

AUSTRALIA / JUDGMENT

Ahmed v Phase Projects Pty Ltd

[2026] NSWCATAP 303**COURT**

Civil and Administrative Tribunal

DECIDED

25 September 2026

BEFOREI R Coleman SC ADCJ, Principal Member
J McAteer, Senior Member**CASE / FILE NUMBER**

2026/00278694

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Ahmed v Phase Projects Pty Ltd [2026] NSWCATAP 303**Hearing dates:** 13 August 2026**Date of orders:** 25 September 2026**Decision date:** 25 September 2026**Jurisdiction:** Appeal Panel**Before:** I R Coleman SC ADCJ, Principal Member
J McAteer, Senior Member

Decision:

- (1) The notice of appeal lodged on 9 March 2026 is dismissed.
- (2) Leave to appeal is refused.
- (3) A party seeking an order for the costs of the appeal is to lodge and serve written submissions not exceeding 10 pages in length inclusive of attachments in support of such application within 28 days of these orders.
- (4) A party opposing an application for costs is to lodge and serve written submissions not exceeding 10 pages in length inclusive of attachments in support of such opposition within 42 days of these orders.
- (5) A party seeking an order for costs is to lodge and serve written submissions not exceeding 5 pages in length inclusive of attachments in response to any submissions lodged pursuant to order 4 within 56 days of these orders.

Catchwords: APPEALS – leave to appeal – contract – damages arising from breach – breach of preliminary agreement – weight of evidence – fair and equitable principles – causation and quantum

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Fair Trading Act 1987 (NSW)
Residential Tenancies Act 2010 (NSW)

Cases Cited:	Ahmed v Phase Projects Pty Ltd [2024] NSWCATAP 92 Ahmed v Phase Projects Pty Ltd (No. 2) [2024] NSWCATAP 165 Collins v Urban [2014] NSWCATAP 17 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 Edwards v Noble (1971) 125 CLR 296; [1971] HCA 54 Ferella v Chief Commissioner of State Revenue [2014] NSWCA 378 Frediani v Hall t/as Happy Camper Conversions [2024] NSWCATAP 134 Hadley v Baxendale (1854) 156 ER 145; [1854] 9 Ex 341 Haritos v Commissioner of Taxation [2015] FCAFC 92 Jamaican Coffee Kitchen Pty Ltd t/as Dushan & Shelby Trust v M20 Pty Ltd [2022] NSWCATAP 203 Kudrynski v Orange City Council [2024] NSWCA 33 March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12 Nguyen v Cosmopolitan Homes [2008] NSWCA 248 Pollock v New South Wales Trustee and Guardian [2022] NSWSC 923 Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33 Robinson v Harman [1848] 1 Ex 850 Ros v Commissioner of Police [2020] NSWCATAP 70 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Sabouni v Revelop Building and Developments Pty Ltd [2021] NSWSC 31 Schwartz v Health Care Complaints Commission [2025] NSWCA 162 Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54 Sunshine Loans Pty Ltd v Australian Securities and Investments Commission [2026] HCA 8 Thomas & Naaz Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCA 40 Unique Commercial Property Group Limited v Cusumano [2024] NSWCATAP 204 Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31
Category:	Principal judgment
Parties:	Farah Ahmed (Appellant) Phase Projects Pty Limited (Respondent)
Representation:	
Solicitors:	Appellant (self-represented) Chatswood Law Pty Limited (Respondent)
File Number(s):	2026/00278694
Publication restriction:	Nil Decision under appeal
Court or tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	10 February 2026
Before:	S de Jersey, Principal Member
File Number(s):	2023/00401454

REASONS FOR DECISION

By Notice of Appeal lodged on 9 March 2026 Farah Ahmed (Appellant) appealed against orders made by the Consumer and Commercial Division of the Tribunal on 10 February 2026 in proceedings between the Appellant and Phase Projects Pty Limited (Respondent). Although not formally seeking such leave, the Appellant's notice of appeal pleaded grounds on which leave to appeal against the Tribunal's decision could be sought.

By Reply lodged on 26 March 2026 the Respondent sought that the appeal and application for leave to appeal be dismissed.

The proceedings before the Tribunal arose out of a contract (Preliminary Agreement) between the Appellant and the Respondent for the provision of architectural services. The proceedings have a lengthy and complex history.

In her Notice of Appeal, the Appellant articulated six grounds of appeal. In her written submissions in reply of 31 July 2026 the Appellant sought to agitate a further ground, identified as ground eight. Although the Respondent disputed that ground eight had merit, it did not oppose the Appellant having leave to rely upon it. Leave was granted to the Appellant to agitate ground 8.

The Appellant's grounds which are capable of supporting an application for leave to appeal assert that the decision of the Tribunal at first instance was not fair and equitable and was against the weight of evidence.

Material before the Appeal Panel

In addition to the Appellant's Notice of Appeal, and the Respondent's Reply, each of which contained brief submissions, the Appellant lodged written submissions on 22 May 2026. The Respondent lodged written submissions in reply on 6 July 2026. On 31 July the Appellant lodged written submissions in response to the Respondent's submissions in reply.

In addition to the reasons for the Tribunal of 10 February 2026, it has been necessary for the Tribunal to consider the reasons for the decision of the Appeal Panel of 28 May 2024 in *Ahmed v Phase Projects Pty Ltd* [2024] NSWCATAP 92, allowing the Appellant's appeal against some of the orders made by the Tribunal on 2 January 2024 (original substantive decision), and ordering that some of her originating application be remitted for re-hearing.

The Appellant lodged a number of volumes of documents which were before the Tribunal in the proceedings which resulted in the present appeal, and documents which were considered by the Tribunal in the original substantive decision of 2 January 2024.

On 10 February 2026, the Tribunal at first instance awarded the Appellant the sum of \$2,000 in respect of a number of claims which in total amounted to \$100,000. In lieu of the order made by the Tribunal at first instance, the Appellant seeks that she be awarded \$7,865 for engineering costs, \$31,690 by way of refund of monies paid by her to the Respondent, mortgage/rent costs of

\$85,971.78 or \$56,120 and CAD file/copyright licence, and architectural costs of \$21,120. As is apparent, even on the lower sum sought with respect to mortgage/rent costs, the sum sought by the Appellant exceeds the jurisdictional limit of the Tribunal. The Appellant accepts that, if successful, that is the maximum sum which she could be awarded by the Appeal Panel.

Background

The history and complexity of the proceedings between the parties is helpfully informed by referring to the decision of the Appeal Panel of 28 May 2024 which resulted in the redetermination of the proceedings on 10 February 2026. After setting aside the decision at first instance of 2 January 2024, the Appeal Panel ordered that the Appellant's application be "remitted for rehearing limited to consideration of whether the Appellant should have any of the orders sought and identified in [8(i)-(v)] inclusive of the decision". The findings made in the original substantive decision that the Respondent had breached its obligations under the preliminary agreement between the parties was not disturbed by the Appeal Panel.

The Appeal Panel identified at [62] the matters referred to in order 3 as the issues which were remitted for redetermination:

"Whether the Appellant was entitled to:

- (i) a refund of all monies paid under the Preliminary Agreement;
- (ii) the cost of an engineer's invoice;
- (iii) mortgage costs which were continuing;
- (iv) copyright for architectural drawings;
- (v) release of the CAD file of architectural drawings."

The Appeal Panel found at [61] that the Respondent had not performed the "entirety of its obligations under the Preliminary Agreement" and had repudiated its "remaining obligations under that agreement". The Appellant was thus "entitled to damages that flow from the breach". The Tribunal being unable to assess those damages, the matters referred to above were remitted for redetermination. Although the Appellant submits that it did so erroneously, it is not disputed that the Tribunal at first instance determined each of those matters by its decision of 10 February 2022.

The reasons for the decision of 10 February 2026

The Tribunal recorded by way of background at [12] a number of "mostly uncontested" facts:

"(1) in September 2021 the [Appellant] and her husband purchased a residential property at Mascot NSW (Property) for the purpose of demolishing the house and building a new home;

- (2) the property was vacant on purchase and promptly after purchase the [Appellant] engaged a real estate agent to manage it;

- (3) the agent rented the property to tenants under a residential tenancy agreement which commenced on or about 15 November 2021 and lasted until terminated by the [Appellant] on or about 12 December 2023; the fortnightly rent was \$1,400 and subsequently increased to \$1,600 per fortnight;
- (4) at the time of purchase of the property, the [Appellant] and her family were living in Banksia NSW which they moved out of and into a rental property at Alexandria, NSW for the period from October 2021 to March 2022;
- (5) the [Appellant] and her family then moved to another rental property in Rosebery NSW and finally to a rental property in Zetland NSW, where they were still living by the time of the hearing on 12 November 2025;
- (6) by the time of the hearing on 12 November 2025 the [Appellant] and her family had never lived at the property;
- (7) after purchase of the property, the [Appellant] engaged the Respondent to assist with the design and development approval processes for building a new home;
- (8) the parties entered into a contract titled Preliminary Agreement dated 13 October 2021 (Preliminary Agreement);
- (9) the purpose of the Preliminary Agreement was for the design and approval stages; it was not a building contract;
- (10) the contract price under the Preliminary Agreement was \$28,820;
- (11) disputes ensued between the parties under the Preliminary Agreement which resulted in the commencement of two sets of proceedings;
 - (a) 2023/401454 commenced by Ms Ahmed against Phase Projects;
 - (b) 2023/394894 commenced by Phase Projects against Ms Ahmed;
- (12) the Preliminary Agreement was terminated on or about 21 February 2023 when the Respondent sent an email to the [Appellant] repudiating the Preliminary Agreement (as found by the Appeal Panel at 56);
- (13) the [Appellant] gave oral evidence that:
 - (a) she instructed the real estate agent managing the property to issue a notice of termination of the tenancy in about October 2023;
 - (b) the reason for the notice of termination was that the tenant had a large number of cats and the house smelt of cat urine;
 - (c) the [Appellant] wanted to terminate the tenancy due to the issue with the cats, install new carpets and re-let the property;

- (d) pursuant to the notice of termination the tenant vacated the property on or about 12 December 2023;
- (e) as the [Appellant] had entered into a building contract for construction of the new home on 13 November 2023 and the commencement date was due to be 10 February 2024, the [Appellant's] agent was unable to secure a new tenant for the property for such a short period;
- (14) a construction certificate was issued for the property on 24 May 2024 (Construction Certificate);
- (15) building work for the new home commenced in June 2024 with the demolition of the existing house;
- (16) by the time of the hearing on 12 November 2025 building work was ongoing and construction of the new home was not complete.”

