreasonable or plainly unjust", …

…

[53] Consistent with *House*, a conclusion that the exercise of judicial discretion was unreasonable or plainly unjust, may enable the appellate court to infer that there was error, but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. …"

46 Having regard to the principles in *Bimson* at [38]-[53], we are not satisfied that the grounds of appeal in the notice of appeal raise a question of law as a matter of form or substance. While we accept that acting on a "wrong principle" in the exercise of a statutory discretion will give rise to a question of law, the builder did not identify the

wrong principle which it contends that the Tribunal applied in making the money order. It follows that the builder does not have a right of appeal in respect of these grounds of appeal.

47 We are satisfied that the question we identified does raise a question of law. It follows that the builder has a right of appeal on this question.

48 If we are later found to be in error in finding that the grounds of appeal in the notice of appeal do not raise a question of law and the builder does not have a right of appeal in respect of these grounds of appeal, then we would have dismissed the appeal for the same reasons as we have refused leave to appeal against the money order.

Issue 2: whether the Tribunal made an error of law in making the money order, and if so whether that order should be set aside

49 We are not aware of any decision that has considered whether an owner who seeks a money order under s 48O(1)(a) of the HB Act rather than a work order s 48O(1)(c)(i) of the HB Act has an evidentiary onus to adduce some evidence that a work order should not be made.

50 The process of statutory interpretation must start and end with a consideration of the text of the statute. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

51 In *Kurmond Homes* at [31(3)] the Appeal Panel referred by way of extrinsic material to the Second Reading Speech for the *Home Building Amendment Act 2014* (NSW) (by which s 48MA of the HB Act was enacted) in which the Minister for Fair Trading said on 6 May 2014:

> "(1) A homeowner should not be permitted to unreasonably refuse a builder access to a building site to rectify defective work;
>
> (2) s 48MA was intended to ensure that, at least, "builders" who were liable to a person for defective work, should be able to return to carry out necessary rectification work if they are willing; and
>
> (3) the amendments were to "further support the timely and cost-effective resolution of disputes".

52 It is well established that the requirement under s 48MA of the HB Act for the Tribunal to have regard to the "principle" that a work order is the "preferred outcome" creates a mandatory relevant consideration in exercising its discretion whether to make a money order under s 48O(1)(a) of the HB Act rather than a work order s 48O(1)(c)(i) of the HB Act: *Galdona v Peacock* [2017] NSWCATAP 64 at [50], [65]; *Leung v Alexakis* [2018]

NSWCATAP 11 (*Leung*) at [139]; *John McDonald Building Services Pty Ltd v Gusa* [2022] NSWCATAP 60 at [69]; *Moody v M K Building Services Group Pty Ltd* [2022] NSWCATAP 212 at [48]-[49].

53 We are satisfied that on the proper construction of s 48MA of the HB Act an owner who seeks a money order under s 48O(1)(a) of the HB Act does not have any evidentiary onus. The meaning of s 48MA of the HB Act is plain and there is no need to resort to extrinsic material to ascertain its meaning. The obligation of a court or the Tribunal is "to have regard" to the principle that rectification of the defective work by the responsible party is the preferred outcome. The decision of the court or the Tribunal to make a money order under s 48O(1)(a) of the HB Act rather than a work order under s 48O(1)(c)(i) of the HB Act does not depend on the adducing of evidence by the owner. The absence of any presumption in favour of a work order as discussed in [81] below reinforces this conclusion.

54 We are not satisfied that the Tribunal proceeded on the incorrect assumption that an owner who seeks a money order under s 48O(1)(a) of the HB Act rather than a work order s 48O(1)(c)(i) of the HB Act has an evidentiary onus to adduce some evidence that a work order should not be made.

55 It follows that the Tribunal did not make an error of law and the appeal ground is not made out.

Issue 3: whether the builder should be granted leave to appeal against the money order, and if so the appeal should be allowed and that order should be set aside

Introduction

56 Before dealing with this issue, it is necessary to set out the applicable legal principles and summarise the evidence and submissions of the parties.

