

AUSTRALIA / JUDGMENT

Spectrum Pools & Spas Pty Ltd v Young

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:

Spectrum Pools & Spas Pty Ltd v Young [2026] NSWCATAP 284

Hearing dates:

10 August 2026

Date of orders:

8 September 2026

Decision date:

08 September 2026

Jurisdiction:

Appeal Panel

Before:

G Blake AM SC, Principal Member

A Bell SC, Senior Member

Decision:

- (1) To the extent necessary, leave to appeal is refused.
- (2) Appeal dismissed.
- (3) Order the appellant to pay the respondent's costs of the appeal on the ordinary basis, including the reserved costs of the appellant's application for a stay.

Catchwords:

BUILDING AND CONSTRUCTION - Home Building Act 1989 (NSW) - Scope of work having regard to statutory warranties under s 18B - s48 MA - Circumstances justifying a money order

Legislation Cited:

Civil and Administrative Tribunal Act 2013

Home Building Act 1989

Cases Cited:

Alexandria Landfill Pty Ltd v Transport for NSW (2020) 103 NSWLR 479; [2020] NSWCA 165

Collins v Urban [2014] NSWCATAP 17

House v The King (1936) 55 CLR 499; [1936] HCA 40

Mashat v Build Property Pty Ltd [2026] NSWCATAP 148

Oikos Constructions Pty Ltd v Ostin & Anor [2020] NSWCA 358

Professional Construction Service Pty Ltd v The Owners- SP 92156 [2023] NSWCATAP 323

Stoker v Adecco Gemvale Constructions Pty Ltd [2004] NSWCA 449

Unique Commercial Group Pty Ltd v Cusumano [2024] NSWCATAP 204

Walker v Randwick Municipal Council (1929) 30 SR (NSW) 84

Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority (1991) 24 NSWLR 156

Texts Cited:

Dorter & Sharkey, Building and construction contracts in Australia: law and practice (looseleaf)

Category:

Principal judgment

Parties:

Spectrum Pools & Spas Pty Ltd (Appellant)

Katrine Young (Respondent)

Representation:

Counsel:

S Saadat (Appellant)

B Anderson (Respondent)

Solicitors:

Invictus Legal (Appellant)

Mitchell & Shorten (Respondent)

File Number(s):

2026/00199224

Publication restriction:

Nil

Decision under appeal

Court or tribunal:

Civil and Administrative Tribunal

Jurisdiction:

Consumer and Commercial Division

Citation:

N/A

Date of Decision:

29 April 2026

Before:

Dr D Goldman, Senior Member

File Number(s):

2024/00215305

reasons for decision

Introduction

The appellant, Spectrum Pools & Spas Pty Ltd (Spectrum), is a building company. Spectrum entered into a home building contract with the respondent, Ms Katrine Young (Ms Young), for work in connection with the installation of an in-ground swimming pool at Ms Young's residence in the Sutherland Shire of Sydney.

Ms Young lodged an application with the Tribunal on 11 June 2024 seeking compensation from Spectrum for alleged defective workmanship. The Tribunal hearing took place on 4 and 5 August 2025, with written closing submissions provided in November and December 2025. The Tribunal gave written reasons for its decision on 29 April 2026 (Reasons).

The Tribunal found that Spectrum's work was defective and in breach of statutory warranties applicable under section 18B of the Home Building Act 1989 (NSW) (HBA). The Tribunal ordered Spectrum to pay Ms Young \$75,405.27 and made an order for costs in favour of Ms Young. Spectrum has brought an internal appeal from the Tribunal's orders, insofar as those orders included an amount for the construction of a new timber retaining wall.

Factual Background

The following facts, which we understand to be uncontroversial, were found by the Tribunal.

The parties entered into a written contract on 13 June 2023. The written contract comprised the Fair Trading NSW standard form, which indicated a total contract sum of \$71,500 but otherwise contained few other details; a document prepared by Spectrum described as a "pool quotation" (Pool Quotation) and another document prepared by Spectrum described as a "payment schedule" (Reasons at [29]-[30]).

The Pool Quotation contemplated council approvals, excavations, formwork, plumbing, coping and walkways. It provided for the coping and walkways to be laid atop an existing retaining wall (described in the Reasons as the "Eastern retaining wall"). The Pool Quotation contained a list of ten exclusions, none of which expressly excluded retaining walls (Reasons at [31]).

Spectrum procured structural drawings from Structa Consulting Engineers on about 10 July 2023. The responsible engineer was a Mr Boutros, who later gave expert evidence on behalf of Spectrum at the Tribunal hearing (Reasons at [32]).

The development application was approved on 23 October 2023 (Reasons at [33]).

A conversation occurred on about 27 October 2023 between Ms Young and Mr Khoury, a director of Spectrum, in which Ms Young asked Mr Khoury if he wanted her to remove the timber of the Eastern retaining wall prior to excavation. Mr Khoury said no, the timber of the Eastern retaining wall would be used as formwork and that Ms Young would only need to dress/paint over the timber after completion (Reasons at [34]).

A geotechnical investigation and site lot classification report by Geotechnical Consultants was issued on or after 14 November 2023. This step was expressly excluded from the contract in the Pool Quotation (Reasons at [35]).