The Tribunal recorded at [17] that on 28 May 2024 the Appeal Panel remitted for rehearing consideration of whether the Appellant should have any of the orders sought and identified in [8(1)-(5)] of the decision of 2 January 2024 “having regard to the findings made by the Appeal Panel that the Respondent had breached its obligations under the Preliminary Agreement”.

The Tribunal identified at [22] the relief sought by the Appellant in the remitted proceedings. It is not suggested that the Tribunal erroneously identified the relief sought by the Appellant. The composition of the Appellant's claim was identified by the Tribunal at [23] by reference to a document (Exhibit A3) prepared by the Appellant calculating the components of her claim.

After referring to a number of the findings of the Appeal Panel of 28 May 2024 the Tribunal reiterated at [34] the Appeal Panel's findings at [58] with respect to the Respondent's breaches, which were that:

the Respondent failed to provide an updated stormwater plan;

the Respondent failed to provide a Geotech report and the fact that the Respondent refunded to the Applicant a sum of money for the cost of that report did not excuse the breach;

the Respondent breached the obligation to provide a structural engineering design in performance of its obligations as the document which was provided by the Respondent was inconsistent with the application to the council; this required the Applicant to re-engage stormwater engineers to update and provide an amended drawing.

The Tribunal referred [35] to the Appeal Panel's observation, at [64] that

“The measure of compensation for breach of contract is the amount necessary to put the innocent party in the position it would have been in if the contract had been performed: Robinson v Harman (1848) 1 Exch 850 at 855”.

The Tribunal referred [36] to the finding of the Appeal Panel at [65] that, although the Appellant might be entitled to an order for refund of the monies she paid under the Preliminary Agreement, an order to that effect might not be applicable pursuant to the Robinson principles, or be “fair and equitable”.

The Tribunal acknowledged, at [37] the Appeal Panel’s statement at [66] that the Tribunal must be satisfied that its orders are fair and equitable to all parties, as required by s 79U of the Fair Trading Act 1987 (NSW) (FT Act).

The Tribunal recognised, at [38]-[39] that the Appeal Panel had not been able to assess the merits of those aspects of the Appellant’s claim, and remitted them for rehearing.

The Tribunal referred [40] to the Appellant’s claim for the cost of the expert report and considered that “The Appeal Panel stated that the report had not been considered by them in deciding the appeal and they were of the view that the [Appellant] was not entitled to an order for the Respondent [to] pay the [Appellant’s] costs incurred in obtaining this report”. The Respondent did not lodge a cross-appeal against the decision of the Tribunal of 2 January 2024.

Under the heading “Damages”, the Tribunal recorded at [42] that the Appellant bore the onus of proving on the balance of probabilities that the amounts claimed by her represented “losses she has suffered in order to be placed in the position she would have been in had the Respondent not breached the Preliminary Agreement (as found by the Appeal Panel)”. The Tribunal recorded at [43], uncontroversially for present purposes, that there was no issue that any of the damages claimed by the Appellant were too remote in accordance with *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. The Tribunal reiterated, at [45] that the Appellant’s damages for the Respondent’s breach of contract were evaluated in accordance with the principle in *Robinson* which has been identified above.

At [46], the Tribunal referred to the decision of Black J in *Sabouni v Revelop Building & Developments Pty Ltd* [2021] NSWSC 31 (Sabouni) which was considered to have been applied by the Appeal Panel in *Jamaican Coffee Kitchen Pty Ltd t/as Dushan & Shelby Trust v M20 Pty Ltd* [2022] NSWCATAP 203. In Sabouni, Black J observed, at [41] that the monetary damages payable for breach of contract represent “so far as money can” fair and adequate compensation for the loss or injury sustained by the plaintiff by reason of the defendant’s breach. His Honour further observed that the Court must “do the best it can to make a reliable assessment of damages, where damages are difficult to assess, including where a party has failed to lead the best evidence of damages”. Black J referred to the statement by Beazley JA (as Her Excellency then was) in *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31, at [135] that:

“Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provides for breach of contract, an award of damages”.

At [43], Black J recorded the qualification that “Damages must be proved with a degree of precision which reflects the proof that is reasonably available to the parties”, and that an assessment of damages which was in the nature of a “guess”, should not be made where precise evidence of the damages suffered could have been adduced, but was not.

The Tribunal at [47] considered that the authorities to which it had referred established that “Where there has been loss of some sort arising from a breach of contract, the Tribunal must do the best it can to make a reliable assessment of the damage suffered; however, the Tribunal is not required to guess an estimated amount where the applicant could have produced precise evidence but chose not to”. The Tribunal then considered each of the remitted heads of loss or damage claimed by the Appellant.

After recording the competing contentions with respect to the Appellant’s “proposed order 1 – refund all monies paid under the Preliminary Agreement in the amount of \$31,690” the Tribunal found at [52] that in cross-examination on 12 November 2025, the Appellant gave evidence that she had engaged her certifier on 24 April 2024, and that she had provided a copy of the documents which she had received from the Respondent to the consultant she engaged for the purpose of the development and construction, including Rise Engineering, Paragon Building Certifiers and Signature Living Homes. The Tribunal accepted at [53] the evidence relied on by the Respondent that the documents produced by the Appellant, Zorowar Homes Pty Limited t/as Signature Living Homes and Mr Regmi of Paragon Building Certifiers, established that the documents provided by the Respondent under the Preliminary Agreement had been used by the Appellant in support of her application for the construction certificate, which was approved by her private certifier on 24 May 2024.

The Tribunal was accordingly at [54] satisfied on the evidence that “substantial work has been done by the Respondent under the Preliminary Agreement and that work has been supplied to the Applicant’s certifier and builder in order to obtain the construction certificate in May 2024”. The Tribunal held that in those circumstances the appropriate remedy was not a refund of the monies which the Appellant had paid, but compensation for the Appellant’s loss or damage in accordance with the principles in Robinson, which would be “the cost necessary to enable the [Appellant] to engage a private certifier for the purposes of the issue of the construction certificate, which the Appeal Panel found at [48] to be the purpose of the Preliminary Agreement”. Accordingly, [55] the Tribunal dismissed the Appellant’s claim for a refund and recorded that the claim for “additional costs” were the subject of other proposed orders which the Tribunal later dealt with.

After recording the competing contentions with respect to “proposed order 2 – the Respondent to pay the [Appellant] the cost of the engineering invoice in the amount of \$7,865” the Tribunal found at [59] that the Appellant’s oral evidence on 12 November 2025 was that Rise Engineering “changed the design and specifications for the development, including changing the piers from concrete to screw piles and the flooring in the secondary dwelling from suspended concrete to timber flooring”, and that there was “also evidence that the location of the pool was changed”. The Tribunal also found [60] that the Appellant had given evidence that “further revisions were

required because the pool had to be relocated from the courtyard to the back garden because Council had rejected the design and recommended a redesign". The Respondent's contention that these changes were "outside the scope of the Preliminary Agreement" was accepted by the Tribunal at [61].

The Tribunal further accepted, at [62] the evidence relied on by the Respondent that Rise Engineering had "substantially used the Respondent's documents prepared by Horizon Engineering under the Preliminary Agreement and are in substance the same". The evidence relied on by the Respondent that Rise Engineering "used the stormwater drainage plans provided by the Respondent under the Preliminary Agreement for the plans submitted for the construction certificate" was accepted by the Tribunal at [63].

The Tribunal recorded at [64] that there was no evidence "other than the [Appellant's] oral confirmation that the [Appellant] has paid this invoice or any part of it" and that the Appellant had adduced no evidence as to what work was done by Rise Engineering to update and provide an amended drawing. The Appellant was found at [65] to have had "more than ample opportunity to provide the evidence necessary to support this claim" and, as accepted in Sabouni, the Tribunal was not required to "guess" an amount when the evidence of what work had to be done by Rise Engineering to undertake the work to remedy the Respondent's breach and the cost of that breach was "readily available and should have been adduced by the [Appellant] who bears the onus".

Notwithstanding those findings the Tribunal accepted [66] that the Appeal Panel had made "clear" at [60] of its decision that there was "a need for the [Appellant] to re-engage stormwater engineers to update and provide an amended drawing". Working "as best I can" on the evidence and submissions provided, in accordance with the principles in Sabouni, the Tribunal assessed at [67] an appropriate amount of compensation to provide an updated and amended drawing to be \$2,000. The "full amount" claimed by the Appellant was rejected by the Tribunal as there were "changes to the design which were not part of the Preliminary Agreement and the [Appellant] has not established on evidence" which should have been readily available and provided as part of the hearing of the Remitted Matters that the Respondent is liable for the full amount of the invoice.

