SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0004

METRICON HOMES PTY LTD (ACN 005 108 752) — Applicant

v

EARL SOFTLEY — First Respondent

and

SHELLEY SOFTLEY — Second Respondent

JUDGES:	WARREN CJ, TATE JA and ROBSON AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	9 September 2015
DATE OF JUDGMENT:	6 April 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 60
JUDGMENT APPEALED FROM:	[2014] VCAT 1502

APPEALS – Court of Appeal – Application for leave to appeal against decision of Victorian Civil and Administrative Tribunal – Whether *Supreme Court Act 1986* ss 14A–14D apply – Whether 'real prospect of success' test in *Supreme Court Act 1986* s 14C applies – Comparison of 'real prospect of success' test with test in *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 – *Victorian Civil and Administrative Tribunal Act 1998* s 148 – *Ikosidekas v Karkanis* [2015] VSCA 121 considered.

STATUTORY INTERPRETATION – Legislative intention – Interpretation of two State Acts – Whether inconsistency arises – *Victorian Civil and Administrative Tribunal Act 1998* s 148 – *Supreme Court Act 1986* ss 14A–14D.

JUDICIAL REVIEW – Application for leave to appeal against decision of Victorian Civil and Administrative Tribunal – Building contract – Applicant's breach of contract resulted in slab heave and structural distress in respondents' house – Whether Tribunal erred in assessing damages as cost of demolishing and rebuilding house – Whether Tribunal failed to provide adequate reasons – *Bellgrove v Eldridge* (1954) 90 CLR 613, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 and *Kirkby v Coote* [2006] QCA 61 applied – Leave to appeal granted – Appeal dismissed.

WORDS AND PHRASES – 'civil appeal'.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr J H Gobbo QC with Mr B B Carr	Norton Rose Fulbright
For the Respondents	Mr T J Margetts QC with Mr R A Scheid	Slater & Gordon

WARREN CJ:

1 This is an application for leave to appeal from a decision of the Victorian Civil and Administrative Tribunal ('VCAT') pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). The matter was heard and decided by VCAT constituted by a Vice President and a Member.

2 The facts are set out in the judgment of Robson J, where his Honour has drawn substantially on the findings of fact made by VCAT in its reasons.

3 A preliminary issue raised by this matter is the applicable test for leave to appeal to the Court of Appeal from VCAT. Prior to the introduction of the new regime governing civil appeals to the Court of Appeal, the test for leave to appeal under s 148 of the VCAT Act was that set out in *Secretary to the Department of Premier and Cabinet v Hulls* ('*Hulls*').[1] The question arises whether the introduction of ss 14A–14D of the *Supreme Court Act 1986* ('the SC Act') has changed that position.

4 This question has previously been raised but not decided in this Court.[2] Given the uncertainty about the issue and its ongoing relevance, it is desirable to consider it in detail in the present matter.

5 For the reasons that follow, my view is that applications for leave to appeal from VCAT to the Court of Appeal are subject to ss 14A–14D of the SC Act and, in particular, the 'real prospect of success' test in s 14C.

The relevant legislation

6 A new regime governing civil appeals to the Court of Appeal commenced on 10 November 2014. The regime was brought into effect by the *Courts Legislation Miscellaneous Amendments Act 2014* ('the Amending Act'). The Amending Act inserted ss 14A–14D into the SC Act:

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1 [1999] 3 VR 331.

2 See, eg, *Ikosidekas v Karkanis* [2015] VSCA 121; *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216; *Hoskin v Greater Bendigo City Council* [2015] VSCA 350.

14A Leave to appeal required for civil appeals

(1) Subject to subsection (2), any civil appeal to the Court of Appeal requires leave to appeal to be obtained from the Court of Appeal.

(2) Leave to appeal is not required —

(a) for an appeal from a refusal to grant habeas corpus; or

(b) for an appeal under the *Serious Sex Offenders (Detention and Supervision) Act 2009*; or

(c) if the Rules provide that leave to appeal is not required, whether in any particular class of application or proceeding or generally.

(3) For the purposes of this section, ***civil appeal*** means an appeal from a judgment or order made in exercise of civil jurisdiction, including an appeal by way of rehearing or judicial review, for which this Act, any other Act or the Rules provide an appeal to the Court of Appeal.

14B Commencing a civil appeal

(1) An applicant for leave to appeal under section 14A must file an application for leave to appeal within 28 days from the date of the judgment, order, determination or other decision which is the subject of appeal unless the Rules otherwise provide.

(2) Unless this Act, any other Act or the Rules otherwise provide, an application for leave to appeal is commenced by filing the application for leave to appeal.

14C Appeal must have real prospect of success

The Court of Appeal may grant an application for leave to appeal under section 14A only if it is satisfied that the appeal has a real prospect of success.

14D Determination of application for leave to appeal

(1) The Court of Appeal constituted by one or more Judges of Appeal may determine an application for leave to appeal under section 14A with or without an oral hearing of the parties.

(2) Subject to subsection (3), if the Court of Appeal dismisses an application for leave to appeal without an oral hearing, the applicant, in accordance with the Rules, may apply to have the dismissal set aside or varied at an oral hearing before the Court of Appeal constituted by two or more Judges of Appeal.

(3) If the Court of Appeal dismisses an application for leave to appeal without an oral hearing and has determined that the application is totally without merit, the applicant has no right to apply to have the dismissal set aside or varied.

(4) This section does not apply to —

(a) an appeal from a refusal to grant habeas corpus; or

(b) an appeal under the *Serious Sex Offenders (Detention and Supervision) Act 2009*.

7 The main purposes of the Amending Act were stated to include to amend the *Supreme Court Act 1986*:

(i) to provide for appeals to the Court of Appeal in civil proceedings to be generally by leave of the Court of Appeal;

(ii) to make other procedural amendments in relation to appeals to the Court of Appeal in civil proceedings; …[3]

8 Prior to the coming into force of the Amending Act, s 148 of the VCAT Act had provided:

(1) A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding —

(a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or

(b) to the Trial Division of the Supreme Court in any other case —

if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.

(2) An application for leave to appeal must be made —

(a) no later than 28 days after the day of the order of the Tribunal; and

(b) in accordance with the rules of the Supreme Court.

(3) If leave is granted, the appeal must be instituted —

(a) no later than 14 days after the day on which leave is granted; and

(b) in accordance with the rules of the Supreme Court.

…

(5) The Court of Appeal or the Trial Division, as the case requires, may at any time extend or abridge any time limit fixed by or under this section.

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[3] Amending Act s 1(a).

9 Section 23 of the Amending Act made amendments to ss 148(1) and (3) of the VCAT Act, so that those subsections now read:

> (1) A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding —
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> (a) if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others, to the Court of Appeal with leave of the Court of Appeal; or
>
> (b) in any other case, to the Trial Division of the Supreme Court with leave of the Trial Division.
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> …
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> (3) If leave to appeal to the Trial Division of the Supreme Court is granted, the appeal must be instituted —
>
> (a) no later than 14 days after the day on which leave is granted; and
>
> (b) in accordance with the rules of the Supreme Court.

10 In his second reading speech on the Amending Bill, the Attorney-General explained the new provisions of the SC Act as follows:

> Currently, in cases where a party may appeal to the Court of Appeal 'as of right', that party can have their full appeal heard and determined by three judges of appeal, even if the appeal lacks merit. The result is that a significant amount of the court's time and the parties' costs are taken up hearing and determining such appeals.
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> The universal leave requirement for civil appeals will enable the court to determine at an earlier stage which matters merit a full hearing. This will reduce costs for parties, and the time savings for the court will allow the court to focus on those appeals that do merit a full hearing, enabling those matters to be dealt with more promptly.
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> …
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> [T]he bill modernises and simplifies the test for leave to appeal by providing that leave to appeal may only be granted where the court considers that the appeal has a real prospect of success. This replaces the existing common law test for granting leave to appeal which requires an applicant for leave to appeal to demonstrate that the original decision is attended with sufficient doubt to warrant it being reconsidered on appeal, and a substantial injustice would be caused were the decision allowed to stand.[4]

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[4] Victoria, *Parliamentary Debates*, Legislative Assembly, 25 June 2014, 2277 (Robert Clark, Attorney-General).

The Hulls test

11 In *Hulls*,[5] the Court of Appeal gave detailed consideration to the question of when leave to appeal will be granted under s 148(1) of the VCAT Act. The discussion in *Hulls* was summarised in *Myers v Medical Practitioners Board of Victoria*[6] as follows:

- whether leave is granted or not must always depend upon the justice of the particular case;
- if leave is to be granted, the applicant must at least identify a question of law (as distinct from a question of fact) which is important to the substantive appeal's succeeding or failing;
- the applicant need not establish an error below — that is for the appeal itself. Rather, the applicant will be required to show that there is a real or significant argument to be put that error exists;
- although not essential, the applicant may identify a question of law that is of general or public importance. This will weigh in favour of granting leave;
- once a question of law has been identified which bears directly upon the relief which will be sought in the appeal, and once it has been shown that there is sufficient doubt attending that question to justify the grant of leave to appeal, leave will ordinarily be granted if the order below is a final order or final in its effect; and
- where the order sought to be appealed is an interim order, there may be reasons bearing on the justice done to both parties for not granting leave to appeal, for example, where granting leave to appeal will result in an unnecessary interruption to the substantive proceedings.

Subject to the emphasis of Phillips JA that the guidelines laid out are not hard and fast rules, he states:

> When leave is sought to appeal under s 148, it will be necessary for the applicant to identify a question of law which is relevant to the granting of the relief sought on appeal. The importance of the question, either generally or to the would-be appellant in the particular case, will probably be relevant. The applicant must show that there is a real or significant argument to be put on that question of law at least to this extent: that there is sufficient doubt about it to justify the grant of leave. Moreover, it may have to be shown that to allow the error to go uncorrected would impose substantial injustice, although, where the order below is final, that injustice will often be

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5 [1999] 3 VR 331.

6 (2007) 18 VR 48.

more readily discernible.[7]

12 A number of aspects of the principles stated in *Hulls* warrant further elaboration.

Real or significant argument / sufficient doubt

13 One of the principles from *Hulls* is that an applicant for leave should identify a question of law for which there is a real or significant argument to be put that error exists, or about which there is 'sufficient doubt' to justify the grant of leave.

14 The use of the term 'sufficient doubt' in *Hulls* was derived from the decision of the Full Court of the Victorian Supreme Court in *Niemann v Electronic Industries Ltd* ('*Niemann*').[8] In *Niemann*, McInerney J, in the context of discussing leave to appeal from interlocutory orders, stated that attention should be directed to two questions:

> whether the order [sought to be appealed] is attended with sufficient doubt to warrant its being reconsidered on appeal and secondly whether substantial injustice will be caused to the applicant if the order [sought to be appealed] is allowed to stand.[9]

15 Phillips JA in *Hulls* described the *Niemann* 'sufficient doubt' formulation as attractive, because:

> That seems to me to leave open what is 'sufficient', while at the same time confirming that there must be doubt 'sufficient … to justify the grant of leave'. Beyond that it is difficult to be more precise.[10]

16 His Honour observed elsewhere in his judgment that it was difficult to provide for a more precise test than the requirement that 'there is a real or significant argument to be put that error exists':

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7 Ibid 55–6 [28]–[29] (Warren CJ, Chernov JA and Bell AJA agreeing), quoting *Hulls* [1999] 3 VR 331, 337 [16].