Work commenced on 4 December 2023 (Reasons at [36]). Work was suspended on 8 February 2024 (Reasons at [37]). A meeting took place between Ms Young, her friend Mr Davis, and Mr Khoury on 9 February 2024 (Reasons at [38]).

A further meeting took place at the premises on 12 February 2024 during which a number of Mr Khoury's associates from Spectrum were on site (Reasons at [39]). We will return to consider the findings concerning the circumstances of this meeting later in these reasons.

After the meeting on 12 February 2024 there were a number of emails exchanged between Ms Young and Mr Khoury concerning the replacement of the Eastern retaining wall. In one email dated 26 February 2024 Ms Young referred to the replacement of the retaining wall as “a variation to the original scope of works” (Reasons at [40]-[42]).

The concept of a variation was explained to Ms Young “at this time” (which we understand to be on or about 26 February 2024). However, at the time that the contract was entered into, there was no evidence as to the parties’ intentions or state of mind in relation to the state of the Eastern retaining wall (Reasons at [43]).

On 2 October 2024, Ms Young terminated the contract, purporting to accept Spectrum’s repudiation (Reasons at [45]).

The Tribunal Decision

It is only necessary to review that part of the Tribunal decision which is challenged on appeal.

Before considering whether Spectrum’s work was in fact defective or incomplete, at [46]-[52] the Tribunal gave reasons for concluding that, to the extent work was defective or incomplete, a money order was preferable to a work order, notwithstanding that section 48MA of the HBA sets out the principle that rectification of defective work by the responsible party is the preferred outcome.

The factors which the Tribunal referred to in support of this conclusion were that Mr Khoury was reluctant to accept validly alleged defects; the Tribunal’s concern, based on his evidence at the hearing, that Mr Khoury did not appreciate the required standard of work and the skills of relevant tradesmen required to achieve those standards; and that the relationship between the parties had broken down.

In relation to the breakdown of the relationship between the parties, the Tribunal referred to the meeting which took place on 12 February 2024. The Tribunal had found (at [39]) that the meeting involved Ms Young, Mr Davis, Mr Khoury of Spectrum and Spectrum’s associates Mr Marroun, Mr Shakir, Mr Rahmy Khalil and later Mr Bass Khalil. Part of the meeting was observed by Ms Young’s daughter, Tahlia Young.

The Tribunal’s findings included (at [39]) that Ms Young was very upset, shaking and appeared to be crying; that Mr Marroun and Mr Davis were standing very close to each other; that there was a verbal altercation; that Mr Marroun was aggressive and angry; that Mr Khoury in anger withdrew an offer to do rectification work; that Ms Young was uncomfortable and felt intimidated; and that Ms Young continues to feel intimidated by Spectrum’s staff.

At [50], the Tribunal described the meeting on 12 February 2024 as a “disturbing confrontation” at which Ms Young, Mr Davis and later Tahlia Young were vastly outnumbered by six representatives of Spectrum. This was notwithstanding the Tribunal noting Mr Khoury’s evidence that some of those attending the site on behalf of Spectrum were incidental and not participating in the meeting. The Tribunal stated that it did not consider that Ms Young should be expected to allow Spectrum back to the premises.

Four experts gave evidence at the Tribunal hearing: a building expert and an engineering expert for each party. At [56], the Tribunal stated that it had reservations about the weight to be given to the evidence of Mr Boutros, the engineering expert relied upon by Spectrum. The Tribunal found that Mr Boutros was not independent in the manner usually expected of an expert witness. Mr Boutros and his firm Structa Consulting Engineers prepared the engineering specifications upon which Spectrum’s impugned work was based. In addition, the Tribunal stated that it had concerns about Mr Boutros’ ability to provide independent evidence in light of the personal benefit which might ensue to him in the form of continued work from Spectrum, notwithstanding Mr Boutros’ evidence that he would not risk his professional reputation to assist a client.

At [57], the Tribunal held that these facts affected the weight to be given to Mr Boutros’ evidence. The Tribunal decided that if there were irreconcilable differences between the evidence of Mr Boutros and that of Mr Colgrave, Ms Young’s engineering expert, then if all other factors were equal, less weight would be given to Mr Boutros’ evidence due to his lack of independence.

The Tribunal dealt with the Eastern retaining wall at [58]-[68] of the Reasons. At [60], the Tribunal noted that a new retaining wall was not priced into the contract but added that if it was found that a new or renovated retaining wall was foreseeably necessary to deliver a structure for the pool for its lifetime, and that this was not excluded under the contract, then Spectrum may nonetheless be required to provide for a satisfactory retaining wall.

At [62], the Tribunal found that the retaining wall in its present form was insufficient to support the swimming pool for its 50 year lifespan. The Tribunal found that the current retaining wall had at best a life of 25 years. The Tribunal held that Ms Young was entitled to expect the underlying structure of the pool to support the pool for its lifetime, unless such an expectation was excluded by a term of the contract (which it was not).