With respect to "proposed order 3 – the Respondent pay to the Applicant ongoing mortgage costs from April 2023 to May 2024 of \$85,971.78 or in the alternative rent payment from April 2023 to May 2024 of \$56,120 due to having to pay mortgage costs and rent simultaneously", after considering the parties' contentions, the Tribunal referred at [72] to the observations of Hallen J in *Pollock v NSW Trustee and Guardian* [2022] NSWSC 923 with respect to the need for a court to feel "an actual persuasion of the occurrence or existence" of a fact which is required to be proved before it can be found on the balance of probabilities. The Tribunal referred, at [73] to the decision of the Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 which it was accepted that "Proof on the balance of probabilities required a feeling of actual persuasion; that the event in question was more likely than not to have occurred; with a 'probability in excess of 50%'".

For the reasons which it recorded in detail, the Tribunal rejected each of the Appellant's claims. The Tribunal referred at [74] to the Preliminary Agreement having been entered in February 2023, to the engagement of new engineers in about April 2023, and the issuance of the construction certificate in May 2024. The Tribunal held that the Appellant had adduced insufficient evidence to establish on the balance of probabilities that it was a breach of the Preliminary Agreement by the Respondent which caused the delay to the obtaining of the construction certificate in May 2024 in circumstances where the Preliminary Agreement ended in February 2023, and new engineering drawings were obtained in March/April 2023.

The Tribunal further identified, at [75] a "more fundamental problem" with respect to the claim, irrespective of whether the Respondent delayed the Appellant's ability to apply for a construction certificate or even whether the Appellant failed to mitigate any loss in that regard. That problem was that the Appellant sought compensation because she had to pay both mortgage costs and rent simultaneously for the period from April 2023 to May 2024. The Tribunal recorded, at [76] that it "became clear" on the remitted hearing from the Appellant's oral evidence and documents produced under summons by her real estate agent, that the Appellant "had in fact rented out the property from the time of purchase until December 2023 when she chose to end the tenancy" due to the problems with the tenant's cats referred to earlier in the Tribunal's reasons. The Appellant's evidence was that, unsurprisingly, the property was unable to be re-let due to the short period before demolition of the house was due to commence.

The Tribunal recorded, at [78] that if the property was "suitable to rent to a tenant pursuant to a residential tenancy agreement regulated by the Residential Tenancies Act 2010 NSW, it is a reasonable inference to make that the property was fit for inhabitation [sic] at the time and during the time it was rented (as required by s 52 of the Residential Tenancies Act)". The Appellant was found to have adduced insufficient evidence to prove that the property was not fit for her and her family to occupy prior to its demolition. The Tribunal concluded, at [79] that the fact that the Appellant was "paying mortgage repayments and rent simultaneously was a double payment of the [Appellant's] choosing" and reasoned, logically, that if the Appellant had lived in the property from the time of its purchase until it was time to demolish it, she would have had only mortgage costs which were "costs that she would have had to pay in any event, notwithstanding any breach by the Respondent of the Preliminary Agreement".

Reference was made, at [80] to the rent received for the property from May 2023 and the absence of evidence to suggest that it was not market rent. The evidence from the Appellant's managing real estate agent established (Exhibit A3) that the Appellant received rent of \$31,057.14 for the period 3 April 2023 to 12 December 2023. The Appellant's claim for loss of rent from 13 December 2023 to May 2024 was found at [81] to have been due to the Appellant taking steps under the Residential Tenancies Act 2010 (NSW) to terminate the tenancy because of asserted problems with the tenant's cats. The Appellant's evidence that, having rectified the cat damage to the property, she was unable to find a new tenant "due to the short period before demolition was due to take place" was referred to by the Tribunal.

The Tribunal recorded that it was “at least possible” that if the Appellant had not terminated the tenancy, the tenant would have continued with the tenancy until it was time to vacate due to demolition, in which case at [82] having regard to the real estate agent’s evidence, the Appellant would have received an additional sum of \$18,514.28 by way of rental payments, total rent thus being \$49,571.42, which was “very close to the amount of rent the [Appellant] claims that she paid on the property where she was living of \$52,420 for the period April 23 to May 2024”. For those reasons, the Tribunal rejected the Appellant’s claim.

Under the heading “Proposed Order 4 – copyright for the architectural drawings or licence to amend the drawings to be provided to the Applicant and Proposed Order 5 – a copy of the CAD file of the drawings to be provided to the Applicant”, after recording the parties’ competing contentions, the Tribunal said, at [87] that the decision with respect to the CAD files had been recorded at [36]. The Tribunal there found that there was “no issue that the copyright and ownership of the CAD drawings does not subsist with the Respondent but with the architect”, and that there was no requirement under the Preliminary Agreement for the copyright or licence to use the CAD files to be provided as part of the “suite of obligations” of the Respondent. The Tribunal further recorded that “In any event as the construction certificate was issued in May 2024, with the [Appellant] having used and copied the CAD drawings, there is no reason why the [Appellant] would need the remedy sought”.

With respect to “Proposed order 6 – the Respondent pay the Applicant the cost of professional architect to prepare the construction drawings of \$21,121”, the Tribunal recorded, at [88] the Appellant’s contention that the cost of a quote for completion of the architectural documentation necessary for the construction certificate was reasonable, foreseeable and necessary as a substitute for the documentation that the Respondent was obligated to provide under the Preliminary Agreement. The Tribunal held, at [89] that there was no evidence that the Appellant engaged Mr Gerber to assist with the construction certificate documentation or that she incurred any part of the quoted costs. The Tribunal accordingly found that the Appellant had not made out her claim with respect to this head of damage/loss within the scope of Robinson.

With respect to “Proposed Order 7 – no further legal action or costs of appeal to arise from the Respondent in relation to this matter” the Tribunal held, at [90] that not to be within the “scope” of the remitted matters, nor for there to be power to make such an order in that form in any event.

With respect to “Proposed Order 8 – cost of the expert witness report \$2,830 which was incurred to review the contract and the documents which had been provided by the Respondent” the Tribunal recorded, [91] that the report was not part of the evidence when the application was first heard on 18 December 2023 and, further, [92] that, at [70], of its decision, the Appeal Panel found that the expert report was obtained by the Appellant for use in the appeal, albeit it was not considered by the Appeal Panel in the substantive appeal hearing. The Tribunal referred to the Appellant having sought that sum in the context of her application for the costs of the appeal hearing and which it considered the Appeal Panel had rejected. As it was not a remitted matter, the Tribunal accordingly declined to consider that claim.

In its costs decision of 27 August 2024 (*Ahmed v Phase Projects Pty Ltd (No 2)* [2024] NSWCATAP 165) the Appeal Panel referred at [16] to whether, as part of a costs order, the Appellant should recover costs of \$2,860 incurred by her for the provision of an expert report. Although the figures differ by \$30, there is no doubt that the expert report to which the Appeal Panel referred was the same expert report as was considered by the Tribunal in these proceedings. The Tribunal recorded that it had not found it necessary to determine whether the report should be allowed in support of the appeal, as it was able to decide the appeal on a basis which did not involve consideration of the report. The Tribunal found, at [17] that the costs of the report were “neither reasonable nor necessary” in the appeal.

Principles governing the proceedings

The principles governing the present proceedings are not in doubt and require only brief reiteration. Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (CAT Act).

An appeal under s 80(1) of the CAT Act from a final Tribunal decision is focused upon whether the appellant has established an error on a question of law; or otherwise (if leave to appeal is sought) leave to appeal is granted based upon the evidence and submissions before the Tribunal and the manner in which the Tribunal hearing was conducted. In certain circumstances, fresh or further evidence can be admitted (*Ros v Commissioner of Police* [2020] NSWCATAP 70).

An appeal, whether as of right or by leave, does not simply provide a disappointed party before the Tribunal at first instance with the opportunity to run a case again, nor is it sufficient for an applicant to disagree with the outcome and to contend that there should have been a different outcome (*Frediani v Hall t/as Happy Camper Conversions* [2024] NSWCATAP 134). Persuading the Appeal Panel that, had either of its members heard the proceedings at first instance, a different decision may have been made does not, in the absence of recognised legal error, enliven appellate intervention. An evaluative determination of the kind involved at first instance in this case generally permits of reasonable disagreement.

An appeal is not simply an opportunity for a dissatisfied or aggrieved party to reargue the case advanced at first instance (*Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39).

What is an error on a question of law was considered in *Unique Commercial Property Group Limited v Cusumano* [2024] NSWCATAP 204. An error on a question of law is an appeal made as of right, and does not require leave. A mixed error of fact and law requires leave to appeal.

In Cusumano, at [33], the Appeal Panel recorded that the categories of questions of law are “not closed”, and at [37] stated that “What constitutes a question of law is vexed and context dependent in the sense that the distinction between matters of fact and of law may turn on the circumstances in which the question arises” (citations omitted). It is unnecessary for the purpose of this decision to set out all the examples of error on a question of law which were discussed in Cusumano. Error on a question of law may arise in circumstances including the following:

“(i) *failing to provide procedural fairness at the hearing*;

(ii) no jurisdictional power to make an order;

(iii) constructive failure to exercise jurisdiction, in the sense of a failure to consider a ‘substantial, clearly articulated argument relying upon established facts’ that was within the jurisdiction of the Tribunal to determine;

(iv) applying the wrong legal principle (identified in isolation to the factual findings) which materially affected the outcome. ... the wrong application of the correct legal principles to the facts is an error of mixed fact and law for which leave to appeal is required under s 80(2)(b) of the CAT Act;

(v) making a factual finding where there was no evidence at all to substantiate the factual finding, ... a wrong finding does not amount to an error of law. An erroneous finding of fact, including the drawing of an inference or the erroneous failure to find a fact or failure to draw an inference, which is perverse in the sense that it is contrary to the overwhelming weight of the evidence, is not an error of law”

(citations omitted).