8 [1978] VR 431.

9 Ibid 433 (McInerney J). See also at 442 (Murphy J).

10 [1999] 3 VR 331, 336 [12].

> It is not possible to lay down in advance any standard of satisfaction, for much may depend upon the importance of the question of law to the remedy to be sought.[11]

Justice of the case / substantial injustice

17 *Hulls* placed considerable emphasis on considering the justice of the case when deciding whether to grant leave to appeal under s 148(1) of the VCAT Act. This consideration:

> will in some cases be determinative. It directs attention to the position of the parties — and perhaps third parties if directly affected by the order below or the proposed appeal …
>
> Where the order sought to be appealed is interlocutory … there may be particular reasons, based in justice to both parties, for not granting leave to appeal. There are strong considerations against the fragmentation of any proceeding … Where a court is invited to grant leave to appeal from an order which is simply interlocutory, the litigation will be interrupted by the appeal, if leave is granted. … Hence, in *Niemann* it was said that an applicant for leave to appeal from an interlocutory order must show, not only sufficient doubt about the correctness of the order, but also that there would be substantial injustice in leaving that order unreversed.
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> Where the order which is under challenge is final, the injustice of allowing the determination below to stand uncorrected, if indeed it is attended by error, will be more readily discerned. It will be apparent, at least in many cases, that to leave a final order standing which would be reversed if error of law were established is unjust to the party adversely affected by the order: the prejudice lies in that party's being bound to comply with an order that ought not to have been made as a matter of law. Yet that may not always be so … even in the case of a final order, the court from which leave is sought might sometimes require persuasion that there would be prejudice if the order below were allowed to stand, though tainted by error. What was said in *Niemann* might then still be a useful guideline under s 148, whether the order below be final or interlocutory — provided it is recognised that the injustice attending an order's continuing to stand is probably more readily discernible if it is final rather than interlocutory.[12]

18 Subsequent cases have indicated that there will be no substantial injustice, and hence a lesser likelihood of leave to appeal being granted, where the alleged errors relied upon have been overtaken by events or where the success of the appeal would have limited practical impact. For example, in *De Simone v Bevnol*

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11 Ibid 335 [10].

12 Ibid 336–7 [13]–[15].

Constructions & Developments Pty Ltd,[13] the applicant sought leave to appeal from orders of VCAT refusing to grant a stay of a counterclaim against him. The applicant had sought the stay on the basis that he was the subject of a current police investigation arising out of the same facts as the counterclaim. The applicant submitted that defending the counterclaim might require him to forgo his right to silence in relation to any subsequent criminal proceedings brought against him. Prior to the hearing of the application for leave by the Court of Appeal, the applicant was charged with offences as foreshadowed. The Court of Appeal, in refusing leave to appeal, observed:

> [E]ven if his Honour [a Vice President of VCAT] erred … we do not consider that allowing the error to go uncorrected would cause substantial injustice on the facts of this case. VCAT has already made orders prohibiting the disclosure of the contents of the applicant's affidavit of 1 July 2008 to any person not involved in the VCAT proceedings. …
>
> Further, the matter has been somewhat overtaken by events. The applicant has now been charged as anticipated. It is open to him to make a fresh stay application in these altered circumstances, bearing in mind that the vice-president reached his conclusion in part on the basis that s 25 of the Charter did not apply to persons who were only under investigation. His Honour did not exercise his discretion in the circumstances which now prevail and there would be no utility in the court considering the challenge the applicant presently seeks to ventilate on appeal.[14]

Question of general importance

19 In *Hulls*, the Court accepted that the general importance of a question of law raised by the applicant was relevant to the determination of the grant of leave. Indeed, Phillips JA indicated the possibility that the general importance of the question of law could lead to the grant of leave where it might not otherwise have been granted:

> Thus, if the question of law, affecting the determination below, is one that not infrequently arises in a type of proceeding which is quite common, there may be compelling reason for a grant of leave so that the point may be exposed on appeal and corrected, if error there be, before error becomes entrenched. In such a case, it might be sufficient for the applicant to identify the question of

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13 (2009) 25 VR 237.

14 Ibid 247–8 [54], [56] (Neave JA and Williams AJA).

> law and its general importance. That is not to suggest that the applicant could succeed if the point were not open to debate but, given its public importance, there might be as much merit in the court's hearing full argument in order to confirm that there is no error as in its granting leave to appeal in order to correct error, particularly where continuing uncertainty could itself cause unnecessary expense and delay.[15]

20 These observations were applied by this Court in *Secretary, Department of Justice v PMY*.[16] In that case, the Secretary sought leave to appeal from a VCAT decision directing the Secretary to give an assessment notice under the *Working with Children Act 2005* in favour of the respondent PMY. The Secretary's proposed appeal raised a question of general principle about the nature of the 'public interest' required to be taken into account by VCAT in such decisions, namely whether that public interest encompassed the potential impact on public confidence in the assessment system as a result of giving an assessment notice to individuals such as PMY.

21 The Court of Appeal was not satisfied that a sufficiently arguable error of law had been made out, but indicated that on the basis of the *Hulls* test, 'it might have been sufficient for the Secretary to identify a question of law and its general public importance to satisfy a grant of leave.'[17] However, the Court would have required the Secretary to provide an undertaking for PMY's costs as a condition of granting leave. As the Secretary declined to do so, leave was refused.[18]

The test under s 14C of the SC Act

22 The test for the grant of leave to appeal under s 14C is whether 'the appeal has a real prospect of success'. In *Kennedy v Shire of Campaspe* ('*Kennedy*'),[19] the Court explained this test as follows:

> Attention must be focussed on the words 'real prospect of success' used by

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15 [1999] 3 VR 331, 336 [11].

16 [2012] VSCA 143.

17 Ibid [92] (Warren CJ, Osborn JA and Cavanough AJA).

18 Ibid [93].

19 [2015] VSCA 47.

> the statute. Bearing that in mind, those words should be construed consistently with this Court's interpretation of s 63 of the *Civil Procedure Act*. That is, the Court may only grant leave where the appeal has a 'real' as opposed to a 'fanciful' chance of success. This also accords with the interpretation given to the same words in the UK *Civil Procedure Rules* relating to appeals.
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> Naturally, there will be some cases where the prospects of the appeal are strong, others where the prospects are weaker but it cannot be said that they are fanciful, and others where the prospects are fanciful. For the purposes of leave, it is only necessary to distinguish between those whose prospects are real and those whose prospects are fanciful. There is no bright line that divides the two. Nor is it useful to devise other categories using terminology deployed in other situations.
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> There are, of course, some different considerations that may play a part in the exercise of the Court's residual discretion to refuse leave, even where the appeal has a real prospect of success. For example (and without limiting the possibilities), there may be cases where even though the prospects of the appeal are real, no substantial injustice will be done if the decision stands. This may be particularly so when the appeal is from an order as to practice and procedure.[20]

23 An example of the latter type of case referred to by the Court in *Kennedy* is *Bensons Funds Management Pty Ltd v Body in Balance Chiropractic Pty Ltd* ('*Bensons*').[21] The Court of Appeal in that matter was satisfied that there was a real prospect of success in the sense required by s 14C, but nonetheless declined to exercise its discretion to grant leave to appeal because of a number of matters that indicated that substantial injustice would not flow if leave to appeal was refused.[22]

24 In *Note Printing Australia Ltd v Leckenby* ('*Note Printing*'),[23] Tate JA (Whelan and Ferguson JJA agreeing) quoted from the Court's decision in *Kennedy* and continued:

> I agree with their Honours that the words 'real prospect of success' in s 14C of the *Supreme Court Act* should be read as providing that the court may only grant leave where there is a real as opposed to a fanciful chance of success. This is not to deny, however, that the assessment is being made only for the purpose of granting or refusing leave to appeal. It is not incumbent on an applicant for leave to appeal to demonstrate that it is likely that the appeal will be successful; only that its prospects are not fanciful. It may sometimes be

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20 Ibid [12]–[14] (Whelan and Ferguson JJA).

21 [2015] VSCA 198.

22 Ibid [7]–[9] (Whelan and Ferguson JJA and Robson AJA).

23 [2015] VSCA 105; (2015) 105 ACSR 147.

> difficult to assess, at the leave stage, precisely how an appeal will develop. The fact that an appeal would raise a matter of public importance, presumably unresolved, may require, as a practical matter, greater diligence to assess whether the appeal would have a real and not fanciful prospect of success. This may be so because, for instance, the appeal raises a question of the construction of statutory language that reflects comparable legislation in other jurisdictions, or the appeal would potentially affect a number of people beyond the litigants themselves. In those circumstances the fact that a matter of public importance was raised could be a relevant consideration. It remains the case that, as Whelan and Ferguson JJA have said, the test that must be satisfied for leave to appeal to be granted is that the appeal has a real prospect of success.[24]

Comparison of the Hulls test and the s 14C test

25 A consideration of the extent to which the *Hulls* test and the 'real prospect of success' test coincide and differ is a useful preliminary step to deciding the issue of which test applies to appeals from VCAT to the Court of Appeal.

26 The first and obvious point of difference is the language of the tests. *Hulls* refers to 'a real or significant argument to be put' or 'sufficient doubt' about the orders sought to be appealed from, whereas s 14C focuses on a 'real' (as opposed to 'fanciful') chance of success on the appeal. However, as Mandie JA observed in *Ikosidekas v Karkanis* ('*Ikosidekas*'):

> the case of an appeal with a real prospect of success (that is, not a fanciful prospect of success) would usually be the same as a case in which the decision under appeal was attended by sufficient doubt as would justify a grant of leave.[25]

27 A second point of difference is described in the fifth edition of *Pizer's Annotated VCAT Act*:

> the 'real prospect of success' standard of satisfaction has a definite content, albeit difficult to describe precisely. By contrast, Phillips JA observed in *Hulls* (at [10]) that it was 'not possible to lay down in advance any standard of satisfaction for much may depend upon the importance of the question of law to the remedy to be sought'.[26]

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24 Ibid 171 [82].

25 [2015] VSCA 121, [59].

26 Jason Pizer and Emrys Nekvapil, *Pizer's Annotated VCAT Act* (Thomson Reuters, 5th ed, 2015) 900 [VCAT.148.165].

28 There is force in this observation. In *Hulls*, Phillips JA was careful to emphasise that the 'real or significant argument to be put' and 'sufficient doubt' formulations were flexible and did not purport to lay down rigid guidelines for deciding when to grant leave to appeal.[27] The untrammelled discretion to grant leave provided by s 148(1) of the VCAT Act could not, his Honour held, be fettered by judicial decision.[28] In contrast, s 14C clearly states a test or guideline for the decision to grant leave. At the same time, however, as this Court observed in *Kennedy*, the test in s 14C does not require the drawing of bright lines between when leave should and should not be granted.[29] So, while s 14C imposes a more rigid framework within which the Court must work, that framework is by no means immovable.

29 A third and closely related point of difference is that the 'real prospect of success' requirement in s 14C is a threshold requirement for the grant of leave, whereas the same is not necessarily the case with the 'real or significant argument to be put' or 'substantial doubt' formulations in *Hulls*. This is most noticeable in relation to proposed appeals that raise questions of general or public importance. As already discussed,[30] *Hulls* contemplated that the identification of such a question could lead to the grant of leave even where the 'real or significant argument to be put' or 'sufficient doubt' tests might not have been met. In contrast, under s 14C, if the 'real prospect of success' test is not satisfied then there is no statutory basis for the Court to grant leave, regardless of the importance of the question. The power to grant leave is statutory and the Court is constrained accordingly.[31]

30 Again, however, the difference between the *Hulls* test and s 14C in this respect narrows in practice. The Court in *Note Printing* recognised that the fact that an

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27 [1999] 3 VR 331, 335 [8], 336 [12].