At [63]-[64], the Tribunal held that an appropriately robust retaining wall had not been delivered and was required. The Tribunal gave five reasons for this finding:

both engineering experts agreed that the eastern side coping needed to be supported by the Eastern retaining wall, by providing ground support;

Mr Boutros’ evidence of the longevity of the Eastern retaining wall was, at its highest, 25 years; Mr Colgrave considered it more likely to have a life of 10 years;

the Tribunal accepted Mr Colgrave's evidence that even a longevity of 25 years for the retaining wall was not a "medium design life", which was required to comply with the applicable Australian Standard;

Mr Boutros did not attend the site to inspect the retaining wall, relied on photographs provided by Spectrum and was unable to produce calculations in respect of the loading on the retaining wall which he said he performed;

the Tribunal found Mr Colgrave's evidence more persuasive based both on his analysis and the independence which he brought to bear.

At [64], the Tribunal found that the requirement for integrity of the retaining wall over the reasonable life of the pool was within the scope of the obligations imposed on Spectrum under the contract. The Tribunal found that the Builder's "effectuation", i.e. implementation, of the design was inadequate for providing the structural support required. The Tribunal also found that an alternative solution proposed by Mr Boutros to cantilever the coping was inadequate.

At [65], the Tribunal found that Ms Young was relying on Spectrum to construct a pool fit for purpose, requiring the pool and its associated structure to have the lifetime expected of a new pool. The Tribunal found that Ms Young "might justifiably have expected" Spectrum to draw it to her attention if the structure required replacement at the halfway point or earlier in the life of the pool and to exclude such structural work if that was Spectrum's intention. The Tribunal also found that it should have been foreseeable to Spectrum that a customer in Ms Young's position might assume that all required structural works would last the lifetime of the pool unless otherwise stated and excluded.

At [66], the Tribunal referred to authority which justified reading necessary work into the scope of work, unless specifically excluded. The Tribunal quoted from *Dorter & Sharkey, Building and construction contracts in Australia: law and practice* (looseleaf) at [8.50], part of which we have extracted below:

Courts faced with the task of determining the scope of work in particular construction contracts will rarely conclude that the scope is defined exclusively by the technical contract documents, especially where the obligation of the contractor is to perform some entire work such as a house "completed and dry and fit" (*Williams v Fitzmaurice* 157 ER709;(1858)3 Hurl & N 844); a railway line "from terminus to terminus complete" (*Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597); or "the construction of a concrete retaining wall" (*Walker v Randwick Municipal Council* (1929) 30 SR (NSW) 84). Perhaps realising how near to impossible it would be to expressly incorporate every item of work, no matter how minor, in the technical contract documents, judges have shown a tendency to interpret a general work obligation as obliging the contractor to also perform works not specifically referred to in those documents where such works are indispensably necessary for completion and for the satisfaction of the general obligation.

...

Reference is sometimes made to a “principle” relating to indispensably necessary works. It is more correct, however, to see the issue in terms of a judicial disinclination to narrowly construe a contractor's entire work obligation rather than in terms of some enshrined doctrine.

At [67], the Tribunal concluded that the failure by Spectrum to make satisfactory provision for the Eastern retaining wall represented a design defect and a breach of the duty to perform work with due care and skill under section 18B(1)(a) of the HBA; a breach of the duty of due diligence under section 18B(1)(d) of the HBA; and a breach of the duty to deliver a pool reasonably fit for purpose under section 18B(1)(f) of the HBA. The Tribunal stated that these breaches entitled Ms Young to be put in the position she would have been in if these warranties had been fulfilled.

At [55], the Tribunal found that it was appropriate to allow an uplift factor of 4% for pricing estimates between the time those estimates were given and the time of the hearing. In making this finding the Tribunal accepted the percentage proposed by Ms Young's building expert based on the Rawlinson guide and preferred this approach to an uplift figure proposed by Spectrum's building expert based on his anecdotal observations of the market. The Tribunal stated it preferred setting an uplift factor based on the Rawlinson guide because it was an industry standard objective guide with an established research method and was accepted in construction pricing and litigation.

Allowing for this 4% uplift factor, at [67] the Tribunal allowed \$31,115.44 as damages for breach of the statutory warranties in respect of the retaining wall. The total figure for damages assessed by the Tribunal at [101] included certain percentages for factors such as preliminaries, builder's profit and contingencies which were assessed on all amounts allowed as damages, including the sum allowed for the Eastern retaining wall.

At [68], the Tribunal held that as the pricing for the retaining wall took into account a walkway as prescribed by the development application approval from Council, it was unnecessary to consider and resolve a dispute about whether construction of the originally quoted 800 mm walkway should prevail over the one metre wide walkway approved by Council.

Notice of Appeal

Spectrum lodged its Notice of Appeal within time on 14 May 2026. In terms, Spectrum sought to set aside the order for compensation against it in its entirety. Spectrum sought an order that Ms Young's application be dismissed insofar as it related to the Eastern retaining wall, or alternatively that the proceeding be remitted for rehearing by a differently constituted Tribunal.

At the hearing of the appeal the solicitor for Spectrum confirmed that Spectrum only sought that the order for compensation against it be set aside to the extent that the amount assessed by the Tribunal for a new retaining wall formed part of the total damages.