The Appellant is required to identify with sufficient precision the questions of law asserted to be raised by her Notice of Appeal (*Ferella v Chief Commissioner of State Revenue* [2014] NSWCA 378).

Although not unacquainted with litigation, at first instance and on appeal, the Appellant is not legally qualified and, as a litigant in person, the Appeal Panel adopts the “more generous” approach to the articulation of her grounds of appeal than would be the case if she were legally qualified or legally represented (*Kudrynski v Orange City Council* [2024] NSWCA 33). Consistent with that approach, and as it could cause the Respondent no procedural unfairness, the Appeal Panel proceeds on the basis that the Appellant seeks leave to appeal in reliance on grounds of appeal purportedly raising questions of law which in substance do not do so. That does not mean however that different principles govern the determination of the Appellant’s appeal or application for leave to appeal than those in cases where a party is legally represented. The Appeal Panel has focused on the substance of the Appellant’s challenges to the decision of the Tribunal at first instance.

As is apparent from their terms, most of the Appellant's grounds of appeal assert errors on questions of law. Whether that is so remains to be seen. In *Schwartz v Health Care Complaints Commission* [2026] NSWCA 162, Leeming JA, with whom Adamson JA and Griffiths AJA agreed, said that at [3] that pleading grounds commencing with the words "The Tribunal erred in law" did not necessarily mean that the ground raised a question of law. His Honour recorded that that "familiar deficiency" in pleaded grounds of appeal was "not cured by the drafting technique of framing complaints, some of which were palpably complaints about fact finding unattended by any question of law, by the mantra of the six words "the Tribunal erred in law" or "the Tribunal erred in law by".

In *Haritos v Commissioner of Taxation* [2015] FCAFC 92 at [192], it was accepted that, although it could not be held that an appeal on a question of law could "never extend to a mixed question of fact and law or as requiring that the question of law be a 'pure' question", it may "more accurately be said that the right of appeal does not extend to mere questions of fact", as the court, or Appeal Panel in this case should not "usurp the fact-finding function" of, in this case, the Tribunal. It was also accepted, at [195] that:

"where the facts found are capable of falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact and not of law. Such a decision will generally involve weight being given to one or other element of the facts and so involve matters of degree"

(citations omitted).

In *Thomas & Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 at [32], Leeming JA said, with the agreement of Meagher JA and Griffiths AJA that it has "been said on a large number of occasions, it is not sufficient merely to assert that the Tribunal erred in law in order to satisfy the limited conferral of jurisdiction" and that an appellant cannot 'convert' a challenge which is wholly or partly factual to one which is on a point of law or question of law merely by including those words in the formulation of a ground".

The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are not at large, and are limited to those set out in cl 12(1) (a)-(c) of Sch 4 to the CAT 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:

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

the decision of the Tribunal under appeal was against the weight of evidence or, which has no application in the present appeal,

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

In *Collins v Urban* [2014] NSWCATAP 17 the Appeal Panel said at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 may have been suffered where “there was a ‘significant possibility’ or ‘a chance which was fairly open’ that a different and more favourable result would have been achieved for the appellant had the relevant circumstances in (a) or (b) not occurred”.

The Appeal Panel further recorded in *Collins* at [84] that the authorities to which the Appeal Panel had earlier referred revealed the “general principles” with respect to applications for leave to appeal which establish that, in order to be granted leave to appeal the appellant 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;

ordinarily it is appropriate to grant leave to appeal only in matters that involve issues of principle, questions of public importance or matters of administration or policy which might have general application or an injustice which is “reasonably clear, in the sense of going beyond what is merely 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”;

a factual error that was unreasonably arrived at and clearly mistaken or 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.

To the extent that the Appellant’s purported grounds of appeal on questions of law in substance involve mixed questions of fact and law or raise only issues of fact, the Appeal Panel will consider them in the context of the Appellant’s application for leave to appeal.

The Appellant’s grounds of appeal

Ground 1: Error of law – failure to apply binding findings of the Appeal Panel

The Appellant asserted that the Tribunal at first instance erred by failing to give proper effect to the Appeal Panel’s “Binding Findings” at [48] of its reasons, that the Preliminary Agreement was “entire and indivisible”, and that its purpose was to provide the Appellant with the expressly identified documents necessary to engage a private certifier for the issue of a construction certificate. The Appellant asserted that the Appeal Panel had determined that the Respondent repudiated the contract before performing all of its obligations, and that the Tribunal at first instance had erroneously dismissed her claim for a refund on the basis that “substantial work” had been done by the Respondent. The Tribunal’s approach was submitted to be “inconsistent with the legal character of an entire contract, where partial performance does not entitle a breaching party to retain consideration”.

In her written submissions of 22 May 2026, the Appellant referred extensively to the evidence which was before the Tribunal at first instance, and submitted that the Tribunal’s reasoning, at [54] was “internally inconsistent”, for the reasons which the Appellant advanced (at [19]). The

Appellant submitted that the approach of the Tribunal at first instance “effectively permits the Respondent to benefit from its own repudiation” by retaining the contract price (\$31,690 paid to the Respondent including variation) notwithstanding its failure to complete the agreed scope of works. That was submitted to have been “contrary to settled principles and contrary to requirement under s 79U of the FT Act that orders be fair and equitable”.

The Respondent submitted that the Appellant’s contentions were misconceived, on the basis that the Tribunal at first instance accepted the findings of the Appeal Panel that the consideration was “entire and indivisible” and that such finding was made in the context of the Appeal Panel’s determination as to breach. The Appeal Panel was submitted to have “eschewed any determination as to the loss or damage arising from the finding that the Respondent repudiated the agreement”. The reasons of the Appeal Panel at [65]-[67] were submitted to confirm that contention. The reasons of the Tribunal at first instance at [35]-[38] were submitted to confirm that the Tribunal at first instance had followed the Appeal Panel’s findings. Reliance was placed upon the decision at first instance at [36] and the reasons of the Appeal Panel at [65]-[66] in support of the finding of the Tribunal at first instance that a refund “might not be applicable”. Whether that was so was submitted to have been the rationale for the remittal of the proceedings, and the limits of the remittal.

The Respondent submitted, correctly, that the Appeal Panel remitted the assessment of loss “because there was insufficient evidence about the further cost, if any, of obtaining the outstanding documents and services required from another provider” [67]. It was submitted to be clear from the reasons of the Tribunal at first instance, at [38] that the Tribunal recognised that to be the issue which it was required to determine. The Respondent submitted, correctly, that no finding made by the Appeal Panel involved acceptance of the Appellant’s contention that she was necessarily entitled to a full refund. As submitted by Counsel for the Respondent during the hearing of the Appeal, if the Appeal Panel had so found, it could have made that order, and could not have made an order remitting specific issues for re-determination. The Respondent submitted that the Tribunal at first instance proceeded correctly to determine the issues which were remitted for redetermination.

The Respondent submitted that the Appellant sought to “conflate” the Appeal Panel’s “entire and indivisible finding” into a finding that the Appellant was entitled to a refund but, by so doing had failed to recognise that the Appeal Panel “eschewed making any such finding” and ignored the finding made by the Appeal Panel at [64]-[67] that a refund may not be consistent with Robinson and s 79U of the FT Act.

The Appellant’s submissions in reply largely reiterated her primary submissions and did not further advance her case.

Consideration

The Appeal Panel accepts the submission of the Respondent that, if the Appellant's contentions are correct, there would have been no occasion for the Appeal Panel to have remitted the proceedings for rehearing – it could simply have ordered a full refund of monies paid by the Appellant to the Respondent. It is also relevant that the Appeal Panel upheld the Appellant's appeal, not on the basis that the Tribunal at first instance had erred in its determination of issues, but rather that, by failing to determine those issues, the Tribunal had constructively failed to exercise its jurisdiction. The Respondent correctly submitted that the Appeal Panel “eschewed” re-determining the proceedings, on the basis that it lacked sufficient findings of fact to be able to do so.

The reasons for the decision of the Tribunal at first instance recorded, accurately, at [27]-[40], the findings of the Appeal Panel. At [29], the Tribunal recorded the Appeal Panel's findings, at [46], that the Preliminary Agreement was to be “interpreted as an entire obligation, meaning that the Respondent was not free to decline to produce one of the documents or plans contractually obliged to be provided even with the promise of a refund for the document or documents not provided”. The Tribunal at first instance referred to the finding of the Appeal Panel at [48] that the consideration paid by the Appellant for the provision of services agreed to by the Respondent was “entire and indivisible”, and that the purpose of the agreement was to “put the Appellant in the position of having the expressly identified documents so that the Appellant could engage a private certified [sic] for the purposes of the issue of a Construction Certificate”.

The Tribunal at first instance referred (at [34]) to the findings of the Appeal Panel at [58] in respect of which the Appellant was entitled to damages which flowed from such breaches. The issue for re-determination was whether the Appellant was entitled to a full refund of the monies she had paid to the Respondent, or whether the Respondent should be liable to pay the Appellant such loss or damages as she could establish that she had suffered as a result of the Respondent's breach(es) of the Preliminary Agreement.

The Tribunal at first instance referred (at [36]) to the finding of the Appeal Panel that, although the Appellant “might be entitled to an order for a refund of the monies she paid under the Preliminary Agreement, an order to that effect might not be applicable to the principles in Robinson, nor might such an order be ‘fair and equitable’”. The issues for re-determination were thus, whether the Appellant should be entitled to a full refund, and, if not, to what damages was she entitled. The Appeal Panel is not persuaded that the Tribunal at first instance erred in its approach to the proceedings.

Ground 2: Error of law – misapplication of damages principle

The Appellant submitted that the Tribunal had refused her claim for a refund of monies paid on the assertedly erroneous basis that “substantial work has been done by the Respondent under the Preliminary Agreement” and that this work had been “used by the Appellant to obtain the construction certificate”. The reasoning was submitted to disclose “a fundamental misapplication of the damages principle”. The Appellant set out three ways in which that error was submitted to have occurred.