28 Ibid 335 [8].

29 [2015] VSCA 47, [13], quoted above at [22].

30 See above at [19]–[21].

31 For the converse situation — where the 'real prospect of success' test is satisfied but the Court exercises its residual discretion to nonetheless refuse leave — see below at [31].

appeal would raise a matter of general importance is not irrelevant under s 14C, because it may warrant the Court looking more closely at whether the 'real prospect of success' test is met.[32] This approach to questions of general importance converges with that expressed by Phillips JA in *Hulls*, which I have described earlier in these reasons.[33] It is conceivable that an application for leave to appeal that raises a weak question of general importance might pass the more flexible *Hulls* test and not the s 14C test, but such a case would be rare.

31 Finally, a fourth point of difference between the *Hulls* and s 14C tests is in their approach to the relevance of 'substantial injustice', particularly in the case of applications for leave to appeal from interlocutory orders. In *Hulls*, it was contemplated that a party seeking leave would usually need to show 'that to allow the error to go uncorrected would impose substantial injustice, although, where the order below is final, that injustice will often be more readily discernible.'[34] In contrast, there is no express requirement to show substantial injustice on the face of s 14C. In practice, however, as foreshadowed by this Court in *Kennedy* and acted upon in *Bensons*,[35] substantial injustice is a consideration relevant to the Court's residual discretion under s 14C to refuse leave. Again, the two tests tend to converge.

32 In summary, the approaches under *Hulls* and s 14C have different starting points in a number of respects. In practice, however, the two tests can be expected to produce the same result in the vast majority of cases.

Do ss 14A–14D of the SC Act apply to appeals to the Court of Appeal from VCAT?

33 I come now to the question at issue. It has not been resolved by this Court,

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32 [2015] VSCA 105; (2015) 105 ACSR 147, 171 [82], quoted above at [24].

33 See above at [19].

34 [1999] 3 VR 331, 337 [16].

35 See above at [22]–[23].

although it was considered in some detail in *Ikosidekas*.[36] In *Ikosidekas*, Mandie JA, after outlining the *Hulls* test, observed:

> The position of civil appeals generally is now governed by ss 14A–14D of the *Supreme Court Act 1986*. Section 14C provides that the Court of Appeal may grant an application for leave to appeal '*under s 14A* only if it is satisfied that the appeal has a real prospect of success'. Section 14A provides that any civil appeal (as defined by s 14A(3)) to the Court of Appeal requires leave to appeal to be obtained from the Court of Appeal. It seems to me that, as regards appeals under s 148 of the *VCAT Act*, s 14A of the *Supreme Court Act 1986* is arguably inapplicable or redundant. Section 14A provides that any civil appeal requires leave to appeal, but, as regards appeals from VCAT, leave to appeal was already specifically provided for and dealt with in the *VCAT Act* itself, by s 148. Further, s 148(1) of the *VCAT Act* made and still makes provision for leave to appeal from VCAT not only to the Court of Appeal but also to the Trial Division. It therefore tentatively seems to me that, despite the definition of 'civil appeal' in s 14A(3) of the *Supreme Court Act 1986*, an application for leave to appeal under s 148(1) of the *VCAT Act* is not 'an application for leave to appeal' under s 14A of the *Supreme Court Act 1986* (as referred to in s 14C of the *Supreme Court Act 1986*).
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> It would follow from the foregoing, I think, that, among other relevant considerations, the criterion 'attended by sufficient doubt' remains applicable to applications for leave to appeal under s 148 of the *VCAT Act*, whether the proposed appeal is to the Court of Appeal or to the Trial Division. It may be that, for practical purposes, this makes little or no difference because the case of an appeal with a real prospect of success (that is, not a fanciful prospect of success) would usually be the same as a case in which the decision under appeal was attended by sufficient doubt as would justify a grant of leave.[37]

34 In a separate judgment, Kyrou JA observed:

> There is some uncertainty about whether s 14C of the *Supreme Court Act 1986* ('*SC Act*') applies to [an application for leave to appeal from an order of the President or a Vice President of VCAT]. As that section only applies to 'an application for leave to appeal under s 14A' of the *SC Act*, the question arises whether an application for leave to appeal from an order of VCAT constitutes an application for leave to appeal under s 14A. The starting point for analysing this issue is a consideration of whether an appeal under s 148 of the *VCAT Act* constitutes a 'civil appeal to the Court of Appeal' for the purposes of s 14A(1) of the *SC Act*. This question takes one to the definition of 'civil appeal' in s 14A(3), which provides as follows:
>
> > For the purposes of this section, ***civil appeal*** means an appeal from a judgment or order made in exercise of civil jurisdiction, including an appeal by way of rehearing or judicial review, for which this Act, any other Act or the Rules provide an appeal to the Court of Appeal.

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36 [2015] VSCA 121.

37 Ibid [58]–[59] (emphasis in original).

On one view, an appeal under s 148 of the *VCAT Act* is 'an appeal … for which … any other Act … provide[s] an appeal to the Court of Appeal' and is thus a 'civil appeal' for the purposes of s 14A(1) of the *SC Act*. Although an appeal under s 148 of the *VCAT Act* is not as of right but requires leave, s 148 can accurately be described as providing an appeal to the Court of Appeal. This is reinforced by the wording of s 148: it states that a party to a proceeding 'may appeal … to the Court of Appeal' subject to obtaining leave, rather than that such a party 'may seek leave to appeal … to the Court of Appeal'.

On the basis of the above analysis, it is arguable that the definition of 'civil appeal' in s 14A(3) of the *SC Act* is wide enough to cover an appeal under s 148 of the *VCAT Act* and that, consequently, such an appeal falls within s 14A(1) and is subject to the 'real prospect of success' requirement in s 14C. The obvious advantage of such a construction is that it ensures that all applications for leave to appeal to the Court of Appeal are subject to the test set out in s 14C and to the provisions of s 14D.[38]

The above construction, however, must be considered in the context of the history of the relevant provisions and the legislative schemes to which they belong. The leave obligation in s 148 of the *VCAT Act* has existed from the enactment of the *VCAT Act* in 1998. The principles that have governed applications for leave to appeal under s 148 have been clear since the Court of Appeal decided *Hulls* in August 1999. Those principles have operated side by side with the principles in *Niemann* which this Court has traditionally applied in considering applications for leave to appeal from interlocutory orders. Against this historical background, it would have been expected that if Parliament had intended to alter the settled principles governing applications for leave to appeal from an order of VCAT, it would have expressly said so. No provisions appear in the *SC Act* which expressly give effect to any such intention.

The fact that s 148(2) of the *VCAT Act* has not been amended consequent upon the enactment of s 14B of the *SC Act* indicates that applications for leave to appeal from an order of VCAT continue to be governed by s 148 and are not subject to ss 14A to 14D of the *SC Act*.

Section 14B(1) of the *SC Act* provides that an application for leave to appeal under s 14A must be filed 'within 28 days from the date of the … order … which is the subject of appeal unless the Rules otherwise provide.' Section 148(2) of the *VCAT Act*, on the other hand, provides that an application for leave to appeal from an order of VCAT 'must be made … no later than 28 days after the day of the order of the Tribunal' and must be 'in accordance with the rules of the Supreme Court.' Section 148(5) provides that the Court of Appeal 'may at any time extend or abridge any time limit fixed by or under this section.'

If applications for leave to appeal from an order of VCAT were intended to be governed by ss 14A to 14D of the *SC Act*, there would have been no need for

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[38] Kyrou JA did not expressly consider the flipside of this, namely that if ss 14A–14D apply to appeals under s 148 of the VCAT Act, then applications for leave to appeal from VCAT to the Court of Appeal will be subject to a different test for leave compared to applications for leave to appeal from VCAT to the Trial Division: see below at [60].

> s 148(2) of the *VCAT Act* to continue to apply to applications for leave to appeal to the Court of Appeal, and that section would have been amended to confine it to applications for leave to appeal to the Trial Division. That is because s 14B(1) specifies the applicable time limit of 28 days and provides that this period can be modified by the rules. As ss 14B to 14D of the *SC Act* and the rules are capable of dealing with all procedural matters concerning applications for leave to appeal, it would not have been necessary for s 148(2) of the *VCAT Act* to continue to apply. The existence of this overlap between s 14B of the *SC Act* and s 148(2) of the *VCAT Act* suggests that it was intended that s 148 of the *VCAT Act* would continue to apply unaffected by ss 14A to 14D of the *SC Act*.
>
> This conclusion is supported by the inconsistency between those provisions. Section 14B(1) of the *SC Act* specifies a 28 day deadline which is capable of modification by the rules, whereas s 148(2) of the *VCAT Act* specifies a 28 day deadline without providing for modification by the rules. Any modification to the time limit in s 148(2) can only be made by an order of the Court of Appeal under s 148(5).
>
> The above discussion indicates that there are competing arguments on whether applications for leave to appeal from an order of VCAT continue to be governed solely by s 148 of the *VCAT Act* and thus whether such applications are to be determined by reference to the principles set out in *Hulls* or the 'real prospect of success' test in s 14C of the *SC Act*. If such applications do not constitute 'an application for leave to appeal under s 14A' then the provisions of s 14D of the *SC Act* — which deal with the composition and powers of the Court of Appeal — may not apply to those applications. This is because s 14D(1) applies to 'an application for leave to appeal under s 14A'.
>
> I find it unnecessary to decide the above issues as the outcome in the present case would have been the same irrespective of which test had been applied.
>
> Irrespective of whether ss 14A to 14D of the SC Act apply to an application for leave to appeal to the Court of Appeal from an order of the President or a Vice President of VCAT, the nature and scope of the appeal which is the subject of the application are governed by s 148 of the *VCAT Act*. That is, the appeal is 'on a question of law'. It follows that the application for leave to appeal must set out the questions of law that are said to be involved in the order of VCAT that is sought to be impugned.[39]

35 In *Northern Health v Kuipers* ('*Kuipers*'),[40] this Court observed that similar considerations arose in relation to the interaction between s 74 of the *County Court Act 1958* ('the CC Act') and ss 14A–14D of the SC Act. Section 74 provides for appeals from orders of the County Court to the Court of Appeal. The provision states:

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[39] Ibid [69]–[79] (citations omitted).

[40] [2015] VSCA 172.

(1) Subject to this section, any party to a civil proceeding who is dissatisfied with any judgment or order of the court constituted by a judge other than an associate judge may appeal from the same to the Court of Appeal with leave of the Court of Appeal, notwithstanding that the civil proceeding may have been brought in the County Court by consent as provided by this Act.

(2) An appeal by a party referred to in subsection (1) must be commenced by filing an application for leave to appeal in the Court of Appeal within 28 days after the date of the judgment or order of the court being appealed.

(2A) The Court of Appeal may extend the time within which an appeal or an application for leave to appeal may be commenced, whether or not the time has expired and whether or not an application for extension of time has been made.

36 The Court in *Kuipers* observed:

The question that arises is whether an application for leave to appeal from an order of the County Court is 'an application for leave to appeal under s 14A' of the SC Act.