The applicable legal principles

Leave to appeal under s 80(2)(b) of the NCAT Act

57 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 of the NCAT Act may have been suffered where:

> "… there was a *"significant possibility"* or a *"chance which was fairly open"* that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance." (emphasis in original)

58 In *Collins*, the Appeal Panel at [77], without seeking to be exhaustive in any way, stated the authorities establish that:

(1) if there has been a denial of procedural fairness the decision under appeal can be said to have been "not fair and equitable" within cl 12(1)(a) of Sch 4 of the NCAT Act;

(2) the decision under appeal can be said to be "against the weight of evidence" within cl 12(1)(b) of Sch 4 of the NCAT Act where the evidence in its totality preponderates so strongly against the conclusion found by the Tribunal at first instance that it can be said that the conclusion was not one that a reasonable Tribunal member could reach.

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

60 In *Collins*, the Appeal Panel at [84] summarised the general principles which govern the granting of leave to appeal:

> "[84] The general principles derived from these cases can be summarised as follows:
>
> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
>
> (2) 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,
>
> *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [20] and the authorities cited there, *SAB v SEM* [2013] NSWSC 253 at [8] and [9] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
>
> (3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21] and the authorities cited there."

Section 48MA of the HB Act

61 In *Leung* at [140] the Appeal Panel made the following observation as to the nature of the obligation imposed on a court or the Tribunal by s 48MA of the HB Act:

> "[140] Being expressed as a "preferred outcome", it operates in the manner of a presumption. That is, unless the facts of the particular case make it inappropriate to order rectification of the defective work by the responsible party, an order should be made in terms that give effect to the principle."

62 In *Kurmond Homes* at [42]-[46] the Appeal Panel gave the following explanation as to the nature of the obligation imposed on a court or the Tribunal by s 48MA of the HB Act:

> "[42] First, the principle, by its terms, only applies "in determining a building claim involving an allegation of defective residential building work or specialist work". It is not expressed to apply where, for example, the building claim only involves an allegation of incomplete residential building work or specialist work. That is not to suggest s 48O does not otherwise permit a work order in respect of work found to be incomplete
>
> [43] Second, 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 court or tribunal might make.
>
> [44] Third, while s 48MA provides the court or tribunal "is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome", the section does not mandate that a work order must be made in all cases. Further, the section does not confine the form of orders that may be made under s 48O, including an order that defective work be rectified by the responsible party engaging another person to carry out that work on behalf of the responsible party.
>
> [45] Fourth, the term "preferred" is not defined. The HB Act and Regulations do not specify circumstances in which the preferred outcome is not to be adopted. However, guidance as to the meaning of "preferred" and the circumstances that would justify an order for a different outcome is found in the second reading speech where the Minister for Fair Trading makes clear that the purpose of the amendment was to:
>
> > (1) prevent a homeowner from unreasonably refusing a builder access to a building site to rectify defective work;
> >
> > (2) permit a builder to return to carry out necessary rectification work if they are willing; and
> >
> > (3) support the timely and cost-effective resolution of disputes.
>
> [46] That is, in deciding what order should be made, a court or tribunal may consider whether there is a reasonable basis for any objection raised by the homeowner to the builder being permitted to rectify the defective work, the terms of any order, whether the builder is willing to return and whether such an order would support a timely and cost effective resolution of the dispute."

63 In *Brennan Constructions Pty Ltd v Davison* [2018] NSWCATAP 210 (*Brennan*) at [16]-[21] the Appeal Panel cited *Kurmond Homes* at [42]-[46] with approval.

64 In *Nationwide Builders Pty Ltd v Le Roy* [2019] NSWCATAP 220 (*Nationwide Builders*) the Appeal Panel found that the Tribunal had not made an error of law because it had not considered or applied s 48MA of the HB Act. The Appeal Panel at [20]-[21] dealt with some specific challenges to the decision under appeal under this ground of appeal:

> "[20] The Appellant also made some specific challenges to the Decision under this ground of appeal. First, the Appellant challenged the statement at [21] of the Decision that there is: *"no evidence that the Respondent has expressed its preparedness to undertake identified defective work in the report by Mr Capaldi dated 12 November 2018"*. It was submitted that the Senior Member erred in making this statement because, firstly, *"the builder was licensed and able to perform the work at the time of the determination"*.