The Appellant submitted that the Tribunal’s reliance on “substantial work” was inconsistent with the Appeal Panel’s “binding finding” that the Preliminary Agreement was “entire and indivisible”, and reiterated the finding of the Appeal Panel at [48]. The Appellant reiterated those contentions with respect to the Tribunal’s reasons at [54]. The Tribunal there said that it was “satisfied on the evidence” that substantial work had been done by the Respondent under the Preliminary Agreement and that the work had been supplied to the Appellant’s certifier and builder in order to obtain the construction certificate in May 2024. The Tribunal was thus satisfied that the appropriate remedy in the circumstances was not a refund of monies paid, but to compensate the Appellant for loss in accordance with the principles in *Robinson* which would be the cost necessary to enable the Appellant to engage a private certifier for the purposes of the issue of a construction certificate, which the Appeal Panel had found, at [48] to be the purpose of the Preliminary Agreement. The Appellant reiterated a number of submissions which she had made at first instance.

The Respondent submitted that ground 1 repeated ground 2, and should “likewise be rejected”. It was submitted that the Tribunal at first instance correctly stated and applied the *Robinson* principle, at [45]-[47] and [54]. The Respondent disputed that the Tribunal at first instance had “conflated” the use of DA documentation with receipt of the contractual benefit, and submitted that “the use of the material was a relevant fact in assessing the economic position in which the Appellant stood after the Respondent’s breach and loss, if any, required to be compensated. The utilisation of the DA documentation was not treated as an answer to the breaches.” It was submitted that the Tribunal was entitled to take into account, as it did, at [49]-[54], that the Appellant obtained the Development Consent, later obtained a Construction Certificate and proceeded with construction of the home as designed under the Preliminary Agreement.

The Respondent submitted that ground 2 was a “merits challenge to the primary member’s factual assessment of benefit and loss”. It was submitted that there was no evidence from “architects” as asserted by the Appellant and that, if the only evidence from an architect produced by the Appellant was an unsigned letter (Exhibit 7), which was itself submitted to be “inconsistent” with the Appellant’s claims, that could not assist the Appellant.

The Respondent submitted that the Appellant had ultimately “copied and reproduced the Respondent’s DA plans and drawings as ‘construction drawings’”, which the Respondent had always maintained had the detail necessary to be used as or to obtain a construction certificate. The Respondent submitted that the Appellant’s admission at paragraph 25 of her submissions confirmed that no cost was incurred by her in producing the construction drawings.

At paragraph 25 of her submissions, the Appellant submitted that she was “compelled – after significant delay and at considerable personal hardship – to recreate construction drawings herself without the benefit of CAD files, which the Respondent refused to provide. No professional architect would assume responsibility for another architect’s work without CAD files and copyright consent, leaving the Appellant with no practical alternative but to undertake this work herself despite lacking the requisite qualifications”.

In her submissions in reply the Appellant disputed the Respondent’s contention that there was no evidence from architects, and that the only evidence was an unsigned letter (Exhibit 7) was misleading. The Appellant submitted that she had provided “multiple pieces of evidence with her submission including in her submission to the Appeal Panel in May 2026” (Exhibits 6, 7 and 8).

Consideration

The Appeal Panel agrees with the contention of the Respondent that, notwithstanding that it is pleaded as involving a question of law, in substance, ground 2 is a challenge to the Primary Member’s factual assessment of benefit and loss, involving questions of fact and not of law, or, at most, mixed questions of fact and law. Contrary to how it is pleaded, the substance of this ground is not that the Tribunal at first instance misapplied the damages principle emerging from *Robinson*, but that, on the facts found by the Tribunal, by not finding the Appellant’s claim to have been made out, the Tribunal “got it wrong”.

The Appellant has included grounds in her notice of appeal which could be pleaded in support of an application for leave to appeal but not actually sought such leave. Allowing her to do so would arguably be procedurally unfair to the Respondent. The Appellant has prepared extensive submissions, which outline the case which the Respondent has been obliged to meet. The Respondent has been able to deal with the substance of those submissions. As doing so involves no procedural unfairness to the Respondent, later in these reasons the Appeal Panel has considered whether leave to appeal could be granted with respect to this challenge.

This ground asserts that, rather than misconceive the damages principle emerging from *Robinson*, the Tribunal misapplied the principle. There is no challenge to the Tribunal’s acceptance of the principle, or the principles with respect to remoteness of damage established by *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. To succeed with her challenge on a question of law, the Appellant needs to demonstrate that the Tribunal at first instance relied on facts which were unsupported by any evidence, relied on facts which were irrelevant to its decision, or failed to consider facts which were relevant to its decision, or made a decision which no reasonable decision maker could have made. None of those challenges has been made out. The Tribunal at

first instance adequately exposed the process of reasoning which led to its decision (Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 133).

The Tribunal referred, at [46] to Black J's Judgment in Sabouni. The Appellant has not suggested that doing so was erroneous. Nor has the Appellant disputed the observation of the Tribunal at first instance, at [47], that where there has been "loss of some sort arising from a breach of contract, the Tribunal must do the best it can to make a reliable assessment of the damage suffered; however, the Tribunal is not required to guess an estimated amount where the applicant could have adduced precise evidence but chose not to". The Tribunal clearly identified, at [48], that the Appellant sought a "full refund" of the monies which she had paid to the Respondent. The Appellant does not suggest that the Tribunal misconceived the six grounds on which she sought that relief. The Tribunal then considered, and made findings of fact with respect to each of the heads of the Appellant's damages claim. The Appellant has not demonstrated that any of those findings was unsupported by evidence, or otherwise "wrong" (Edwards v Noble (1971) 125 CLR 296; [1971] HCA 54) (Noble).

Adopting even the most benevolent approach to this ground, it cannot be accepted as asserting, much less demonstrating, error on a question of law in any of the ways identified above. Properly understood, the ground challenges, findings of fact made by the Tribunal at first instance on the basis that, by rejecting the Appellant's claims, the Tribunal must in some unidentified way, have misapplied the principles which governed her damages claims.

Ground 3: Error of law – failure to award proven engineering costs

The Tribunal was asserted to have "erred in law in reducing the Appellant's claim for engineering costs from \$7,865 to \$2,000". It was submitted, although no ground of appeal asserted such error, that the reduction "was made without adequate reasoning" and in "disregard of the documentary evidence before the Tribunal".

The Appellant set out the factual basis on which she sought recovery of the \$7,865 pursuant to an invoice dated 10 March 2023 issued by Rise Engineering in that sum, itemising work performed for structural design and documentation \$5,100, stormwater drainage design and documentation at CC stage \$1,500, and additional CAD drafting to convert architectural drawings \$550.

The Appellant referred to the findings of the Tribunal at first instance, at [56]-[68], and submitted that the Tribunal accepted that it was bound by the Appeal Panel's findings at [60], that there was a need for the Appellant to re-engage stormwater engineers to update and provide amended drawings.

The Tribunal's findings were submitted to reveal five errors of law. The first asserted error was that the Tribunal's finding that there was no "breakdown" of the work done by Rise was factually incorrect, and the invoice on its face provided precisely such a breakdown. As is clear from the terms of the Appellant's submission, the Tribunal's asserted error was one of fact.

The second basis advanced by the Appellant was that the damages assessed by the Tribunal, \$2,000, was a “figure that was not supported by any evidence whatsoever” and was thus an impermissible guess. Unless the Appellant succeeds with this ground on other bases, if the Tribunal erred, it did so in her favour in the sum of \$2,000.

The third basis of the ground was submitted to be that the Tribunal’s reasoning at [61]-[63], disclosed a “fundamental misunderstanding of the engineering requirements”. It was submitted that the Tribunal’s assumption that the engineering required would “be in substance the same” as that done by Rise Engineering “contradict(ed) the Appeal Panel’s binding finding, and ignored the evidence that the Respondent’s engineering documentation was non-compliant”. The latter contention is a challenge to the merits of the Tribunal’s decision which does not involve a question of law. The former contention fails, for the reasons recorded earlier in rejecting ground 1.

The fourth basis of the challenge, that “No professional engineer would accept responsibility for, or merely ‘update’, another engineer’s work” and subsequent submissions in relation to the issue was not supported by any evidence to which the Appellant referred.

The fifth basis of the ground is a challenge to the merits of the Tribunal’s decision not involving asserted error on a question of law. In summary the Appellant submitted that the Tribunal had before it “an itemised invoice for \$7,865 evidencing the actual cost incurred by the Appellant to remedy the Respondent’s breach of the Preliminary Agreement”, and that, although the Tribunal accepted the Appeal Panel’s finding that “re-engagement of engineers was necessary” it awarded only \$2,000 “without any evidentiary foundation, in circumstances where the invoice itself provided the breakdown the Tribunal said was lacking”.

The Respondent submitted that ground 3 was in substance “an attack on factual findings about causation and quantum”, and accordingly required leave but that, in any event no error was demonstrated.

The Respondent relied on the reasons of the Tribunal at [59]-[65], for rejecting the Appellant’s claim. The Respondent submitted that the Tribunal had not ignored the Rise Engineering invoice, and accurately set out the three components of the invoice (at [56]). The Respondent relied on the Tribunal’s findings at [59]-[61], with respect to the changes to design and specifications undertaken by Rise Engineering. The Tribunal’s finding that Rise Engineering “substantially used the Respondent’s Horizon Engineering documents, and that the stormwater plans supplied by the Respondent were used for the construction certificate” (decision [62]-[63]) was submitted to have been “incontrovertible on the evidence”. Even if it had not been, that would have been an error on a matter of fact.