On one view, such an application is an application under s 74(1) of the CC Act which, together with the other provisions of that section and the rules of this Court, is part of a self-contained procedure governing such applications. That procedure differs from the procedure in ss 14A to 14D of the SC Act in a material respect, namely, in relation to variation of the 28 day deadline for filing an application for leave to appeal. … s 74(2A) of the CC Act provides that the Court of Appeal may extend that deadline. By contrast, s 14B of the SC Act stipulates that the rules of this Court may 'otherwise provide' in relation to the deadline and makes no express provision for extensions by this Court.

The opposing view is that the provisions of s 74 of the CC Act do not preclude an application for leave to appeal in accordance with those provisions constituting an application under s 14A of the SC Act. This is because the definition of 'civil appeal' in s 14A(3) of the SC Act is wide enough to cover an appeal from an order for which the CC Act provides an appeal to the Court of Appeal.

A similar issue arose recently in the case of *Ikosidekas v Karkanis* in the context of an application for leave to appeal from an order of a Vice President of the Victorian Civil and Administrative Tribunal in accordance with s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. In separate judgments, Mandie and Kyrou JJA left the issue unresolved because they concluded that leave to appeal would be granted in that case irrespective of which test was applicable.

Similarly, in the present case, we can leave the issue unresolved because the outcome would be the same irrespective of whether the *Niemann* test or the

'real prospect of success' test is applied.[41]

Parties' submissions

37 At the Court's invitation, the parties filed written submissions addressing the question of whether ss 14A–14D of the SC Act apply to appeals from VCAT to the Court of Appeal.

Applicant's submissions

38 The applicant submitted that it would be open to the Court to not decide whether ss 14A–14D of the SC Act apply to appeals under s 148 of the VCAT Act, as under either test leave to appeal should be granted. However, in the event that the Court wished to determine the issue, the applicant submitted that ss 14A–14D do not apply to VCAT appeals.

39 The applicant identified two inconsistencies between ss 14A–14D of the SC Act and s 148 of the VCAT Act. First, the applicant submitted that there is an inconsistency between s 14A of the SC Act and s 148(1) of the VCAT Act. Both of these provisions impose a requirement to obtain leave to appeal. The applicant submitted that if s 14A of the SC Act applies to appeals from VCAT, it would leave s 148(1) with no work to do in respect of appeals to the Court of Appeal, insofar as s 148(1) already requires leave to appeal.

40 The second inconsistency identified by the applicant is one between s 14B of the SC Act and s 148(2) of the VCAT Act. Section 14B requires an application for leave under s 14A to be filed 'within 28 days … unless the Rules otherwise provide'. In contrast, s 148(2) states that an application for leave must be made 'no later than 28 days after the day of the order of the Tribunal', with provision in s 148(5) for the Court of Appeal to extend that 28-day period.

41 The applicant observed that whichever way the issue is decided by the Court,

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41 Ibid [12]–[16] (Kyrou and McLeish JJA) (citations omitted).

it will lead to discrepancies. If ss 14A–14D apply to applications for leave to appeal from VCAT to the Court of Appeal, then such applications will be subject to the s 14C 'real prospect of success' test, whereas applications for leave to appeal to the Trial Division of this Court will be subject to the *Hulls* test. If, on the other hand, ss 14A–14D are held not to apply to applications for leave to appeal from VCAT to the Court of Appeal, then such applications will be subject to a different (*Hulls*) test compared to other applications for leave to appeal to the Court of Appeal.

42 In its submissions, the applicant noted the difficulties in ascertaining Parliament's intention in this situation, but ultimately concluded that:

> If Parliament had intended for the test provided in section 14C to apply to section 148 of the VCAT Act, it could readily have amended the VCAT Act to remove the redundant appeal mechanism to the Court of Appeal and the inconsistent time period provisions, and make it clear that appeals to the Trial Division of the Supreme Court would be subject to different considerations. It did not do so. It is of significance that the *Courts Legislation Miscellaneous Amendments Act 2014* … made consequential amendments to the VCAT Act, but made no amendments to alter the appeal mechanism in section 148(1).
>
> On that basis, the Court of Appeal should have comfort that Parliament did not intend to alter the existing position in respect to appeals from the Tribunal.

Respondents' submissions

43 Like the applicant, the respondents took the position that whether ss 14A–14D of the SC Act apply to appeals under s 148 of the VCAT Act has no impact on the outcome. In the respondents' case, they submitted that leave to appeal should not be granted under either the s 14C test or the *Hulls* test. However, in the event that the Court wished to decide the matter, the respondents submitted that ss 14A–14D do apply to appeals to the Court of Appeal under s 148 of the VCAT Act.

44 The respondents submitted that a literal and plain reading of the definition of 'civil appeal' in s 14A(3) of the SC Act is wide enough to include appeals under s 148 of the VCAT Act. To read down the definition of 'civil appeal' to exclude appeals under s 148 would therefore place an artificial constraint on the plain language of

s 14A. The respondents also submitted that the second reading speech for the Amending Bill that led to the insertion of ss 14A–14D indicates that the legislative intention was to introduce a new regime for all leave applications to the Court of Appeal.

45 The respondents submitted that the inconsistency between ss 14A–14D and s 148 is limited to a procedural matter only, namely the time periods for filing applications for leave. Section 148 does not itself impose a test for granting leave to appeal other than the requirement that the appeal be on a question of law. Arguably, therefore, no inconsistency with the 'real prospect of success' test in s 14C arises. Further, the respondents submitted that since s 14C sets out a specific test for applications for leave to appeal, the principle of *generalia specialibus non derogant* applies to give s 14C operation in the context of appeals to the Court of Appeal pursuant to s 148 of the VCAT Act.

Analysis

46 The question under consideration arises because ss 14A–14D of the SC Act do not expressly indicate how they are intended to interact with s 148 of the VCAT Act. The issue can be summarised as one of:

> the interrelation in law of two statutes whose field of application is different, where the later statute does not expressly repeal or override the earlier. The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field?[42]

47 The exercise is one of statutory construction, requiring close attention to the particular provisions of the two Acts.[43] In undertaking that exercise, regard must be had to the presumption stated by Fullagar J in *Butler v Attorney-General (Vic)* that:

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42 *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 553 (Lord Wilberforce for the Privy Council).

43 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 138 [18] (Gummow and Hayne JJ).

> where the comparison to be made is between two State Acts, there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate.[44]

48 For that reason, it is a 'comparatively rare phenomenon' for an Act to impliedly (as opposed to expressly) repeal the provisions of an earlier Act.[45] For a court to find such an implication, it must 'be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together … ie, the repeal must, if not express, flow from necessary implication.'[46] Other cases have referred to the need for 'actual contrariety' so that 'the later of the two provisions be not capable of sensible operation if the earlier provision still stands'.[47] In *Saraswati v The Queen*, Gaudron J stated that:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other … More particularly, an intention to affect the earlier provision will not be implied if the later is of general application … and the earlier deals with some matter affecting the individual. Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation.[48]

49 The starting point for analysing the issue at hand is the language of ss 14A–14D. Section 14A is expressed to apply to 'any civil appeal', and ss 14B–14D are expressed to apply to applications for leave to appeal 'under section 14A'. 'Civil appeal' is defined broadly in s 14A(3) as:

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44 (1961) 106 CLR 268, 276. See also ibid 146 [49] ('presumption that two laws made by the one legislature are intended to work together'); *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 19 [48] (Crennan, Kiefel and Bell JJ), 33 [98] (Gageler J).

45 *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276 (Fullagar J). See also *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14 [43] (Gummow, Hayne and Heydon JJ).

46 *Goodwin v Phillips* (1908) 7 CLR 1, 10 (Barton J), quoting W F Craies, *Statute Law* (Sweet and Maxwell, 1907) 303. See also *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43, [87] (French CJ and Kiefel J).

47 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 585 [48] (Gummow and Hayne JJ).

48 (1991) 172 CLR 1, 17–18.

> an appeal from a judgment or order made in exercise of civil jurisdiction, including an appeal by way of rehearing or judicial review, for which this Act, any other Act or the Rules provide an appeal to the Court of Appeal.

50 Is an appeal from VCAT to the Court of Appeal pursuant to s 148 of the VCAT Act a 'civil appeal'? One argument to the contrary, alluded to by Mandie JA in *Ikosidekas*,[49] is that as s 148 itself imposes a requirement to obtain leave to appeal, an application under that section is not an 'appeal', or at least not an application for leave to appeal 'under section 14A'.[50] In my view, the fact that s 148 imposes a leave requirement does not take it outside the definition of 'civil appeal'. I adopt the observations of Kyrou JA in *Ikosidekas* that:

> Although an appeal under s 148 of the *VCAT Act* is not as of right but requires leave, s 148 can accurately be described as providing an appeal to the Court of Appeal. This is reinforced by the wording of s 148: it states that a party to a proceeding 'may appeal … to the Court of Appeal' subject to obtaining leave, rather than that such a party 'may seek leave to appeal … to the Court of Appeal'.[51]

51 Another argument is that because an appeal under s 148 is restricted to questions of law, it is not truly an appeal. In *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*, the plurality described the nature of an appeal under s 148 as follows:

> Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word 'appeal', it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review. That is not to say that there are no other avenues for judicial review. The VCAT Act makes no express provision excluding the general supervisory jurisdiction of the Supreme Court. It may, therefore, be doubted that s 148 should be understood as doing more than providing, in some cases, an important discretionary reason for not permitting resort to that general supervisory jurisdiction on the basis that s 148 provides a suitable alternative remedy. Nevertheless, it is important to recognise that the essential character of s 148 is that it provides for the institution of proceedings in the Supreme Court, by leave, in which the legal correctness of what the Tribunal has done can be

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49 See above at [33].

50 Section 74 of the CC Act also describes the right to appeal from a judgment or order of the County Court to the Court of Appeal as being subject to leave.

51 [2015] VSCA 121, [70].

challenged.[52]

52 Be that as it may, the definition of 'civil appeal' in s 14A(3) expressly includes 'an appeal by way of rehearing *or judicial review*' (emphasis added). Thus, this feature of appeals pursuant to s 148 of the VCAT Act does not provide a basis for excluding the application of ss 14A–14D of the SC Act.

53 Prima facie, then, the plain language of ss 14A–14D of the SC Act indicates that those provisions do apply to appeals pursuant to s 148 of the VCAT Act. However, the situation is complicated by potential inconsistencies between ss 14A–14D and s 148. A number of these have been identified in the submissions of the parties and the judgments of Mandie JA and Kyrou JA in *Ikosidekas*:

(a) both s 14A and s 148(1) impose a leave to appeal requirement, arguably giving rise to redundancy;[53]

(b) s 14C imposes a different test from the *Hulls* test that has so far been applied under s 148;[54]

(c) s 14B and s 148(2) impose different requirements in relation to the timing of applications for leave to appeal;[55] and

(d) if ss 14A–14D were to apply, it would mean that applications for leave to appeal from VCAT would be subject to different tests for leave depending on whether the application is to the Court of Appeal or to the Trial Division of the Supreme Court.[56]

54 Turning to the first of these, while it is true that both s 14A of the SC Act and s 148(1) of the VCAT Act state that leave must be obtained to appeal to the Court of Appeal, this in itself does not give rise to an inconsistency in the true sense of the

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52 (2001) 207 CLR 72, 79–80 [50] (Gaudron, Gummow, Hayne and Callinan JJ). See also *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320, 331–2 [18] (French CJ, Gummow and Bell JJ), 351 [71] (Hayne and Kiefel JJ).