> [21] In our view, there was no error on the part of the Senior Member because even if the Appellant was *"able"* to perform the work, it was correct to say that the Appellant had not given any evidence of its *"preparedness"* to undertake the work as identified by the Senior Member and this was a relevant consideration."

An appeal in relation to the miscarriage of the exercise of a statutory discretion

65 In *House v The King* (1936) 55 CLR 499 (*House*) at 504-505; [1936] HCA 40 Dixon, Evatt and McTiernan JJ stated:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

66 In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40; [1986] HCA 40 (*Peko-Wallsend*) Mason J explained the ground of failing to take into account a relevant consideration (Gibbs CJ at 30 and Dawson J at 71 agreeing):

> "The ground of failure to take into account a relevant consideration can only be made out if a decision·maker fails to take into account a consideration which he is bound to take into account in making that decision … What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act."

67 In *Peko-Wallsend* at 40 Mason J explained the ground of taking into account irrelevant considerations (Gibbs CJ at 30 and Dawson J at 71 agreeing):

> "In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ..."

68 It is fundamental that deference is to be given by an appellate court to the discretionary decisions of judges at first instance, insofar as it is insufficient for the appellant merely to persuade the appellate court that it would have decided the matter differently: *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61 (*AHNA*) at [13], [18]-[19] (Bathurst CJ and Leeming JA).

The adequacy of reasons

69 In *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 two members of the New South Wales Court of Appeal raised but did not decide the question of whether there is any duty, whether statutory or otherwise,

for the Tribunal to give reasons for a decision in the absence of a request from a party under s 62(2) of the NCAT Act: Bell P at [54], Ward JA at [110]-[114]. Bell P at [55] (with Ward JA at [109] agreeing) observed that it is not unreasonable to suppose that s 62(3) of the NCAT Act supplies important guidance as to what should be set out by the Tribunal in reasons which it chooses to give even without a request for reasons pursuant to s 62(2) of the NCAT Act.

The evidence of the parties

The evidence of the owner

70 The owner in his statement dated 30 September 2021:

(1) gave evidence as to why a money order rather than a work order should be made including that his wife and himself had lost all confidence in the builder being able to comply with its obligations pursuant to any work orders (at [21]);

(2) attached email correspondence between himself and the builder between 2 December 2019 and 19 April 2021 with respect to complaints by the owner about incomplete work and defective work which included a denial by the builder that alleged defective work was part of the contract (exhibit MP-1, at 128-150).

71 In cross-examination, the owner agreed that he contacted the builder about his complaints, but said he was not confident about the builder answering those questions (Tcpt, 23 May 2022, p 62).

The evidence of the builder

72 Mr Noori in his statement dated 20 April 2021 stated that there was no defective work and in the alternative, the builder has always been ready, willing, and able to remedy any defective work (at [4.A.ii.], [4.A.iv.].

73 In cross-examination, Mr Noori said that it was safe for the builder to rectify defects with people living in the house (Tcpt, 23 May 2022, p 100).

The submissions of the parties

The builder's appeal submissions

74 In the builder's appeal submissions, the builder made the following submissions:

(1) leave ought to be granted because the Tribunal Decision was not at the very least fair and equitable for the following reasons:

> "i. The Learned Member failed to apply in part or in whole a number of the principles relevant to the determination of whether a work order ought to be made.
>
> ii. The Learned Member failed to weigh competing factors and evidence appropriately in determining whether an order should not be made in accordance with the principles on HBA Section 48MA.
>
> iii. The Learned Member had regard to irrelevant considerations, namely the Builder's alleged failure to provide evidence as to how the rectification work would be attended to so that the Tribunal could be satisfied that the Builder had

resources to complete the same with due care and skill and in a timely fashion.

lv. The Learned Member failed to give appropriate weight to various facts, namely that there was no persuasive reason or evidence from the Owners to rebut the presumption in favour of a work order set out in HBA Section 48MA.

v. The Learned Member failed to provide adequate reasons with respect to the basis upon which the preferred outcome was refused." (footnotes omitted)