The Respondent submitted that the Appellant had not proved what work Rise Engineering had undertaken to remedy the particular breach identified by the Appeal Panel, nor did she provide payment of the invoice or any “separable loss attributable to that breach”. The findings of fact of the Tribunal in relation to those matters were submitted to have been well open to the Tribunal.

The Respondent submitted that a “single invoice which includes costs of new structural design, design changes, and CAD conversion does not prove that the whole invoice was the cost of updating an amended stormwater drawing” and that the “breakdown for the cost of the stormwater drawing was only \$1,500”.

The Respondent relied on the Appellant’s failure to call the engineer to give evidence or be cross-examined, to tender a work breakdown identifying work caused by the Respondent’s breach, or to have adduced evidence separating costs associated with the redesign from the limited remedial stormwater work. The award of \$2,000 compensation was submitted in all the circumstances to have been generous to the Appellant and that, although, sensibly, the Respondent did not cross-appeal, at least arguably, only \$1,500 should have been awarded. The Respondent reiterated its contention that no finding made by the Appeal Panel regarding the engineering requirement constrained the Tribunal at first instance from determining that issue.

In her submissions in reply, the Appellant largely reiterated her primary submissions without significantly adding to them.

Consideration

The Tribunal at first instance identified, at [56], accurately, the quantum and breakdown of the Appellant’s claim with respect to engineering costs. The Tribunal at first instance identified the competing contentions with respect to the issue. The Tribunal referred at [59] to the oral evidence of the Appellant on 12 November 2025 that “Rise Engineering changed the design and specifications for the development, including changing the piers from concrete to screw piles and the flooring in the secondary dwelling from suspended concrete to timber flooring” and that there was “also evidence that the location of the pool was changed”. The Appellant does not dispute that she gave such evidence.

The Tribunal referred, at [60], to the oral evidence of the Appellant on 12 November 2025 that “further revisions were required because the pool had to be relocated from the courtyard to the back garden because Council had rejected the design and recommended a redesign”. The Appellant does not dispute that finding. At [61], the Tribunal accepted the Respondent’s submission that the changes were “outside the scope of the Preliminary Agreement”. That was a finding of fact, any challenge to which, given that there was evidence in relation to the issue, could not involve a question of law.

Similar observations apply to the Tribunal’s findings at [62] and [63]. The Tribunal recorded, at [64] that there was no evidence “other than the [Appellant’s] oral confirmation that the [Appellant] has paid this invoice or any part of it”, or any evidence as to what work was done by Rise Engineering “to update and provide an amended drawing”, adopting the finding of the Appeal Panel at [60]. Although the Appellant disputes that such evidence was necessary, she does not dispute the finding which the Tribunal made.

The Tribunal ultimately found at [68] that the Appellant had not made out her claim because the evidence established that “there were changes to the design which were not part of the Preliminary Agreement and the [Appellant] has not established on evidence (which should have been readily available and provided as part of the hearing of the Remitted Matters) that the Respondent is liable for the full amount of the invoice”.

This ground does not assert error on a question of law. To the extent that the ground asserts that the Tribunal gave inadequate reasons for its decision, that assertion has not been made out. The Appellant’s contention that the Tribunal failed to have regard to relevant evidence has not been made out. The ground is in substance a challenge to the Tribunal’s findings. Not insignificantly, although seeking leave to appeal in relation to other issues, the Appellant has not sought leave to appeal in reliance on the matters advanced in support of this ground. Even if the Appellant had done so, the Appellant has not established a basis upon which leave to appeal would be granted in accordance with the principles emerging from the authorities identified earlier in these reasons.

Ground 4A: Error of law – misapplication of the causation test for delay costs

The Appellant referred to the decision of the Tribunal at first instance, at [74] and submitted that the Tribunal’s reasoning “discloses a fundamental misapplication of the ‘but for’ test for factual causation established in *March v Stramare (E & MH) Pty Ltd* (1991) CLR 506”. The Appellant did not identify where in that decision the test was identified.

The Appellant submitted that the Tribunal’s “own chronology” established the “causative link” which was that the Respondent repudiated the contract in February 2023, the Appellant promptly engaged new engineers in April 2023 to mitigate her loss, yet, despite these mitigation efforts, the construction certificate was not obtained until May 2024. The delay of over 14 months was submitted to have been “directly attributable to the consequences of the Respondent’s breach”.

The Appellant reiterated her earlier, and unsuccessful, assertion that the Tribunal further erred by failing to apply the Appeal Panel’s “binding findings on the nature of the contractual obligation” as recorded at [48] of its decision. The Appellant submitted that, applying the correct legal “but for” test, the Appellant would have received the construction drawings in February 2023 and could have proceeded directly to the certifier, thereby avoiding the 14 month delay. The Tribunal was submitted to have “compounded” the legal error stating at [75] that “However, irrespective of whether the Respondent delayed the Applicant being able to apply for a construction certificate” by treating the causation question as “irrespective”, the Tribunal failed to determine the causation issue at all, and thereby erred in law.

The Respondent submitted with respect to this ground that the Appellant “mischaracterises” the decision. The Respondent relied on the Tribunal’s finding of fact that the Appellant had not established on the balance of probabilities that the Respondent’s breach caused the claimed delay to the issue of the construction certificate at [74]. That conclusion was submitted to be open on the evidence. The “counterfactual” necessary to support the claim was submitted not to have been proved by the Appellant, and to have required evidence that but for the relevant breaches:

“(a) the outstanding documents would have been provided by February 2023;

- (b) a certifier would then have issued a construction certificate by April 2023;
- (c) finance, a builder and all other conditions to commencement were in place;
- (d) construction would have commenced and completed within the asserted 12 to 14 months;
and
- (e) the claimed rent or mortgage expenditure would thereby have been avoided.”

The Respondent submitted, correctly, that the Appellant had not adduced evidence from a certifier, builder, architect or engineer establishing, or tending to establish that “chain of causation”. It was submitted, again correctly, that a loan pre-approval, without more, did not prove that construction would have commenced or completed within the asserted timetable and that the Tribunal could not infer a 14 month causative delay merely from the interval between repudiation and the construction certificate.

The Tribunal’s reference to “irrespective” in [75] of its decision was submitted not to establish that the Tribunal treated causation as legally irrelevant, and that its finding at [74] demonstrated that the contrary was plain. Properly understood, [75] was submitted to provide an additional and independent reason why the particular financial claim failed, even assuming the relevant delay.

The additional reasoning referred to the “more fundamental problem” in the Appellant’s claim for the particular head of damages, being that the Appellant was claiming both rental and mortgage costs simultaneously for the period April 2023 to May 2024 although the property had been rented out from shortly after it was purchased until December 2023, a fact which was not disclosed to the Appeal Panel, to the Tribunal or to the Respondent. The Tribunal was asserted to have been entitled to infer that the property was habitable while it was successfully rented under a residential tenancy and to find that the Appellant had not proved that it was not unsuitable for her family to occupy.

The Appellant’s personal preference not to live in the property was submitted not to transform the rent on alternative accommodation into loss caused by the Respondent, particularly as the Appellant would have had to pay the mortgage costs regardless of any breach by the Respondent of the Preliminary Agreement. Reliance was placed on the Appellant’s omission from her claim of the \$31,057.14 rent actually received during the relevant period, that having been established by the Respondent after investigation, by issuing a Summons for production to the Appellant and the Appellant’s real estate agent. The Tribunal’s finding that a continuation of the tenancy would have produced further rent broadly offsetting the claimed rent was submitted to be based on the evidence, and was relevant to both causation and quantum. Paragraphs [81] and [82] of the decision were relied on in this regard.

The conclusion of the Tribunal, at [83] was submitted not to have been against the weight of evidence, but to have been a conclusion well open on the undisputed rental history and the absence of proof of the asserted construction counterfactual. The ground was submitted to demonstrate no error of law or a basis for granting leave to appeal.

The Appellant lodged submissions in reply which addressed this ground and the following ground. Although disputing findings of fact made by the Tribunal at first instance, nothing there raised by the Appellant advances this ground.

Consideration

Properly analysed, this ground does not involve an asserted error on a question of law, but rather an assertion that the Tribunal should have come to a different decision.

The Tribunal's consideration of the issue commenced, at [69] by identifying the Appellant's claim, and the basis of it. Nothing to which the Appellant has referred the Appeal Panel establishes that the Tribunal misconceived the quantum of the Appellant's claim or the basis of it.

After identifying the Respondent's submissions the Tribunal referred, at [72] to the decision of Hallen J in *Pollock v NSW Trustee and Guardian* [2022] NSWSC 923 with respect to the need for a court to feel "an actual persuasion of the occurrence or existence" of an asserted fact before the fact can be found in accordance with the civil standard of proof. The Tribunal, at [73] referred to the decision of the Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 in which the Court of Appeal accepted that proof on the balance of probabilities required a feeling of actual persuasion that the event in question was more likely than not to have occurred with a "probability in excess of 50%".

The Tribunal recorded, at [74], accurately, that the Preliminary Agreement ended in February 2023, that the Appellant retained new engineers in about April 2023 and the construction certificate issued in May 2024. The Tribunal found that there was "insufficient evidence" adduced by the Appellant to establish on the balance of probabilities that it was the breach of the Preliminary Agreement by the Respondent which caused the delay to obtain the construction certificate in May 2024, 14 months after new engineering drawings were obtained. The Appellant has not demonstrated that that finding of fact was not open to the Tribunal or was "wrong" (Noble).