53 See above at [33], [39].

54 See above at [34].

55 See above at [34], [40].

56 See above at [41].

word. The requirements to obtain leave in s 14A and s 148(1) do not contradict each other. At the same time, it cannot be said, as the applicant does, that allowing s 14A and s 148(1) to apply concurrently would leave the latter with no work to do. Section 148(1) is the provision that provides the right to appeal from VCAT decisions. Presuming ss 14A–14D of the SC Act are held to apply to VCAT appeals, those provisions themselves do not give rise to the right to appeal; rather, they impose additional conditions on the exercise of the ability to appeal that is provided for in s 148(1). Further, it is important to note that s 148(1) stipulates that an appeal from VCAT must be 'on a question of law', a requirement which does not appear in s 14A. Therefore, even assuming full operation of ss 14A–14D to appeals from VCAT to the Court of Appeal, there remains a relevant restriction on those appeals which requires the Court to apply s 148.

55 The second potential inconsistency is between the *Hulls* test and the s 14C 'real prospect of success' test. As the respondents submit, this inconsistency does not arise expressly on the text of the two sets of provisions. Section 148 of the VCAT Act does not itself impose a test for leave to appeal, other than the requirement that the appeal must be on a question of law. However, as Kyrou JA observed in *Ikosidekas*, the *Hulls* test is well-settled and has consistently been applied to s 148.[57] It is evident that the *Hulls* test does differ from the s 14C 'real prospect of success' test, notwithstanding the fact that the two converge in their practical operation.[58] The two tests cannot both apply to the same application for leave to appeal.

56 On the one hand, this inconsistency could be seen as an indication that Parliament did not intend ss 14A–14D of the SC Act to apply to appeals from VCAT.[59] But the inconsistency equally, and arguably more strongly, points in the opposite direction. Parliament is presumed to have been aware that the *Hulls* test

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57 [2015] VSCA 121, [72], quoted above at [34].

58 As discussed at above [25]–[32].

59 *Ikosidekas* [2015] VSCA 121, [72] (Kyrou JA), quoted above at [34].

was the extant test under s 148(1) of the VCAT Act when it enacted ss 14A–14D. Notwithstanding that knowledge, it enacted provisions that are expressed broadly to apply to all civil appeals and that set out a clear test for leave to appeal that differs from the *Hulls* test. This suggests that Parliament intended to replace the *Hulls* test with the test for leave set out in s 14C of the SC Act. This conclusion is supported by the second reading speech on the Amending Bill, in which the Attorney-General stated that ss 14A–14D were intended to modernise and simplify the test for leave to appeal, and to replace the existing 'sufficient doubt' and 'substantial injustice' common law test with the 'real prospect of success' test.[60]

57 The third area of potential inconsistency relates to the time periods for applying for leave to appeal under the two sets of provisions. Section 14B of the SC Act requires applications for leave to appeal to be filed within 28 days from the date of the order 'unless the Rules otherwise provide'. In comparison, s 148(2) of the VCAT Act requires applications for leave to appeal to be made no later than 28 days after the day of the order, with the possibility of an extension by the Court of Appeal under s 148(5). There are therefore two conflicts on the face of s 14B and s 148: first, s 14B allows for extensions of time provided by the Rules, whereas s 148 does not; and secondly, s 148(5) expressly grants the Court the ability to extend the time for making an application, whereas s 14B does not.

58 These differences are minor. The base time period for applying for leave is the same in both sets of provisions — 28 days. The differences only arise in relation to the extension of that time period. Even then, it is hard to imagine that they would produce different outcomes in practice. While s 14B does not expressly grant the Court the ability to extend that time period, it does allow extensions by the Rules, and r 64.05 of the *Supreme Court (General Civil Procedure) Rules 2015* provides that the Court or Registrar may extend the time for filing an application for leave to appeal.

59 The more significant point is that, to the extent that both sets of provisions

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60 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 June 2014, 2277 (Robert Clark, Attorney-General), quoted above at [10].

seek to govern the time period for applications for leave to appeal, ss 148(2) and (5) are rendered redundant in circumstances where s 14B applies. Thus, as observed by Kyrou JA in *Ikosidekas*, the continued existence of ss 148(2) and (5) could be said to indicate a legislative intention that those provisions should apply to VCAT appeals, to the exclusion of s 14B.[61] The alternative conclusion is that to the extent that ss 148(2) and (5) are inconsistent with s 14B, the latter is intended to displace the former. Under this latter interpretation, s 14B would apply to appeals from VCAT to the Court of Appeal, to the exclusion of ss 148(2) and (5), but ss 148(2) and (5) would continue to apply to appeals from VCAT to the Trial Division.

60 The final — and, in my view, most significant — consequence of the concurrent operation of ss 14A–14D of the SC Act and s 148 of the VCAT Act is that applications for leave to appeal from VCAT to the Court of Appeal will be subject to the 'real prospect of success' test, whereas applications for leave to appeal to the Trial Division of this Court will be subject to the *Hulls* test. This is an undesirable situation.[62] It would mean that an application for leave to appeal from a VCAT matter could be subject to one of two different tests, determined solely by whether the Tribunal in that matter was constituted by the President or a Vice President. And, if a party who was refused leave to appeal from VCAT to the Trial Division then sought leave to appeal from the Trial Division to the Court of Appeal, the Court of Appeal would be called upon to apply the 'real prospect of success' test to the Trial Division judge's application of the *Hulls* test.

61 The preceding discussion demonstrates that the question of the interaction between ss 14A–14D of the SC Act and s 148 of the VCAT Act is by no means an easy one. The respondents cited the maxim of *generalia specialibus non derogant*[63] to support their argument that ss 14A–14D should apply to appeals from VCAT to the Court of Appeal. The principle was summarised in *Goodwin v Phillips* as follows:

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61 [2015] VSCA 121, [75], quoted above at [34].

62 See also the comments of Phillips JA in *Hulls* [1999] 3 VR 331, 337 [17].

63 That is, a general provision does not detract from a specific provision.

> Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.[64]

62 I do not find the principle to be of much assistance here. Applying it would require the rather artificial exercise of deciding which of ss 14A–14D of the SC Act and s 148 of the VCAT Act is the 'general provision', and which is the 'special provision'. That exercise obscures the true nature of the task at hand, which is to ascertain the legislative intent behind ss 14A–14D of the SC Act in the context of appeals from VCAT to the Court of Appeal.

63 Ultimately, my view is that the problems that arise should ss 14A–14D be held to apply to appeals under s 148 of the VCAT Act do not override the clear language in s 14A, and in particular the intractably broad definition of 'civil appeal'.[65] They do not provide a principled basis on which appeals pursuant to s 148 of the VCAT Act can be held to fall outside the definition of 'civil appeal'. Once it is accepted that an appeal from VCAT to the Court of Appeal pursuant to s 148 is a 'civil appeal', then s 14A, and consequently ss 14B–14D, must apply.

64 The view that a broader interpretation of ss 14A–14D should prevail is supported by the purpose underlying the Amending Act.[66] That Act and its associated extrinsic materials indicate that ss 14A–14D were intended to effect a general change to the regime for appeals to the Court of Appeal. One of the stated purposes of the Amending Act is 'to provide for appeals to the Court of Appeal in civil proceedings to be *generally* by leave',[67] with that general requirement to be supported by procedural amendments introduced by the Amending Act.[68] In the second reading speech for the Amending Bill, the Attorney-General stated that:

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64 (1908) 7 CLR 1, 14 (O'Connor J).

65 See above at [49]–[52].

66 *Interpretation of Legislation Act 1984* s 35.

67 Amending Act s 1(a)(i) (emphasis added).

68 Ibid s 1(a)(ii).

> the bill introduces a requirement that leave be obtained in *all civil appeals to the court*, except in appeals against a refusal to grant habeas corpus, cases arising under the *Serious Sex Offenders (Detention and Supervision) Act 2009* and in other cases that may be provided for in the court rules. …
>
> The *universal* leave requirement for civil appeals will enable the court to determine at an earlier stage which matters merit a full hearing.[69]

65 To interpret ss 14A–14D so that they do not apply to appeals from VCAT to the Court of Appeal would undermine the legislative purpose of the Amending Act. It would mean that appeals from VCAT to the Court of Appeal would not benefit from the significant procedural amendments that were introduced by the Amending Act, including the ability for the Court to determine applications for leave to appeal from VCAT without an oral hearing and by a single Judge of Appeal.

66 A further consideration is that, as this Court observed in *Kuipers*,[70] many of the arguments that could be said to support the conclusion that ss 14A–14D do not apply to appeals from VCAT would also arise in the context of appeals from the County Court pursuant to s 74 of the CC Act.[71] A finding that ss 14A–14D do not apply to appeals from VCAT to the Court of Appeal would make it more likely that the provisions will also not apply to appeals from the County Court to the Court of Appeal. This would further narrow the scope of the civil appeals regime introduced by ss 14A–14D, contrary to the intention of the Amending Act to create a 'general' or 'universal' regime for appeals to the Court of Appeal.

67 In summary, my view is that appeals from VCAT to the Court of Appeal are now governed as follows. Section 148(1) of the VCAT Act is the provision that provides a right to appeal VCAT decisions. It restricts that right to appeal to questions of law, and imposes a requirement to obtain leave to appeal. For an appeal from VCAT to the Trial Division, s 148 is the primary statutory provision to which regard must be had. For such an appeal, the test for leave to appeal is not

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69 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 June 2014, 2277 (Robert Clark, Attorney-General) (emphasis added).

70 [2015] VSCA 172.

71 See above at [35]–[36].

codified in statute; the applicable test is the *Hulls* test as developed and applied by the courts. The time period for making an application for leave to appeal is found in s 148(2), as qualified by s 148(5).

68 For an appeal from VCAT to the Court of Appeal, on the other hand, s 148 is only the starting point. It provides for a (limited) right to a 'civil appeal', being 'an appeal from a judgment or order made in the exercise of civil jurisdiction … for which … [an] Act … provide[s] an appeal to the Court of Appeal'.[72] This then brings into operation ss 14A–14D of the SC Act, which impose additional requirements on the appeal in question. Section 14A confirms the requirement stated in s 148(1) that the leave of the Court of Appeal must be obtained. Section 14B(1) provides for the time period in which the application for leave to appeal must be made. It displaces ss 148(2) and (5) for the purposes of appeals from VCAT to the Court of Appeal.[73] Section 14C provides that the test for leave to appeal is the 'real prospect of success' test. This statutory test obviates the need to resort to the *Hulls* test. Section 14D then sets out how the application for leave to appeal may be determined.

69 In my view, this interpretation of the operation of s 148 of the VCAT Act and ss 14A–14D of the SC Act is the one that best accords with the statutory language and the purposes underlying the Amending Act. This is not to ignore the issues that I identified earlier in my reasons,[74] and in particular the consequence that appeals from VCAT to the Trial Division will now be subject to a different test for leave to appeal compared to appeals from VCAT to the Court of Appeal. As I have stated, this is an undesirable situation.[75] It appears to be the result of an oversight by the legislature. It is an anomaly that will need to be rectified by legislative amendment, for example by the insertion of a subsection in s 148 of the VCAT Act stating expressly that the applicable test for leave to appeal from VCAT to the Trial Division

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72 SC Act s 14A(3).