In its Notice of Appeal, Spectrum relied on ten grounds of appeal, all of which it continued to press at the hearing of the appeal. Spectrum asserted that the first eight of its grounds of appeal raised questions of law which gave it a right of appeal under section 80(2)(b) of the Civil and Administrative Tribunal Act 2013 (NCAT Act) but that it required leave to appeal on the basis of grounds 9 and 10 under section 80(2)(b) and clause 12 of Schedule 4 to the NCAT Act.

The grounds of appeal contended for by Spectrum may be summarised as follows:

Ground 1: The Tribunal erred in law at [60]-[67] in applying what Spectrum described as the “indispensably necessary works” doctrine in circumstances where the Eastern retaining wall was outside the scope of the contract.

Ground 2: The Tribunal erred in law at [62]-[64] in failing to provide adequate reasons to explain why Spectrum’s case in relation to the Eastern retaining wall was rejected.

Ground 3: The Tribunal erred in law at [68] in failing to decide a material contested issue, namely the length of any required extension to the eastern pool coping.

Ground 4: The Tribunal erred in law at [56]-[57] in giving less weight to the evidence of Spectrum’s engineer, Mr Boutros, on the basis of his perceived lack of independence.

Ground 5: The Tribunal erred in law at [50] by failing to take into account evidence elicited by the Tribunal Member in relation to whether a work order should be made instead of compensation.

Ground 6: The Tribunal erred in law at [50] by characterising the attendance at the meeting at the residence on 12 February 2025 as involving six representatives of Spectrum in circumstances where there was uncontested evidence that two of those representatives were not participating in the discussions.

Ground 7: The Tribunal erred in law at [39(6)] and [76] in relying on an alleged statement by Mr Marroun on behalf of Spectrum that the tilers were poor tradesmen when that proposition was not put in cross-examination to Mr Marroun.

Ground 8: The Tribunal erred in law at [55] in adopting a 4% uplift factor based on the Rawlinson’s guide without engaging with a concession by Ms Young’s building expert that the 4% figure was a forecast rather than actual data of recorded increases.

Ground 9: Alternatively to Grounds 1 to 4, the finding that the Eastern retaining wall was within scope and that damages should be awarded in respect of it was against the weight of evidence and leave to appeal should be granted.

Ground 10: Alternatively, the Tribunal’s preference for a money order over a work order was not fair and equitable and leave to appeal should be granted.

Submissions

At the outset it is regrettably necessary to record that the hearing of the appeal was considerably disrupted due to Spectrum's failure to comply with directions for the lodgment of its documents and submissions.

On 10 June 2026 Spectrum was ordered to lodge with the Appeal Registry and give to Ms Young by 1 July 2026, among other things, all the evidence on which it intended or sought leave to rely on and its written submissions. Ms Young was ordered to lodge and give to Spectrum by 22 July all of the evidence on which she relied or sought to leave to rely on and her submissions in opposition.

In fact, the Appeal Panel was provided by Spectrum with two lever arch volumes comprising 649 pages of materials, including its written submissions, on the day of the hearing of the appeal. Evidence provided by Ms Young showed that that her legal team was provided with these materials progressively from 22 July 2026 to 7 August 2026. Ms Young lodged her written submissions and Appeal Bundle on 7 August 2026.

Spectrum's submissions

Ground 1 of the appeal received the most attention in Spectrum's submissions. Spectrum submitted that the Tribunal incorrectly applied what it described as the "indispensably necessary works" doctrine into a defined scope contract when it in fact only correctly applied to what Spectrum described as "entire work" obligations. Spectrum submitted that it did not have a general work obligation under the contract but a precise scope of work defined by the quotation and the ten express exclusions. It submitted the presence of a closed list of exclusions gave rise to an *expressio unius* inference that inclusions and exclusions were addressed by the parties' bargain.

Spectrum submitted that its construction of the contract was supported by the evidence of all four experts that the retaining wall was not part of the contract and by Ms Young's statement to Mr Khoury that the retaining wall would be a variation.

In argument it was put to the solicitor for Spectrum that the contract in this case was analogous to the contract in *Walker v Randwick Municipal Council* (1929) 30 SR(NSW) 84 for the construction of a concrete retaining wall (referred to in the extract at [29] above) and that similarly in this case the contract was for the entire work involved in providing a swimming pool for its expected life, subject to specified exclusions. The response of Spectrum's solicitor was that it was not an analogue because a retaining wall was already present in this case and that it would only be an analogue if there was no retaining wall present at all.

During the course of oral argument on the appeal, the solicitor for Spectrum submitted for the first time that Spectrum relied on a principle which had not been referred to at the Tribunal hearing or in its Notice of Appeal or written submissions. Spectrum's solicitor stated that this principle was that the warranties in section 18B of the HBA do not apply to work which is outside the contractual scope of work. In support of this principle he referred to *Oikos Constructions Pty*

Ltd v Ostin & Anor [2020] NSWCA358 (Oikos) and Professional Construction Service Pty Ltd v The Owners- SP 92156 [2023] NSWCATAP 323 (Professional Construction Service).

As to Ground 2, which asserted inadequate reasons to expose why Spectrum's engineering case was rejected, Spectrum claimed that particular evidence was not addressed in the Tribunal's reasons, namely Mr Boutros' evidence that the pool was founded on bedrock and the retaining was doing very little other than holding up topsoil and certain concessions by Mr Colgrave in cross-examination concerning Council guidelines and the hypothetical possibility that a pool can be built with an existing retaining wall.