(2) the Tribunal, against the weight of evidence and inappropriately, relied on certain 'other relevant factors' to ultimately conclude that the preferred outcome was unfit in the circumstances. For instance, the Tribunal determined that the builder was not ready, willing and able to attend to the rectification work simply and only because the builder had not proved how the work would be attended to with due care and skill and in a timely fashion. The manner of reaching this conclusion (not to mention the conclusion in its substance) was flawed because:

(a) the lay evidence adduced on the builder's readiness, willingness and ability to attend to the rectification work suggested otherwise and was not considered on this point;

(b) the builder was not required to prove how it would attend to the rectification work in any more detail than what it submitted in lay and expert evidence. It evidenced both before and during the final hearing that it was ready, willing and able to attend to the rectification work including as agreed by the experts;

(3) the Tribunal failed to consider certain 'other relevant factors' that would have weighed in favour of making a work order in the circumstances. Amongst other things, these included:

(a) ample evidence that it had completed significant parts of the building works to an acceptable standard to the extent that the owners could reside in and operate a day care centre from the property;

(b) no evidence to suggest that it would not be able to replicate the acceptable standard of workmanship in rectifying the defective building work;

(c) the defects were limited in number and of minor nature;

(d) the defects arose from building works that the builder was licensed and originally contracted by the owners to complete;

(e) the owners had failed to serve any objective evidence of any defective or incomplete works until less than two months prior to the final hearing;

(f) the owners did not make a formal claim under the relevant contract for defective residential building work during the defect's liability period;

(4) the Tribunal failed to take into consideration how the relationship between the parties had not in fact broken down. The owners had never alleged there to be any animosity between the parties nor did they attempt to terminate the relevant

contract;

(5) the Tribunal applied an all or nothing approach when making a money order rather than allowing it to rectify at the very least the ‘relatively minor’ ones.

The owner’s appeal submissions

75 In the owner’s appeal submissions, the owner submitted that there has been no substantial miscarriage of justice and made the following submissions:

(1) the builder in its Amended Points of Defence dated 14 December 2021 at [15] did not admit it carried out defective works and stated that certain unidentified alleged defective items were not part of the relevant contract and not defective in nature;

(2) the Tribunal found that there were 47 defects including defects which the builder never conceded;

(3) there was no evidence put before the Tribunal by the builder which would suggest that the cost of the builder carrying out the work itself was substantially less than the amount which was awarded, or that the builder could more quickly remedy the defective works than would occur if the owners engaged an independent contractor to do so;

(4) contrary to the builder’s submission, the Tribunal did not find that it was not ready, willing and able to attend to the rectification work;

(5) there was evidence that the builder was, at all times, deflecting and/or denying the owners’ complaints;

(6) the Tribunal was not required to take into account whether the relationship between the builder and the owners had broken down. This at its highest could have only been one of the factors to have been taken into account by the Tribunal;

(7) there was no error within the criteria in *House* at 504-505;

(8) there was no basis at law requiring the Tribunal to make a part work order and a part money order, although it could have done so.

The builder’s appeal submissions in reply

76 In the builder’s appeal submissions in reply, the builder in addition to rejecting the owner’s submissions submitted that the errors made by the Tribunal within the criteria in *House* at 504-505 included acting upon a wrong principle, allowing irrelevant matters to guide or affect it and not taking into account material considerations.

Consideration

Introduction

77 We have considered below each of the reasons of the builder for contending that leave to appeal against the money order should be granted.

Whether the Tribunal acted upon a wrong principle

78 We are not satisfied that the Tribunal acted upon a wrong principle. The builder made the general submission that the Tribunal failed to apply in part or in whole a number of the principles relevant to the determination of whether a work order ought to be made. However, the builder did not identify the “wrong principle" upon which the Tribunal acted, and then explain how that materially affected the outcome. We do not accept that it is appropriate to equate factors that have been operative in decisions with respect to the application of s 48MA of the HB Act with a principle to be applied in the exercise of the discretion to grant relief under s 48O of the HB Act.