73 However, as already stated, ss 148(2) and (5) continue to apply to appeals from VCAT to the Trial Division.

74 See above at [49]–[60].

75 See above at [60].

is the 'real prospect of success' test.

70 The overlapping scope of s 14B of the SC Act on the one hand and ss 148(2) and (5) of the VCAT Act on the other is less immediately troubling, but would also benefit from legislative amendment for the sake of clarity. For example, s 148(2) could be amended to state that 'An application for leave to appeal *to the Trial Division* must be made …'. This would make it clear that s 148(2) applies to appeals to the Trial Division only, and thus remove the overlap between s 148(2) and s 14B. Further, even with s 148(2) restricted to appeals to the Trial Division, it may be desirable to amend the wording of s 148(2) to match that of s 14B, so that applications for leave to appeal from VCAT to both the Trial Division and the Court of Appeal are subject to the same time periods.

Application of the s 14C test to the grounds of appeal

71 Applying the 'real prospect of success' test in s 14C of the SC Act, for the reasons given Robson AJA, I would grant leave to appeal on grounds 1, 2 and 3 but dismiss the appeal. I would otherwise dismiss the application for leave to appeal.

TATE JA:

72 I have had the advantage of reading, in draft form, the reasons of the Chief Justice and those of Robson AJA, with which I agree.

ROBSON AJA:

Introduction

73 The applicant ('Metricon') seeks leave to appeal against a decision of the Victorian Civil and Administrative Tribunal constituted by a Vice President and a Member.

74 The Tribunal decision concerned the alleged faulty construction of the footing

system on a house that was built by Metricon for the respondents, Mr and Mrs Softley. Mr and Mrs Softley contended before the Tribunal that the footing system was defective and that this had led to and continued to lead to damage to the structure and fabric of the house. The house was a brick veneer construction with a wooden frame on a waffle slab.

75 The Tribunal found that the waffle slab was not constructed by Metricon in accordance with the building contract. In particular, the Tribunal found that Metricon in breach of its contractual obligations had failed to prevent water gathering under the slab during the construction phase.

76 Mr and Mrs Softley contended that the footing system was rendered irrevocably defective by the gathering of water under the slab during the construction phase as the soil upon which the slab sat would continue to expand and contract causing the slab to heave and resulting in damage to the structure and fabric of the house.

77 Metricon argued that the Tribunal erred in law, inter alia, in not exposing the reasoning that led the Tribunal to conclude that it was necessary and reasonable to fix the measure of damages by reference to the cost of demolition and reconstruction of the Softley home and in applying the wrong principles of law in so concluding.

78 For the following reasons, I have decided that the Tribunal did not err in law in holding, in substance, that the correct measure of damages was the cost of demolishing the house and reconstructing the house.

Background

79 It is convenient to indicate at the outset that I adopt the Tribunal's factual findings. The factual background is as follows. In late 2008, Mr and Mrs Softley were looking to buy their first home. They purchased a vacant allotment at what is now 7 Long Tree Drive, Melton West, from Melrose Land Sales Pty Ltd. At that point the allotment was just an open paddock. It was delineated by pegs, but no

roadways or kerbing and channelling had been constructed.

80 On 25 February 2009, the Softleys signed a Domestic Building Contract with Metricon, whereby for a total contract price, inclusive of GST, of $200,140, Metricon contracted to construct a dwelling on the allotment in accordance with a design prepared for Metricon, including engineering drawings by an engineering practice known as 'Structural Works'. The design derived from one of Metricon's standard homes known as 'Santorini 26'. The structure included a family room, a sitting room, a dining room, a rumpus room, three bedrooms, and a double garage under the main roof structure, together with all necessary amenities and an outdoor room or 'alfresco area', at the rear, beneath the roofline but otherwise open to the elements. The price paid by the Softleys to Metricon was $199,897.01.

81 Melton West is an area on the outer western fringe of the Melbourne metropolitan area, reached via the Western Highway. It forms part of a large basaltic plain to the west and northwest of the metropolis. The subsoil is reactive clay. The Metricon design provided for what the plans described as a 'traditional waffle slab 385mm in freeboard'. The relevant part of Long Tree Drive runs approximately east–west. Number 7 is on the north side. The land is approximately flat. The plan provided for the preparation of the site:

> Scrape approx 200mm on RL.100 and spread fill over remaining building area to level.

82 The house was to have a setback of 4.5 metres from the street frontage to the front porch, with a tiled roof pitched at 22.5 degrees. As a preliminary to the execution of the Domestic Building Contract, Structural Works, on behalf of Metricon, carried out a site investigation on 3 December 2008, designating the site as having highly reactive clay subsoil. This study described the drainage of the block as 'fair'. A later investigation by Structural Works, on 25 March 2009, downgraded this to 'poor'. The land purchase was completed on 6 September 2009 and a building permit was issued on 10 September 2009. Construction began on 10 October 2009, with the Occupancy Certificate being issued on 16 February 2010. The Softleys

moved into the house on 10 March 2010.

83 It was only four months later, in early July 2010, that the Softleys began to notice cracks appearing in the plasterboard, skirting board and cornices. Mr Softley gave evidence at the hearing:

> At this time … I noticed the first of many areas where the ceiling had separated from the cornice.

84 In November 2010, a longstanding drought affecting the Melbourne metropolitan area, which stretched back to the late 1990s, broke with torrential rain. According to the evidence given by Mr Softley:

> our home went from just having internal issues that were visible to having external damage in the form of the whole back left-hand side having severe cracking and splitting through the bricks and mortar from the top corner right through to the bottom corner of that side of the building, which is the real wall of the rumpus room.

85 Mr Softley gave evidence that shortly afterwards, he:

> Found the internal wall corresponding with the back wall [viz of the rumpus room] had cracked and what appeared to be squashed from one end to the other [sic]. The cornice had completely split in half and there were specks of plaster all over the carpet in that room that had fallen from the ceiling …

86 In July 2010, the Softleys made their first contact with Metricon about the cracking. Metricon told them that the 'issues were caused by our [the Softleys'] lack of concreting and landscaping'. Following the events of November 2010, according to Mr Softley, Metricon advised him and his wife:

> To hold doing any landscaping until [Metricon] tested the plumbing to make sure there were no leaks underground. [Metricon] tested the plumbing and no leaks were found.

87 Mr Softley gave evidence that he demanded of Metricon that their structural engineer be made available to advise him and his wife 'with respect to the paving'. A representative of Structural Works attended in February 2011. Structural Works issued a Distressed Building Report, dated 15 February 2011. The report said the residence was:

generally in good condition. However, the following main areas of distress were noted:—

- Diagonal plaster cracking around openings in the wall between BED 1 and the WALK-IN ROBE and BED 1 and the ENSUITE (<1mm).
- Diagonal and horizontal plaster cracking over rear door and RUMPUS window; refer crack diagram and photographs.
- Separation of ceiling cornice and plaster sheet at multiple locations around the dwelling.
- Cracking of cornice mitred joints at multiple locations.
- Lifting of FAMILY/RUMPUS wall (10mm) off the slab.
- Separation of wall, plaster sheet and skirting:
    - ENTRY/BED 1 wall (2 mm)
    - Passageway/WIR wall (1mm)
- Horizontal movement of ceiling in RUMPUS relative to plaster sheet of OUTDOOR ROOM wall.
- Outward movement of soffit lining of Outdoor Room relative to brickwork; refer photograph.
- Separation of cornice from DINING rear wall plaster sheet; refer photographs.
- Diagonal cracking and horizontal movement of brickwork at location of outdoor room timber beam.
- Diagonal cracking to brickwork of rear wall of house at bottom of rumpus room window.
- Cracks between tiles at floor edge in laundry.
- Wrinkling of plaster taping on external wall in corner of BED 2.

88 The report said:

> Spot levels were taken across the floor of the dwelling, which indicate that the slab has undergone edge heave around the structure, most pronounced at the north-west corner — 44mm, and least pronounced at the opposite corner (garage corner) — approximately 16mm.

89 The report observed compression of articulation joints on both sides of the house. The report noted that Austest Pipeline Solutions had carried out a CCTV survey of the stormwater system and 'a broken pipe was found behind the garage'. A flood test carried out 'failed owing to the broken pipe'. According to Structural

Works, it had been advised by email from Metricon 'that the broken pipe had been repaired, the system has been re-tested and is now without leaks'.

90 Structural Works found that the heave 'was causing the external walls to lift, distorting the timber frame and so causing cracking at the corners of openings'. The report also noted that the trusses supported on the external walls had lifted and, as a result, there was a gap between the trusses and the top plate of the internal wall, and this caused gaps between the ceiling sheet and the cornice. Mr Softley gave evidence that he prepared a pebble garden at the front of the house and to the west of the front door, but was yet to install the pebbles themselves. Structural Works commented that:

> Pebbles can admit moisture and prevent free evaporation. Moreover, the shallow troughs, which have been dug out to hold them, have the potential to hold water against the footings, leading to additional expansion of the clays beneath.

91 According to Structural Works, the cause of the heave was 'the ingress of water to the footing system causing the underlying clays to swell'. Structural Works said that the possible sources of the moisture ingress were:

> (a) rainwater falling on this and the adjacent block draining towards the house, collecting in the site cut zone and ponding against the slab
>
> (b) overflow at the stormwater shoes, caused by blockages or restrictions in the stormwater drains on the western side of the house
>
> (c) a leak in the water supply line
>
> (d) some combination of the above
>
> Contributing factors could be: —
>
> (e) distribution of water by means of the stormwater trenches
>
> (f) collection of water in the excavated areas prepared for pebble beds at the front of the house[.]

92 Structural Works said of the possible sources of water that 'all should be either ruled out or dealt with'. As Structural Works interpreted the site, the stormwater trench drained to a pit in the easement drain at the rear of the property, but 'significant lengths of the trench are without effective grade'. It said that during

rain events:

> of which there have been several since commencement of construction, it is probable that water has overflowed at the shoes and entered the stormwater trench. If the grade of the trench is inadequate, some of the water will have lain in the trench over time and seeped into the clay beneath the slab. What we have seen of the CCTV record of the stormwater inspection, in conjunction with the written report by Austest, renders this probable and if proved has a long term adverse effect on the footing performance.

93 According to the report, Structural Works had overlaid the slab levels diagram on the site cut plan:

> The fact that the areas showing heave correspond precisely with the cut zone is suggestive. It is probable that during construction and subsequently, water has flowed down this slope and been contained in the cut zone of the building platform, ponding against the slab. We also consider it possible that this may continue to occur.

94 As a result of these observations, Structural Works recommended that (emphasis in original):

> 1. The water supply line should be pressure-tested for leaks to rule it out as possible source of water.
>
> 2. … [A] cut-off drain be installed around three sides of the house, starting at the front near the driveway … The drain should be constructed a minimum of 1.2m away from the house *and* 800mm beyond the existing stormwater trench … It should be founded 100mm minimum into the natural clay and have a minimum fall to all sections of 1% even when this runs counter to the natural fall of the land and involves deeper excavation into the clay … Silt pits should be installed well away from the corners of the house. The ground should be sloped away from the house, all the way to the AG drain with a minimum slope of 5%.

It suggested that 'the downpipes be sealed into the shoes and all the way up to the guttering to eliminate overflow … and to increase the head of water (thus improving the efficiency of the 90mm drainage pipes)'.