In support of Ground 3, Spectrum claimed that at [68], the Tribunal had failed to decide a material issue in contest concerning the length of coping requiring extension and that Ms Young's rectification estimate for the retaining wall depended on its resolution.

Spectrum submitted in support of Ground 4 that the Tribunal had applied a wrong principle in discounting Mr Boutros' evidence because of his lack of independence. As we understand the submission, Spectrum said that both at common law and by virtue of NCAT Procedural Direction 3, a lack of independence goes to the weight of evidence rather than its admissibility and that the weight to be attributed to Mr Boutros' evidence should have been assessed by reference to the evidence he gave rather than by discounting based on a presumption of lack of independence.

Ground 5, described as a "failure to take into account the Tribunal's own s 48MA evidence" amounted to a submission that the Tribunal had failed to take into account evidence given by Mr Marroun in answer to a question from the Tribunal, to the effect that if a work order was made Spectrum would have to do it, Mr Marroun thought he could do a better job and that he bore no ill will to Ms Young.

Ground 6 relates to the number of people on behalf of Spectrum who attended the meeting on 12 February 2024. Spectrum submitted the Tribunal wrongly characterised the meeting as involving "six Builder parties" when there was uncontroverted evidence that two of those six did not participate in the discussion.

As to Ground 7, Spectrum submitted that the Tribunal had relied on evidence from Ms Young that Mr Marroun had said that Spectrum did not have good tilers without Ms Young having put that to Mr Marroun in cross-examination. Spectrum submitted that this offended the rule in *Browne v Dunn* (1893) 6 R 67 and denied Spectrum procedural fairness.

Spectrum submitted in relation to Ground 8 that the Tribunal's decision to adopt an uplift factor of 4% failed to address a concession by Ms Young's building expert that the 4% figure was a forecast rather than actual data of reported increases.

Ground 9 was put briefly and was expressed as in the alternative to Grounds 1 to 4. It involved an application for leave to appeal in respect of the decision to award relief for the retaining wall. Spectrum relied on matters raised in support of the earlier grounds to submit that the decision was against the weight of evidence and that there was a significant possibility that Spectrum would have achieved a materially better outcome had the evidence been weighed correctly.

The submission in support Ground 10 was also put concisely and involved an application for leave to appeal in relation to the decision to prefer a money order over a work order on the basis that the decision was not fair and equitable for reasons raised in support of other grounds.

Ms Young's submissions

As to Ground 1, Ms Young accepted that this ground involved a question of law but submitted that there was no error in the decision. Ms Young submitted that it was not in dispute that the retaining wall was not referred to in the contract and the Tribunal had acknowledged this at [60].

Ms Young submitted that the contract was a design and construct contract, that Spectrum was responsible for the design and this and the obligation of Spectrum to provide a pool that was fit for purpose was the relevant context. Ms Young emphasised the Tribunal's finding that she was relying on Spectrum to provide a pool that was fit for purpose.

Counsel for Ms Young submitted that whilst there was no express term in the contract making Spectrum responsible for the design, this obligation could be inferred from Spectrum's work to design the pool, including engaging Mr Boutros for the structural design. Furthermore, it could be inferred from the Reasons at [67] that the Tribunal found that Spectrum had an obligation to design the pool.

Ms Young submitted that her statement to Mr Khoury that the retaining wall was a variation should not be taken as an admission in the legal sense, particularly as she is a lay person.

As to Spectrum's response to the argument that this contract was not for the entire work of providing a swimming pool because there was an existing retaining wall, counsel for Ms Young submitted that it made no difference whether there was no existing retaining wall or an existing defective retaining wall. In either case the pool had to be fit for purpose, and it was equally unfit for purpose if there was an existing defective wall or no wall at all.

In relation to the new submission first raised in oral argument on appeal by Spectrum that the warranties in section 18B of the HBA do not apply to work outside the contractual scope of work, counsel for Ms Young said that this argument should not be countenanced by the Appeal Panel due to the prejudice occasioned to Ms Young by this argument being raised for the first time at the hearing of the appeal. Counsel submitted that she had no opportunity to consider this submission or to read the cases to which reference was made. Counsel submitted that the prejudice to Ms Young was amplified by Spectrum's breach of the Appeal Panel's directions, which meant that Ms Young had been fully engaged in endeavouring to absorb the existing arguments made against Ms Young in a very limited time.

As to Ground 2, Ms Young accepted that failure to give adequate reasons raises a question of law but submitted that the Tribunal adequately explained its reasons for rejecting Spectrum's engineering case in relation to the retaining wall. Ms Young pointed out that the fact that a court or tribunal does not refer to every piece of evidence, including every aspect of lengthy expert reports, does not mean that the evidence has not been considered: *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 189.

In response to Ground 3, Ms Young submitted that this did not raise a question of law. In any event, the only relevance of the coping length was if Spectrum's position was accepted and the entire retaining wall did not need to be replaced. As the Tribunal determined that the retaining wall had to be replaced the issue did not need to be decided, as only Ms Young had assessed an amount for the complete replacement and there was no competing assessment from Spectrum.