Whether the Tribunal failed to weigh competing factors and evidence appropriately, and failed to give appropriate weight to various facts

79 We do not accept that any failure by the Tribunal to weigh competing factors and evidence appropriately and to give appropriate weight to various facts will constitute an error in the exercise of its discretion in determining to make a money order rather than a work order within the criteria in *House* at 504-505.

80 Further, we are not satisfied that the decision of the Tribunal to make a money order was against the weight of evidence within cl 12(1)(b) of Sch 4 of the NCAT Act as explained in *Collins* at [77]. In the light of the evidence of the owner set out above, we do not accept that the evidence in its totality preponderates so strongly against the conclusion found by the Tribunal that it can be said that the conclusion was not one that a reasonable Tribunal member could reach.

81 We do not accept the submission of the builder that there is a presumption in favour of a work order pursuant to s 48MA of the HB Act which the owner is required to rebut before a money order can be made under s 48O(1)(a) of the HB Act. The submission is contrary to *Kurmond Homes* at [43] and *Brennan* at [17]. We do not accept that the Appeal Panel in *Leung* at [140] was correct in its observation that s 48MA of the HB Act operates in the manner of a presumption.

Whether the Tribunal had regard to irrelevant considerations

82 Having regard to the principles in *Peko-Wallsend* at 40, we are satisfied that the factors to which the Tribunal can have regard in considering a money order under s 48O(1)(a) of the HB Act rather than a work order under s 48O(1)(c)(i) of the HB Act are unconfined. We do not accept that, by reason of the subject-matter, scope and purpose of the HB Act, there is an implied limitation preventing regard to a failure of the responsible party to provide evidence as to how the rectification work would be

attended to so that the Tribunal could be satisfied that the party has resources to complete the work with due care and skill and in a timely fashion. This is consistent with the approach in *Nationwide Builders* at [20]-[21] where the Appeal Panel rejected the submission that the Tribunal erred in taking into account the absence of evidence of preparedness of the responsible party to undertake the rectification work. We are not satisfied that the Tribunal erred in having regard to the builder's failure to provide evidence of how the rectification work would be attended to if a work order was made.

Whether the Tribunal failed to take into account material considerations

83 Having regard to the principles in *Peko-Wallsend* at 39-40, we are not satisfied that upon the proper construction of s 48O of the HB Act there are any mandatory considerations that are to be taken into account when the Tribunal exercises its discretion whether to make a work order or a money order other than the principle that rectification of the defective work by the responsible party is the preferred outcome as required by s 48MA of the HB Act.

84 We are satisfied that the Tribunal took this consideration into account in deciding to make the money order.

Whether the Tribunal failed to provide adequate reasons

85 We do not accept the submission of the builder that the Tribunal failed to provide adequate reasons with respect to the basis upon which the preferred outcome specified in s 48MA of the HB Act was refused. The Tribunal Decision at [109]-[115] adequately satisfied the guidance for written reasons specified in s 62(3) of the NCAT Act.

Conclusion

86 We have approached this issue having regard to the fundamental principle of deference being given by an appellate court to the discretionary decisions of judges at first instance as explained in *AHNA* at [13], [18]-[19] as applied to the Tribunal. Since none of the criteria in cl 12(1) of Sch 4 of the NCAT Act has been satisfied, we are not satisfied that the builder may have suffered a substantial miscarriage of justice. It follows that leave to appeal against the money order should be refused.

87 Even if we had been satisfied that the builder may have suffered a substantial miscarriage of justice, then having regard to the matters in *Collins* at [84(2)], we would not have exercised the discretion under cl 12(1) of Sch 4 of the NCAT Act to grant leave to appeal against the money order.

Issue 4: whether, if the money order is set aside, a money order or a work order should be made in its place

88 In view of our decision on issues 2 and 3, this issue does not arise for determination.

Issue 5: the costs of the appeal

89 In view of the concession of the builder which we consider was properly made, the builder should pay the owner's costs of the appeal.

Orders

90 We make the following orders:

(1) leave to appeal is refused;

(2) the appeal is otherwise dismissed;

(3) the appellant is to pay the respondent's costs of the appeal as agreed or assessed under the applicable costs legislation.

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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

Decision last updated: 06 June 2023