95 It also said that 'landscaping be put on hold until all drainage work is completed, as concrete paving will tend to slow down natural evaporation from the soil.' It advocated compliance with CSIRO guidelines for management of sites of this type, designated BTF 18. It also suggested that ceiling sheets should be:

> freed from the trusses and 'dropped-back' to rest on cornices where separation has occurred. Ceiling sheets should not be glued to truss bottom chords near internal walls.

96 Structural Works observed that the footing system had been constructed in accordance with Australian Standard AS2870-1996. With adequate site maintenance, the crack width was unlikely to grow larger to any noticeable extent. The effect of the Standard, however, was that 'a crack free, distress free performance was not guaranteed or implied' even where the footing system complied with the standard. Structural Works said it strongly suspected that this site had experienced significant abnormal moisture conditions. Remedial measures should be 'directed at minimising the potential for future movement. Preventative measures, which eliminate movement, do not exist'.

97 This report led to the Softleys calling on Metricon to install the agricultural drain advocated by Structural Works at Metricon's expense. Metricon refused to do this and stated in an email of 11 March 2011 that, in Metricon's view, the installation of the agricultural drain might accelerate or exaggerate movement of the house rather than alleviate or prevent it.

98 Metricon told Mr Softley that Structural Works no longer believed that the agricultural drain was necessary. Metricon referred the Softleys to CSIRO BTF 18 which Metricon said recommended a concrete path being placed around the perimeter of the house.

99 In September 2011, rectification workers attended at the house on behalf of Metricon. They consisted of a bricklayer working outside and two plastering contractors working indoors, removing cornices and plasterboard in the rumpus room and replacing them. They realigned an internal stud wall using a sledge hammer, as shown on a video taken by Mr Softley.

100 The Softleys carried out only limited works, constructing a two-metre-wide concrete path around each side of the house with surface drainage points. Those paths did not extend to the rear corners of the house. They also installed

landscaping at the front of the house, consisting of mulch, crushed decorative rock and river pebbles.

101 According to evidence given by Mr Softley in November 2014, 'the home continues to experience continuous movement'.

102 On 18 January 2012, Structural Works and Metricon attended at the home to check the levels of the floor of the house. According to the Metricon report of that visit:

> comparison between the two spot level surveys indicate[s] that the majority of the slab has remained within a recorded 4mm of its previous figure.

103 Metricon's report said that the west side of the rear had moved the greatest amount toward original levels, in other words, it had subsided. Metricon said that the rumpus room wall had subsided approximately 8 millimetres, but the heave to the north elevation had increased. Metricon's report said:

> To explain this effect we point to the fact that the direction of the recent heavy rainfall events coming from the north-west, have been concentrated on the elevation containing the pebbled garden beds previously mentioned.

104 Metricon said that paving had been added to the dwelling and was 'very well shaped to drainage points and is a good width'.

The proceeding

105 On 18 December 2012, the solicitors acting for the Softleys filed an application with the Tribunal, commencing the proceeding.

106 The Softleys alleged, inter alia, that Metricon had failed to carry out its contract in a proper and workmanlike manner. They alleged that Metricon had warranted that the home would be suitable for occupation at the time of completion, and that upon completion the building would be reasonably fit for the purpose of use as a domestic home and of such a nature and quality as those building works might reasonably be expected to achieve.

107 They said that the breaches of contract by Metricon included a failure to backfill or compact the site during construction to ensure prevention of water ingress or penetration under the footings and the absence of a drainage system as required by the contract and clause 5.5.4 of Australian Standard AS2870. Further, they alleged that there were missing downpipes and cut-off drains and an absence of flexible fitting piping which 'allowed uncontrolled water penetration of and around the slab edge during construction and generally'.

108 They said the slab footing 'was not constructed so as to maintain the required 85mm thickness and the slab was not properly vibrated'. They alleged further breaches, including missing double studs under girder truss locations, constructing an under-strength framework and missing stud ties and incorrect fittings.

109 They alleged that the filling under the concrete slab provided by Metricon was scoria which, it was said, was contrary to Part 3.2.2.2 of the *Building Code of Australia*, Class 1 and Class 10 Buildings, Volume 2 and the slab/footing system did not have sufficient thickness and strength 'and therefore the design and/or construction of the slab/footing system was and remains defective'. Further, they said that windows and doors 'have not been flashed/waterproofed in accordance with BCA 2009, performance requirements 2.2.2/weatherproofing or Australian Standard AS2047-1999'.

110 The amended points of claim also referred to a document titled 'The Metricon 25 Year Structural Guarantee' which was attached to the contract for the construction of the building which, it was alleged, obliged Metricon to rectify, at its cost, any structural failure of:

i foundation system, concrete or strip footing;

ii load bearing brickwork; [or]

ii structural timber and steel in wall or roof framing.

111 The Softleys' claim drew attention to the distress and cracking in the structure which, it was alleged, were caused by Metricon's failure to carry out the work in a

proper and workmanlike manner, carry the work out in accordance with all laws and legal requirements and carry out the work with reasonable skill. The Softleys' claim also alleged a breach by Metricon of the terms of the Structural Guarantee.

112 They said the footing system had performed inadequately with a 71mm differential movement. The footings had been designed for a Class H — highly reactive clay subsoil — site whereas the proper classification was Class E — extremely reactive, which soil classification called for a 'significantly stiffer and stronger' footing system. The losses were also caused, it was said, by 'the lack of attention to site drainage by the footing system designers and during construction'.

113 They also complained about the design of the timber roof trusses, which was said to be in breach of Australian Standard AS1170 and AS1720 with the result that 'the trusses are and remain unsafe. The truss system should be demolished and replaced with a correctly designed system'. As mentioned below, this latter claim in respect of the roof trusses was not upheld.

114 The amended points of claim alleged damage by way of cracking in walls; bowing in ceilings; movement in tiles; internal walls lifting off the floor; separation from the ceiling of internal walls; cracking in floors; and footing system failure.

115 The Softleys claimed damages, representing the cost of rebuilding the house of $259,729 inclusive of GST, or, alternatively, the cost of rectification work of $122,427 inclusive of GST. Further, the Softleys also sought damages for alternative accommodation for a period of 12 months during reconstruction of $335 per week, calculated at $17,420, plus removal expenses of $10,020.

Metricon's defence

116 In its defence, Metricon said it had granted a 'Structural Guarantee' to the Softleys, promising to rectify at its cost the structural failure of the concrete or strip footings, load bearing brickwork and structural timbers. The guarantee excluded movement in the property which the Tribunal described as 'movement due to

shrinkage evidenced by minor cracking and slab heave due to changes in soil conditions.'

117 Metricon denied that the property had suffered structural failure, noting that the brickwork and the plasterboard were not load bearing. The defence referred to the installation by the Softleys of cut-off drains and paving to the north, east and west elevations of the property.

118 Metricon said that stone garden beds at the front of the property remained a source of water ingress. The defence complained that landscaping of the property had not been performed in accordance with the CSIRO pamphlet BTF 18.

119 Metricon said that the site classification had been performed in accordance with AS2870, and the cracking in the house was not beyond the levels anticipated by AS2870 for normal moisture conditions.

120 Metricon said that at all times it had been prepared to assist the Softleys to rectify defects and remained willing 'if allowed by the applicants, to return to the house to perform rectification work to the cracked masonry and plasterboard'.

121 Further, Metricon said that any loss suffered by the Softleys was due to a failure on their part to mitigate their damage. It argued that by constructing two pebble beds at the front of the house 'which allow both rainfall and surface runoff to pond adjacent to the footings in the front of the house', the Softleys failed to grade surface landscaping away from the house.

122 Metricon relied on advice to the Softleys to install an apron of paving 'around the building perimeter' and a grated drain on the outside edge of the paving on the uphill side of the building which advice, it was said, was in accordance with the CSIRO pamphlet and correspondence between the parties in March 2011.

123 Metricon said that no remedial work had been undertaken at the front of the house and paving had not been placed at the rear corners of the house as recommended. Had those remedial measures been taken they would have

established normal moisture conditions at the front of the house which would likely have (a) limited further increases in the slab movement in that area; and (b) ensured ongoing cracking was within levels anticipated by AS2870.

***The Tribunal's reasons*[76]**

124 The Tribunal upheld only the Softleys' claim that Metricon had breached its contractual warranties in the construction of the slab on the Softley property on the basis that there were abnormal water conditions at the site at the time of construction that were Metricon's responsibility.

125 The Tribunal did not accept the Softleys' claims that Metricon breached its obligation to the Softleys in failing to maintain an 85mm minimum thickness for the slab;[77] in failing to backfill and compact the site during construction to ensure prevention of water ingress under the footing system;[78] in using scoria as a quarry material under the slab;[79] in its classification of the soil as 'H' rather than 'extreme' 'E' classification[80] and, relatedly, in using a waffle raft slab (which would not have been an appropriate design for a property with 'E' classified soil); and in its design of roof trusses.[81]

126 Metricon does not complain about the Tribunal's findings on liability, including a finding of fact as to causation with respect to the extant distress and damage.[82] Its only complaint is with the Tribunal's assessment of damages. It is relevant therefore to focus on the Tribunal's findings and reasons concerning the breaches in the construction of the slab, which are the basis for the Tribunal's conclusions as to damages.

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76 *Softley v Metricon Homes Pty Ltd* [2014] VCAT 1502 ('Tribunal Reasons').

77 Ibid [71].

78 Ibid [74]–[75].

79 Ibid [77].

80 Ibid [83]–[85].

81 Ibid [86]–[88].

82 That there was such a finding as to causation was conceded by Metricon.

127 The Tribunal found that it was common ground that the contract between Metricon and the Softleys was a major domestic building contract within the meaning of the *Domestic Building Contracts Act 1995*. The Tribunal further noted that s 8(c) of that Act implied a warranty on the part of the builder into all domestic building contracts in Victoria that the work would be carried out in accordance with and would comply with all the legal requirements, including the *Building Act 1993* and the regulations made under that Act. It was common ground between the parties that these warranties were to be regarded as part of the contract.[83] The Tribunal found that under Regulation 106 of the *Building Regulations 2006*, the *Building Code of Australia* had the force of law. Under the Code, the house erected by Metricon for the Softleys fell within Class 1, and the requirements for footings and slabs were satisfied in Class 1 buildings if the footings and slabs were constructed in accordance with AS2870, which was entitled 'Residential Slabs and Footings — Construction'.

128 The Tribunal received expert evidence about AS2870, including from Mr Fox, who was the incumbent chairman of the committee responsible for the preparation of Australian Standard AS2870. The Tribunal found in substance that the standard achieved a compromise between cost and performance. The standard permitted some degree of movement in a slab. The Tribunal said:

> In its preface the Standard, itself, states that the Standard 'places particular emphasis on the design for reactive clay sites susceptible to significant ground movement due to moisture changes'. The design life provided for in the Standard 'may be taken as 50 years' (see paragraph 1.4.2). In paragraph 1.3.1 of the Standard the following statement appears:
>
> > The footing systems complying with this Standard are intended to achieve acceptable probabilities of serviceability and safety of the building during its design life. Buildings supported by footing systems designed and constructed in accordance with this Standard on a normal site (see Clause 1.3.2) which is —
> >
> > (a) not subject to abnormal moisture conditions; and
> >
> > (b) maintained such that the original site classification remains valid and abnormal moisture conditions do not develop;

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83 Tribunal Reasons [52].