Ms Young submitted that Ground 4 did not raise a question of law and that the Tribunal's decision to prefer the evidence of Mr Colgrave was a discretionary decision. Ms Young submitted that the Tribunal did in fact engage with the substance of Mr Boutros' evidence and, in any event, consideration of an expert's evidence and independence are intertwined.

As to Ground 5, Ms Young submitted that this did not raise a question of law and that the failure of the Tribunal to specifically refer to this passage of evidence did not mean it was not considered. Ms Young submitted that it in any event it would have made no difference to the decision to prefer a money order, for the reasons given by the Tribunal.

Ms Young submitted that Ground 6, relating to how many associates of Spectrum were present at the meeting on 12 February 2024, did not raise a question of law and that the Tribunal had expressly noted at [50] that Spectrum's evidence was that two individuals did not participate in the meeting.

Ms Young submitted that Ground 7 did not raise a question of law and did not identify any substantial injustice. Ms Young pointed out that Mr Marroun in his statement did not deny saying the words attributed him by Ms Young. Nor was Ms Young tested in cross-examination on her evidence on this point. In these circumstances there was no obligation on Ms Young to prove the truth of her assertion by putting it to Mr Marroun.

Ms Young submitted that Ground 8 did not raise a question of law, that the Tribunal was entitled to prefer her expert on the appropriate uplift factor and gave sound reasons for doing so.

In response to Grounds 9 and 10, Ms Young submitted that these grounds did not raise any new considerations and that leave to appeal should be refused. Ms Young also pointed out that the decision to prefer a money order was a discretionary decision and no error of the kind referred to in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 had been identified.

Spectrum's submissions in reply

In submissions in reply the solicitor for Spectrum did not accept that the contract was a design and construct contract or that Spectrum had any design responsibilities for the swimming pool under the contract.

Consideration

Ground 1: Scope of Spectrum's obligations

It was agreed by the parties that this ground raises a question of law as to the characterisation of Spectrum's obligations under its contract with Ms Young and the true extent of the scope of work. We treat this ground as raising a question of law, namely whether the Tribunal applied a wrong principle in construing the contract.

There was a dispute between the parties at the hearing of the appeal as to whether the contract should be characterised as a "design and construct contract" under which Spectrum had an obligation to design the pool. Although at [67] of the Reasons there is a reference to Spectrum's failure to make satisfactory provision for the Eastern retaining wall being, among other things, a design defect, there is no clear finding by the Tribunal that Spectrum was responsible for designing the pool.

The contract does not explicitly impose design obligations on Spectrum, although it does impose responsibility on Spectrum for "Approvals (incl. Council)" (Spectrum Appeal Book page 67).

The Tribunal found, as recorded in the Reasons at [32], that Spectrum procured Mr Boutros of Structa Consulting Engineers to produce structural drawings for the pool on 10 July 2023. As contemplated by the contract, Spectrum lodged the development application which contained detailed drawings with Sutherland Shire Council (Spectrum's Appeal Book tab 5, page 6). As recorded at [34] of the Reasons, Mr Khoury gave advice to Ms Young on 27 October 2023 that the timber of the eastern retaining wall would be used as formwork and would just need to be dressed and painted after completion.

It therefore appears, despite the contract containing no express obligation, that Spectrum assumed certain responsibilities to Ms Young for the design of the pool insofar as it related to the Eastern retaining wall. However, it is unnecessary to resolve what, if any, contractual obligations Spectrum had to Ms Young for the design of the pool. The appeal can be resolved by reference to Spectrum's building obligations.

In our view the Tribunal's construction of the scope of contractual obligations was correct. In particular, the parties entered into a contract for Spectrum to undertake all the work in constructing the pool, subject to specified exclusions. The contract contained the warranties implied into the contract by section 18B of the HBA. By virtue of those warranties, Spectrum promised to construct a pool which was, among other things, fit for its specified purpose, which required the pool and its associated structure to have the lifetime expected of a new pool. The contract contained no relevant exclusion derogating from that contractual promise.

It is no answer to this conclusion to assert, as appears to have been common ground in any case, that a new retaining wall was not priced into the contract. Absent any exclusion or other term to the contrary, the contract incorporating the statutory warranties under the HBA required Spectrum to perform the work involved in constructing a pool for its reasonably expected lifetime.

Similarly, it is no answer to this conclusion to point to the statement by Ms Young to Mr Khoury to the effect that a new retaining wall would be a variation. Whether it would amount to a variation involves a legal conclusion in respect of which Ms Young's subjective state of mind is irrelevant.

We accept the submission by counsel for Ms Young that the fact that there was an existing, defective retaining wall is not, in principle, different to there being no retaining wall at all. In either case, the contract incorporating the statutory warranties under the HBA required the pool to be fit for purpose and built to last for its reasonably expected lifetime.

We have not had the benefit of proper argument about Oikos and Professional Construction Service due to the unsatisfactory way in which these cases were first raised by the solicitor for Spectrum in oral submissions, following its written submissions being weeks late. Among other things, we have not heard argument on whether a proper consideration of the principle for which these cases stand might have led to further evidence being led before the Tribunal. In any event however, our review of these cases indicates that they are distinguishable from the present case.