In [75], the Tribunal identified a "more fundamental problem" than whether the Respondent delayed the Appellant being able to apply for a construction certificate or whether the Appellant failed to mitigate any loss. The more "fundamental problem" was identified as relating to the Appellant's contention that "she should be compensated by the Respondent because she had to pay both mortgage costs and rent simultaneously for the period April 2023 to May 2024". The Tribunal found, as was open to it, that it "became clear on the remitted hearing given the [Appellant's] oral evidence and the documents produced under the Summons by the [Appellant's] real estate agent that the [Appellant] had in fact rented out the Property from the time of purchase until December 2023 when she chose to end the tenancy" because of the tenant's cats.

The Tribunal referred to the Appellant's oral evidence that she sought to re-tenant the property again but was unable to do so due to the short period before demolition of the house was due to commence. None of those findings of fact has been successfully challenged in the appeal.

The Tribunal referred, at [77] to the Appellant's contention that the state of repair of the property, and the fact that it was due for demolition meant that according to the Appellant's submission "occupation pending construction was not reasonably contemplated". The Tribunal reasoned at [76] that if the property was suitable to rent to a tenant pursuant to a residential tenancy agreement pursuant to the Residential Tenancies Act it is a reasonable inference to make that the property was fit for habitation at the time and during the time that it was rented, as required by s 52 of the Residential Tenancies Act. Why that inference was not able to be drawn in reliance on the Appellant's own evidence has not been explained or demonstrated by the Appellant.

The Tribunal found that there was insufficient evidence adduced by the Appellant to establish that, notwithstanding that it had been rented out until December 2023 it was not fit for the Appellant and her family to occupy prior to its demolition. The finding of the Tribunal, at [79] that the Appeal Panel was not informed by the Appellant that she had rented the property from the time of purchase until late 2023 has not been successfully challenged and was clearly material to the determination of her delay damages claim. The Tribunal found, undoubtedly correctly, that the Appellant was paying mortgage repayments and rent simultaneously because she chose to and, had she lived in the property from the time of purchase until it was time to demolish then she would have had only mortgage costs, which costs the Appellant would have had to pay in any event, notwithstanding any breach by the Respondent of the Preliminary Agreement.

Reference was made, at [80] to the rent which was actually received by the Appellant from a tenant. The Tribunal found, correctly, that there was no evidence to suggest that the rent paid was less than market rent. There has been no challenge to Tribunal's finding, based on documents produced by the Appellant's own managing real estate agent (Exhibit A3) that between 3 April 2023 and 12 December 2023 the Appellant received \$31,057.14. The Tribunal reasoned [82] that, if the tenancy of the property had continued until 23 May 2024 at \$800 per week for the period from 13 December 2023 to that date the Appellant would have received "very close to the amount of rent" which the Appellant claimed that she paid in rent elsewhere.

Although this ground was pleaded as involving an error of law, nothing raised by the Appellant establishes that, properly understood, the ground involves a question of law, much less demonstrated error on a question of law. In substance, the ground is a challenge to the Tribunal's finding with respect to the causation and quantum of the Appellant's alleged delay damages. No finding of primary fact relied upon by the Tribunal at first instance has been shown to have been wrong, or not open to the Tribunal, or to have been made in the absence of evidence or, where the Tribunal found that there was no evidence, to have wrongly done so. No inference drawn by the Tribunal in reliance upon the undisturbed findings of primary fact has been shown to have involved failure to have regard to any relevant consideration, having regard to irrelevant considerations, or to have been a decision which could not reasonably have been made. This ground is rejected and, to the extent that leave to appeal would be necessary to successfully

agitate it, no basis for doing so in accordance with Collins has been demonstrated by the Appellant. The Appellant bore the onus of proving causation in reliance on evidence of facts capable of discharging that onus. The gaps in the chain of causation found by the Tribunal were referable to the evidence adduced by the Appellant and, equally importantly, the absence of evidence which should have been readily available if the Appellant's disputed allegations had substance. The Appellant's submissions based on her conclusions and unsupported or unqualified opinions could not cure the evidentiary defects in her case which the Tribunal accurately identified.

Ground 4B: Decision against the weight of evidence – delay costs

As its terms make clear, this ground does not assert error on a question of law but seeks to demonstrate a basis for a grant of leave to appeal.

The Appellant substantially reiterated the sequence of events and other factual matters upon which ground 4A was based. Although potentially relevant at a first instance hearing, many of the Appellant's written and oral submissions cannot advance her application for leave to appeal. To read the Appellant's outline is to appreciate why that is so. The assertions, conclusions and unqualified opinions which appear throughout the Appellant's submissions are not matters by which the Appeal Panel can be influenced.

The Appellant submitted that at [76] of its reasons the Tribunal made "impermissible assumptions regarding the Appellant's housing choices which were unsupported by, and contrary to, the evidence". The Tribunal made inferences in reliance on primary facts which were supported by her own, or the evidence of the Appellant's real estate agent. The inferences drawn by the Tribunal flowed logically from those facts. The Appellant's submissions did not identify any reliable evidence which was before the Tribunal which the Tribunal was submitted to have failed to consider, or any fact or circumstance to which the Tribunal had regard for which there was no reliable evidence.

The Respondent submitted that, largely for the reasons relied upon with respect to ground 4A, the Appellant had not demonstrated that any finding of fact made by the Tribunal at first instance with respect to causation or damages was not open to the Tribunal, or that the Tribunal erred in any way in finding that the Appellant had not discharged the onus of proof which she bore.

In her submissions in reply the Appellant largely reiterated, with some amplification, her primary submissions. The Appellant's contention that the Respondent's submissions with respect to her failure to disclose the rental income generated from the property "fails to engage with the evidence" has not been made out. More importantly, the Appellant has not identified any relevant evidence with which the Tribunal failed to engage. The matters to which the Appellant referred were considered by the Tribunal in its reasons, by reference to evidence which the Appellant herself gave, or had failed to give.

The Appeal Panel has not been referred to the evidence in reliance upon which the Appellant asserts that some, or any, of the other explanations proffered by her was established, or that, if any were, why that should have resulted in different findings to those made by the Tribunal. With respect to the Appellant, her submissions attempt more to rationalise her actions with respect to renting the property, and not disclosing the rental, than demonstrating error by the Tribunal at first instance.

On none of the bases identified in Collins has the Appellant demonstrated that leave to appeal should be granted.

Ground 5: Decision not fair and equitable – CAD files and copyright licence

The Appellant asserted that the Tribunal erred in declining to make orders for the delivery of CAD files and a limited copyright licence. The Appellant accepted the Tribunal's finding that copyright subsisted with the architect. The Appellant submitted that the relief sought by her was available under s 79U of the FT Act and that the evidence demonstrated that she "repeatedly requested CAD files and copyright consent, which were refused". The Appellant further submitted that the Tribunal's reasoning that there was "no reason why the [Appellant] would need the remedy sought" because the construction certificate issued failed to account for "ongoing construction requirements and the practical prejudice caused by the Respondent's breach". The appellant did not identify any reliable evidence of any "construction requirements" or "practical prejudice" which she alleged were caused by her not having the documents.

The Respondent submitted that this ground identifies no error of law. The Appeal Panel agrees with that contention. The Appeal Panel also agrees that the CAD and copyright relief was not the subject of the remitter by the Appeal Panel. The Tribunal at first instance in the first substantive decision found that the Tribunal did not have jurisdiction to grant the relief sought [87]. The Appeal Panel did not consider that finding to have been erroneous.

The Respondent submitted, correctly, that the Tribunal considered and determined the CAD and copyright relief issues on the merits and that the reasons at [84]-[87] were open to the Tribunal and supported by the evidence which was before it. The Appellant was submitted to have adduced no evidence that she later wished to or needed to use those documents.

The Respondent submitted that s 79U of the FT Act did not empower the Tribunal to create a proprietary licence in material owned by a non-party, or to compel the Respondent to procure a third party's intellectual property where no such contractual obligation was proved. The third party, The Architect Space, was not joined to the proceedings by the Appellant and accordingly, the Tribunal was submitted to have lacked jurisdiction or power to grant the relief sought by the Appellant. The Respondent further submitted that the construction certificate had been issued in May 2024, and that the Appellant had used and copied the architectural material. The Tribunal was thus submitted to have been entitled to conclude that the practical necessity for the requested relief had not been established.

In submissions in reply, the Appellant largely reiterated the submissions which she had earlier made, but further submitted that the Tribunal had failed to take into account a relevant consideration, which was asserted to have been that the Tribunal had found that there was no reason why the Appellant would need the remedy she sought “without engaging with the [Appellant’s] submission that professionals refused to proceed without copyright/licence, forcing her to recreate construction ready plans”.

Consideration

It is convenient to first deal with the last point raised by the Appellant. As submitted by the Respondent, the Appellant did not adduce evidence from any architect, engineer, builder or other qualified person establishing, or tending to establish that “professionals refused to proceed without copyright/licence”. It was for the Appellant to make out her case. The Tribunal found that she had not done so. The decision did not involve the failure to take into account a relevant consideration. A relevant consideration emerges from the evidence which is before the Tribunal, and is not constituted merely by the submission of a party which is unsupported by a reference to evidence before the Tribunal.

The Tribunal explained why it reached the decision it did with respect to this issue. Having identified, accurately, the relief sought by the Appellant, and the grounds on which she sought that relief, the Tribunal recorded, at [86] the submission of the Respondent that, as the Appeal Panel did not overturn the Tribunal’s finding in its original substantive decision that there was no jurisdiction to determine the copyright issue. The Tribunal found, at [87], and the Appellant does not appear to dispute, or has not successfully disputed, that “the copyright and ownership of the CAD drawings does not subsist with the Respondent but with the architect”, or that there was any requirement under the Preliminary Agreement for the copyright or licence to use the CAD files to be provided as part of the “suite of obligations of the Respondent”. No finding of primary fact made by the Tribunal and relied on for its findings has been shown to have been wrong. Further, as the Tribunal found, as the construction certificate issued in May 2024, with the Appellant having been found to have used and copied the CAD drawings, there was no reason why the Appellant would require the remedy which she sought. The primary facts relied on by the Tribunal for its finding have not, and could not have been successfully challenged. The logic of the inference which the Tribunal drew in reliance on those facts is unassailable.