In Oikos, the new owners of a residence arranged for a building inspection prior to purchase which indicated problems of water penetration. The vendors arranged for a builder to inspect the property. The builder provided by email a list of likely causes of water penetration and an estimate to rectify those causes. The vendors entered into a contract with the builder to undertake remediation based on the builder's email. However, problems of water penetration continued after the work was completed. A subsequent report showed that some of the builder's work was defective. However, the report also showed that even if the builder's work had not been defective it would not have prevented the ingress of water, as there were defects requiring remediation beyond those identified in the scope of works. The primary judge found for the owners, having characterised the contract as for the purpose of preventing water ingress rather than being confined to rectifying the issues identified in the builder's email.

The NSW Court of Appeal allowed an appeal by the builder, holding that the primary judge had mischaracterised the contract. The Court of Appeal held that the objective purpose of the contract was only to address the then identified likely causes of water penetration, not to address all potential causes. The Court held at [78]-[85] that the statutory warranties in section 18B of the HBA may, depending on the circumstances, expand the scope of work that a builder contracts to do. In this case however, there was a specifically agreed scope of works and there was no evidence that the owners disclosed a particular purpose or result that the works were to satisfy.

In Professional Construction Service, the Appeal Panel dismissed an appeal from a Tribunal decision which had, on the relevant issue, followed Oikos in respect of a factual case involving water penetration which it found to be “quite similar” to Oikos (see [27]).

In our view there is a clear distinction between the facts as found in this case and the decision in Oikos. In Oikos the contract had a precise scope of work limited to only certain expressly specified possible causes of water ingress. In contrast in this case, the contract required Spectrum to carry out all the work involved in constructing a pool subject only to certain specified exceptions not presently relevant. Instead of assisting Spectrum, we consider that these two cases provide support for the Tribunal decision in this case.

We dismiss Ground 1 of the appeal.

Ground 2: Adequacy of reasons

The parties agreed that this ground of appeal raises a question of law. We will treat this ground as raising a question of law, namely whether the Tribunal failed to provide proper reasons to disclose why Spectrum’s case in relation to the Eastern retaining wall was rejected.

In our view the Tribunal’s Reasons at [62]-[65] clearly exposed the critical reasons why Spectrum’s engineering case was rejected. The true complaint by Spectrum is that certain specific evidence, which we identified at [45] above, was not expressly referred to in the Reasons. We are not persuaded that any of those matters was critical to the decision made. The Tribunal is not required to spell out in minute detail every step in the reasoning process or to refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings: *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 at [41]. The Reasons did so.

We dismiss Ground 2 of the appeal.

Grounds 3: Failing to decide a material contested issue

We will treat this ground of appeal, which asserts that the Tribunal failed to resolve a material issue presented for determination, as raising a question of law. Grounds such as this have been characterised as a constructive failure to exercise jurisdiction: *Alexandria Landfill Pty Ltd v Transport for NSW* (2020) 103 NSWLR 479; [2020] NSWCA 165 at [6]; *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 at [32(4)].

However, the ground is without merit. In the way in which the Tribunal resolved the dispute, the issue was not material. In the Reasons at [68], the Tribunal explained that it was unnecessary to consider whether the cost of the originally quoted coping of 800 mm should prevail over the cost of coping of one metre approved by Council. This was because the Tribunal had decided that the entire retaining wall had to be replaced. Only Ms Young had provided a quantification of the entire cost of replacement, which was based on, among other things, the Council approved coping.

We dismiss Ground 3 of the appeal.

Grounds 4 to 7

Despite Spectrum's assertion that each of these grounds raises a question of law, in our view it is clear that none of them do so. Each of them is clearly a challenge to factual findings made by the Tribunal. Ground 4 challenges the Tribunal's decision as to the weight to be given the evidence of Mr Boutros. It is one of the matters relied on in support of Ground 9, in which leave is sought to appeal against the finding that the Eastern retaining wall should be replaced. We will consider this issue in that context.

Grounds 5 to 7 involve challenges to factual findings made by the Tribunal relevant or potentially relevant to its decision to prefer a money order over a work order. They are matters which may be considered in relation to Ground 10 of the appeal, in which leave is sought to appeal against the making of a money order. We will take these issues into account in considering that ground of appeal.

We dismiss Grounds 4 to 7 of the Appeal.

Ground 8

Ground 8 of the appeal is a challenge to the finding by the Tribunal that it should adopt a 4% uplift factor in calculating monetary payments. In our view this ground does not raise a question of law. It is purely a challenge to a factual finding by the Tribunal.

Spectrum did not seek leave to appeal in the alternative in relation to this ground. In any event, in our view this finding by the Tribunal, explained in the Reasons at [55], was amply justified by the evidence and was based upon acceptance of an accepted industry guide in preference to personal observations of the market by Spectrum's building expert.

We dismiss Ground 8 of the appeal.

Ground 9: Leave to appeal in relation to the retaining wall

By virtue of Schedule 4 clause 12 to the NCAT Act, the Appeal Panel may grant leave to appeal from decisions of the Consumer and Commercial Division if it is satisfied that an appellant may have suffered a substantial miscarriage of justice because the Tribunal decision was not fair and equitable, or was against the weight of evidence, or significant new evidence has arisen (being evidence not reasonably available at the time the proceedings under appeal were being dealt with).

Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12 of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b) of the NCAT Act. Ordinarily, it is only appropriate to grant leave to appeal if an issue of principle is involved, if there is a question of public importance, or if an injustice is reasonably clear: *Unique* at [42]-[43]; *Collins v Urban* [2014] NSWCATAP 17 at [84].

Spectrum has contended that the decision in relation to the Eastern retaining wall was against the weight of evidence. In its submissions on this ground, Spectrum relied on the matters which it raised in support of Grounds 1 to 4.

We have already addressed those matters raised in relation to Grounds 1 to 3 and concluded that there was no error in the approach taken by the Tribunal. We also see no error in the Tribunal's decision to afford less weight to the evidence of Mr Boutros than the evidence of Mr Colgrave if there were irreconcilable differences between their evidence and all other factors were equal. This was not a decision to reject the evidence of Mr Boutros but a reasoned and orthodox explanation for why, in certain circumstances, that evidence would be given less weight. We accept Ms Young's submission that consideration of an expert's evidence and independence are intertwined.

Plainly Mr Boutros was not independent: his firm had provided the engineering specifications for the pool and had an ongoing commercial relationship with Spectrum. In any event, on the critical engineering issues of whether an appropriate retaining wall had been provided and whether it was required, the Tribunal provided a range of other reasons why Mr Colgrave's evidence was more persuasive, including that, unlike Mr Colgrave, Mr Boutros had never attended the site to inspect the retaining wall: *Reasons* at [63].

We are satisfied that the Tribunal's decision in relation to the retaining wall was not against the weight of evidence. We are not persuaded that Spectrum may have suffered a substantial miscarriage of justice in relation to the Tribunal's decision on this issue. We refuse leave to appeal in relation to Ground 9.

Ground 10: Leave to appeal in relation to the money order

Spectrum has contended that the decision to prefer a money order over a work order was not fair and equitable. It points to the statutory preference for a work order under section 48MA of the HBA and the matters raised under Grounds 5 to 7.

The requirement under section 48MA for the Tribunal to have regard to the principle that a work order is the preferred outcome creates a mandatory relevant consideration in exercising its discretion as to the appropriate remedy. It does not create a presumption. An owner who seeks a money order does not bear any evidentiary onus. Moreover, as it is a discretionary decision, the Appeal Panel must be satisfied that an error has been made in the exercise of the discretion. It is not sufficient for the Appeal Panel to merely conclude that it would have decided the matter differently: see generally *Mashat v Build Property Pty Ltd* [2026] NSWCATAP 148 at [38]-[41] and

the cases there cited.

We see no error in the manner in which the Tribunal weighed up relevant factors in the exercise of discretion in the Reasons at [50]. As to the matter raised by Ground 5 of the appeal, the fact that every item of potentially relevant evidence was not specifically referred to in the Reasons does not mean that it was not taken into account. As to Ground 6, the Tribunal at [50] of the Reasons acknowledged the evidence that some of those in attendance on behalf of Spectrum at the meeting on 12 February 2025 did not participate. The number of representatives of Spectrum at what the Tribunal described as a “disturbing confrontation” was only one contextual factor in leading the Tribunal to conclude that the relationship had broken down.

The matter raised by Ground 7 concerns a statement attributed by Ms Young to Mr Marroun at the meeting on 12 February 2025 relating to supervision and planning of the work and the quality of the tilers. Spectrum’s complaint is that this proposition was not put to Mr Marroun in cross-examination. However Mr Marroun’s statement of evidence (Tab 13 of Spectrum’s Appeal Book) did not deny the statement or challenge Ms Young’s evidence on this point. Furthermore, Spectrum did not explain how this statement attributed to Mr Marroun was material to any relevant finding or conclusion reached by the Tribunal. It is not clear that it was taken into account by the Tribunal in preferring a money order. At [50] of the Reasons, the Tribunal referred to evidence from Mr Khoury himself in cross-examination which led to concern that Mr Khoury did not appreciate the required standard of work and skills required.

We are satisfied that there was nothing unfair or inequitable in the Tribunal’s decision to make a money order in this case. We are not persuaded that Spectrum may have suffered a substantial miscarriage of justice in relation to the Tribunal’s decision on this issue. We refuse leave to appeal in relation to Ground 10.

Costs

Spectrum’s appeal has been unsuccessful and Spectrum accepted in oral submissions that if this was the outcome there should be an order that it pay Ms Young’s costs of the appeal, including the reserved costs of its application for a stay.

In these circumstances it is unnecessary to consider alternative submissions made by Ms Young if Spectrum had succeeded in its appeal.

Orders

We make the following orders:

To the extent necessary, leave to appeal is refused.

Appeal dismissed.

Order the appellant to pay the respondent’s costs of the appeal on the ordinary basis, including the reserved costs of the appellant’s application for a stay.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated:

08 September 2026

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/1a078da5290d02980753c989>

CASE PAGE <https://chat.esheria.ai/case-law/australia/spectrum-pools-and-spas-pty-ltd-v-young-2026>

Prepared on 26 October 2026 · Esheria