This ground raises no question of law. Nor has the Appellant demonstrated any basis on which, in accordance with the principles discussed in *Collins*, leave to appeal would be granted.

Ground 6: Procedural unfairness – apprehended bias and denial of a fair hearing

The Appellant submitted that she suffered a “substantial denial of procedural fairness in the conduct of the remitted hearing, giving rise to apprehended bias and a denial of natural justice”.

The Appellant complained that the Appeal Panel had remitted the matter for rehearing to the same Tribunal Member as had originally dismissed the entirety of the Appellant's claim. It was open to the Appellant during the course of the hearing of the appeal to submit that, if the appeal was allowed and a rehearing ordered, the rehearing should be before another Member of the Tribunal. It was open to the Appellant to seek recusal of the Tribunal Member as soon as it was realised that the remitted hearing would be before that Member.

Nothing to which the Appellant has referred the Tribunal establishes a reasonable apprehension that the Member may not bring an impartial mind to the rehearing. The decision of the High Court in *Sunshine Loans Pty Ltd v Australian Securities and Investments Commission* [2026] HCA 8 provides support for rejecting the Appellant's challenge, having regard to the factual similarities of the case with the present case, and to the principles which their Honours accepted applied to apprehended bias recusals. Gageler CJ and Gleeson J reiterated, at [40] that the test "postulates a fair-minded lay observer" and is objectively assessed in the context of "ordinary judicial practice". As their Honours observed, at [1], evaluation of an application involves:

Identification of the factor which it is said might lead a judge to resolve a question other than on its legal and factual merits;

Articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and,

Assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.

Nothing to which the Appellant has referred the Tribunal demonstrates any of the requirements to demonstrate a reasonable apprehension of a lack of impartiality has been established on the evidence before the Tribunal at first instance. As the Tribunal's reasons make clear, the findings of fact with respect to the remitted issues turned on evidence which the Appellant gave, the accuracy of the Tribunal's record of which has not been successfully challenged, or matters in respect of which the Appellant, who was best or uniquely placed to do so, adduced no reliable evidence, the absence of which evidence the Appellant cannot dispute. It does not follow that because, after a contested hearing, the Tribunal at first instance did not make the findings sought by the Appellant, there must have been some unidentified absence of impartiality at the hearing.

The Appellant further submitted that the conduct of the hearing "itself constituted a denial of procedural fairness". One of the bases on which that was submitted was that the Tribunal permitted Counsel for the Respondent to make its submissions first. The Appellant further submitted that it was procedurally unfair to then direct her to provide written submissions over her objection to doing so, and that it was "manifestly unfair" to deny the Appellant the opportunity to make her submissions orally. The Appellant ultimately submitted that:

"The cumulative effect of these procedural irregularities – the assignment of the remitted matter to the very Member whose decision was overturned on appeal, and the denial of the Appellant's right to present her case orally at the scheduled in person hearing – resulted in a hearing that was neither fair

nor seen to be fair, and constitutes a substantial miscarriage of justice warranting the Appeal Panel's intervention. However, this misapprehends the nature of the claim. The Appellant sought compensation for the reasonable and foreseeable cost of obtaining substitute documentation that the Respondent was obliged to provide under the Preliminary Agreement. Under expectation damages principles, it is not necessary for the Appellant to have already incurred the expense; a reasonable quote for necessary substitute services is admissible evidence of loss."

As discussed earlier, the Appellant was not unsuccessful on that issue solely because she had not established the loss.

The Respondent submitted that the Appellant had not demonstrated that the Member hearing the remitted proceedings should have recused herself, having regard to the well established principles governing recusal for reasonable apprehension of absence of impartiality (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, at [6]). It was submitted, correctly that, the fact that a previous decision is set aside on appeal does not, of itself, satisfy that test. The Respondent relied on the Appellant's failure to make a recusal application before or during the hearing, or to dispute the Appeal Panel's decision to remit the proceedings to be heard by the Member who originally heard them.

The Respondent disputed that the Appellant had been unfairly constrained in any way during the course of the hearing in relation to cross-examination, the tender of documents, or the filing of written submissions.

The Respondent submitted that the Appellant had not identified a "material submission, evidence, or responsive contention which she was prevented from making by the direction to provide written submissions", and that the offer to provide written submissions after the evidence had concluded was a "practical and fair means of allowing the Appellant to respond". The asserted preference for further oral submissions was submitted to fail to establish any denial of natural justice.

Consideration

The Appeal Panel has carefully considered the 36 pages of transcript provided by the Appellant in her reply submissions lodged 31 July 2026. A balanced reading of the transcript does not in our view reveal any basis on which, though the Appellant did not seek it, the Tribunal Member hearing the remitted proceedings should have recused herself. Nor does the transcript reveal that the Appellant was prevented or constrained from presenting her case in any way. The Appellant's contentions with respect to the circumstances surrounding her being required to lodge written submissions are not confirmed by the transcript. The Member explained to the Appellant why it was considered that, as an unrepresented party who has "the last say", it was preferable that the Appellant present her submissions in writing. That was both sensible, and procedurally fair to the Appellant.

The Appellant provided extensive written submissions to the Tribunal at first instance, and has provided extensive written submissions to the Appeal Panel. As submitted by the Respondent, the absence of any indication of what further evidence the Appellant would have adduced, and to what end, has not been identified is significant. Although the Appellant does not accept it, the approach adopted by the Tribunal at first instance was fair. The Appellant was entitled to, and had the “final say”. The Appellant’s submissions engaged with the issues before the Tribunal comprehensively. The Appellant has not identified in what way, by presenting her submissions in writing, and not having the opportunity to make further oral submissions, the Appellant was unfairly limited in the presentation of her case. Importantly, the Appellant does not suggest that she was prevented from adducing evidence of any matters which she wished to rely on. The Appellant has not identified any submission which she was unable to make in writing, or asserts that she would have made more effectively orally.

The Tribunal at first instance was obliged to endeavour to determine the proceedings in a manner which was just, cheap and quick, subject to the over-arching requirements of natural justice and procedural fairness. Nothing to which the Appellant has referred demonstrates that the course adopted by the Tribunal at first instance was erroneous or unfair to her. This ground has no merit.

The Appellant’s additional ground

In her submissions of 31 July 2026, the Appellant raised an additional ground with respect to “procedural fairness: undisclosed calculation”. As was appropriate, Counsel for the Respondent did not oppose the Appellant having leave to agitate this ground, although it was submitted to be without merit.

Whether sought to be raised as an error on a question of law, and thus appealable as of right, or, on some unidentified basis, sought to be raised as leave to appeal was not made clear by the Appellant. The Appellant submitted that, following from the procedural unfairness asserted by her pursuant to the previous ground “the Tribunal denied procedural fairness by relying, at 82 of the decision, on an undisclosed calculation of a hypothetical rental figure of \$18,514.28 said to represent the additional rent the Appellant would have received had the tenancy continued to 23 May 2024 and used that figure as the basis for concluding that the Appellant’s claim for mortgage or rent payments was answered by a rental income she ought to have earned”.

The Appellant submitted that the calculation by the Tribunal based on what “would have been obtained” had a “different, hypothetical course of events occurred” was a calculation “not raised with the Appellant during the hearing or in submissions, and the Appellant had no opportunity to respond to it before it was treated as determinative of the mortgage and rent claim”. The Appellant asserted that the ground, “properly characterised, raises a question of law as to the requirements of procedural fairness, and is available as of right; in the alternative, leave should be granted having regard to the potential for a substantial miscarriage of justice”.

Consideration

This ground requires little discussion. The figures by reference to which the Tribunal made its findings at [82] were figures obtained from the Appellant's own managing real estate agent. The actual rental which that evidence revealed, to which the Tribunal referred, was also provided by the Appellant's agent, the accuracy of which has not been challenged by the Appellant. The calculation made by the Tribunal was mathematically correct and involved no error. Nor did the basis on which the Tribunal took that hypothetical figure into account. The Tribunal's reasoning was logical, and not a matter about which, had it been raised with her, the Appellant could have made submissions which would have resulted in a different finding, or precluded the finding made by the Tribunal. What she would have said, had the Tribunal raised the rental figures with her, has not been identified by the Appellant in any event. Whether as a ground of appeal involving error on a question of law, or as a ground seeking leave to appeal, this challenge has not been made out. Even if it had been, that would not change anything in the absence of any evidentiary foundation for a different finding with respect to this issue (*Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54).

Conclusion

No ground of appeal asserting error on a question of law having been made out, and no basis for a grant of leave to appeal in accordance with *Collins* having been established, the Notice of Appeal will be dismissed. The Appeal Panel's orders will provide a timetable for filing written submissions in the event that either party seeks an order for costs.

Order

The notice of appeal lodged on 9 March 2026 is dismissed.

Leave to appeal is refused.

A party seeking an order for the costs of the appeal is to lodge and serve written submissions not exceeding 10 pages in length inclusive of attachments in support of such application within 28 days of these orders.

A party opposing an application for costs is to lodge and serve written submissions not exceeding 10 pages in length inclusive of attachments in support of such opposition within 42 days of these orders.

A party seeking an order for costs is to lodge and serve written submissions not exceeding 5 pages in length inclusive of attachments in response to any submissions lodged pursuant to order 4 within 56 days of these orders.

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

Registrar

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Decision last updated:

25 September 2026

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