> are expected to experience usually no damage, a low incidence of damage Category 1 and an occasional incidence of damage Category 2.
>
> The categorisation of damage by cracking to walls is to be found in Appendix C, Table C1. Hairline cracks which are less than 0.1mm are categorised as zero. Fine cracks which do not need repair being less than 1mm are Category 1. Cracks being less than 5mm which are noticeable but easily filled and doors and windows sticking slightly are classed as Category 2. Category 3 cracking is described as 'cracks can be repaired and possibly a small amount of wall will need to be replaced. Doors and windows stick. Service pipes can fracture. Weather tightness often impaired.' These cracks are said to be of the range of 5mm to 15mm (or a number of cracks 3mm or more in one group). These are Category 3. Category 4 cracks are described as 'extensive repair work involving breaking-out and replacing sections of walls, especially over doors and windows. Window and doorframes distort. Walls lean or bulge noticeably, some loss of bearing in beams. Service pipes disrupted. Cracks are within the range of 15mm to 25mm, 'but also depend on number of cracks.'[84]

129 As mentioned above, the Tribunal found that in accordance with the principle of avoidance of over conservatism and to avoid excessive cost in building, the Standard represented a significant compromise, that is, it offered no assurance of immunity from cracking, rather it assumed that cracking may very well take place but within distinct parameters.[85]

130 The Tribunal said that it would seem that the premise underlying the application of a standard to reactive clay soils was that construction in accordance with the standard and avoidance of abnormal moisture conditions should lead to an avoidance of cracking in the walls of the structure during its design life of 50 years except for Classes 1 and 2, or to put it another way, exclusive of Classes 3 and 4.[86] The Tribunal cited appendix A to the standard, in which the role of the owner of a property was described as follows:

> The owner is responsible for the maintenance of the building and the site and should be familiar with the performance and maintenance requirements set out in the CSIRO pamphlet, 10-91, 'Guides to Homeowners on Foundation Maintenance and Footing Performance'.

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84 Ibid [33]–[34].

85 Ibid [35].

86 Ibid.

131 The Tribunal noted that the standard deals also with the classification of soils and the different slab types which may be used depending on the soil classification. Traditional strip footings were not appropriate for either class 'H' or class 'E' sites. Class 'H' sites, like the Softleys', required a stiffened raft slab. The Tribunal noted the difference between a stiffened raft slab and a waffle raft slab, the latter of which was used at the Softley property. In the case of the former, beams dug to at least 700mm in the case of brick veneer structures were used. The Tribunal described a waffle slab as follows:

> Paragraph 1.7.63 of the Standard defines a waffle raft as follows: 'A stiffened raft with closely spaced ribs constructed on the ground and with slab panels suspended between ribs'. The ordinary form of a waffle slab is depicted in Figure 3.4 of the Standard. It includes extensive 'formed voids'. In the design for the Softleys' property, the slab thickness was 85mm in accordance with the Standard. The slab, therefore, substantially sits on the ground rather than being dug into the ground. The extensive use of voids entails a lesser use of concrete and the costs of excavation and possible complications and additional expense arising from encountering isolated rocks during excavation are substantially minimised. The waffle slab, therefore, has become very popular as an economical foundation solution in areas of highly reactive soil such as Melton West.[87]

Extent of distress

132 The Tribunal had regard to the extent of cracking and the extent of differential movement in the slab and on both counts found that the performance criterion laid down by AS2870 had not been met.

133 The Tribunal said that the incidence of cracking was the performance measurement under the standard.[88] The Tribunal found that all experts agreed that the 'differential movement' of a slab, which was to be confined within the 'tolerable limit' of 30mm, was a design input rather than a performance measurement. In other words, 'slabs should be designed to meet this "tolerable limit"'.[89] The Tribunal found that the experts agreed that the differential movement could be used as a

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87 Ibid [37].

88 Ibid [38].

89 Ibid.

'guide to the adequacy of the slab's performance', because the design was intended to limit cracking.[90] Accordingly, the Tribunal found it appropriate to apply the design criterion (that is, the tolerable limit of differential movement) as a 'check' on the findings in relation to cracking.

134 Metricon was critical of the Tribunal's reliance on the differential movement measurement, calling it a 'quantum leap' from treating it as a 'check' or 'guide' to the determinative basis upon which the remedy in damages is decided. This mischaracterises the basis of the Tribunal's decision, which, as noted above, expressly addresses both cracking and differential movement. Further, the Tribunal found that the performance measurement under the standard (that is, cracking) was expressed on the basis that the slab in question was 'not subject to abnormal moisture conditions'. To put it another way, if abnormal moisture conditions did exist 'all best [sic] are off'.[91] Given that it found that abnormal moisture conditions obtained, it is clear that the Tribunal found it appropriate to consider both cracking and differential movement.

135 In relation to slab performance as measured by cracking, the Tribunal found that:

> Plainly, this slab has not met performance requirements of AS2870, whether regard is had to a test based on cracking or upon the extent of differential movement. In the course of major rectification works in September 2011, plastering contractors engaged by Metricon removed an entire plaster wall in the rumpus room. A sledgehammer was used to realign the frame. [Counsel for the Softleys] submitted that this was indicative of Category 4 damage to the walls. The descriptor of this damage was as follows, in accordance with Table C1:
>
> > Extensive repair work involving breaking-out and replacing sections of walls, especially over doors and windows. Window and door frames distort. Walls lean or bulge noticeably, some loss of bearing in beams. Service pipes disrupted.
>
> The approximate crack width is 15mm to 25mm 'but also depends on number of cracks'. The evidence did not disclose the width of the cracks that led to this work being carried out in the rumpus room, however, we think a more

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90 Ibid.

91 Tribunal Reasons [48].

likely characterisation of the cracks which led to these repairs is to be found in Category 3 which covers cracking from 5mm to 15mm or a number of cracks 3mm or more in a group with a descriptor:

> Cracks can be repaired and possibly a small amount of wall will need to be replaced. Doors and windows stick. Service pipes can fracture. Weather tightness often impaired.

Whatever the correct view be, since either opinion put the cracking at worse than Category 1 or 2, cracks in which categories must be less than 5mm, the performance criterion laid down by the Standard has not been met. In addition there is at least some Category 3 cracking in the house as it now stands. At least one piece of external brickwork was photographed and identified as a Category 3 crack by Mr Price, a building inspector giving evidence for the Softleys. We observed this at the view that we carried out in the course of the hearing. Mr Price said he observed at least two other Category 3 cracks in the brickwork but there was some doubt as to their identification. Further, in identifying the work which will need to be done to rectify the house in its present state, Mr McLennan, a building surveyor and building consultant who gave evidence for Metricon, said that a 'panel', that is, part of the brickwork on the eastern wall of bedroom 2 would need to be rebuilt. Separately from chasing and re-pointing other parts of this brick veneer wall, he also recommended the removal of two to four courses in the area above window level in this wall and their replacement and re-bricking … Again, whether one characterises this as Category 3 or Category 4 cracking, it goes beyond what AS2870 regards as acceptable performance for the slab. Expert reports, photographs and our own observation at the on-site view revealed instances of windows which were sticking and whose frames had distorted, matters which were also indicative of a performance falling short of what was required by the Standard.

[Counsel for the Softleys] said that as to Category 1 cracking, there were a multitude of such cracks, whereas AS2870 laid down as its criterion a 'low incidence' of Category 1 cracking. Again, the reports, the photographs and the view bore out this observation. [Counsel for Metricon] however, submitted that the extent of this minor cracking had to be judged against the fact that no maintenance work had been done on the house since the applicants commenced the present proceeding. In effect, no maintenance work has been done since the major work undertaken in the later part of 2011 by Metricon. In our view, there is some substance to this observation. On balance, however, even allowing for this consideration, there remains a multiplicity of Category 1 and Category 2 cracking in this house which again goes beyond the performance criterion in AS2870.[92]

136 The Tribunal dealt with differential movement of the slab. The Tribunal explained the measure of differential movement at some length:

> Table 4.1 in selecting 30mm as the tolerable limit for differential movement in a slab focuses not upon absolute movement but rather upon differential movement, that is, bending. If, as a result of seasonal fluctuations, the

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92 Ibid [39]–[42].

> breaking of a drought or the incidence of a drought for that matter, a slab were to rise, say, 70mm or subside, say, 50mm, as long as the slab moved uniformly, the superstructure of the house sitting upon it would not be subjected to distress. These absolute movements occurring in a non-differential way are the very processes which a stiffened raft slab is constructed and adopted to allow in highly reactive clay sub-soil conditions such as those ruling in West Melton. Even if movement of this type does not maintain the slab horizontal so that there is, in effect, a tilt, this is not at odds with the design input provided for in Table 4.1.[93]

137 The Tribunal thus noted that 'uniform' movements did not subject the superstructure of the house to distress. The Tribunal went on to explain the phenomenon of differential movement.

138 The Tribunal said that it was the edges of a slab which were exposed to the ingress of water during rain events or most exposed to drying in the course of prolonged drought because of their proximity to uncovered ground. It said that areas in the centre of the slab were characteristically stable. The Tribunal said that it was for this reason that the heave was almost invariably 'edge heave' and that '[d]ifferential movement therefore would generally manifest itself in a "dishing" effect where the edges of a slab rise or "heave" and the central locations either remain stable or sink slightly'.[94]

139 The Tribunal held that the differential movement was properly calculated by the extent of the bow or bend in the slab measured by drawing a line from one high point to another and measuring the maximum vertical distance from the straight line to the lowest point on that alignment of the slab.

140 The Tribunal found that in this case the differential movement along one alignment of the floor plan was 44mm, which was almost 50 per cent higher than what the Standard regarded as a tolerable limit.[95]

141 The Tribunal concluded that the slab 'has not in the past and is not now,

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93 Ibid [43].

94 Ibid [44].

95 Ibid [47].

performing as AS2870 suggests it should'.[96] The Softleys rely on this passage as evidence of the Tribunal's finding that the slab had failed. Metricon contends, on the other hand, that the Tribunal's findings are directed to past and present performance but not to future performance.

142 The Tribunal, however, also found that the movement was continuing:

> Movement of the property continues and a large number of spot level surveys have been undertaken over the years, including by expert witnesses who gave evidence on behalf both of the Softleys and of Metricon. The precise pattern of the movement is difficult to summarise. Suffice to say that when we undertook a view of the house on the afternoon of 19 November, we found the worst damage on the eastern side of the house immediately behind the double garage which is located at the frontage of the house on the eastern side and is in the vicinity of where an early discovery of a broken stormwater pipe was made. There is extensive cracking internally in bedroom 2 which is on the east wall behind the garage and in the external walls of the laundry and lavatory. There is also a concentration of internal cracking on the eastern side of the kitchen which is located toward the middle of the house and immediately to the west of bedroom 2. In some places, in particular in this eastern location, there has been further cracking in brickwork and plasterwork which was rectified by Metricon in September 2011.[97]

Abnormal moisture conditions

143 The Tribunal dealt with the issue of abnormal water conditions. The Tribunal said that the performance standard laid down in AS2870 was expressed upon the basis that the slab in question was 'not subject to abnormal moisture conditions'. Metricon contended that to the extent that the lack of performance of the slab was attributable to the abnormal water/moisture conditions, the lack of performance of the slab could not be Metricon's responsibility.

144 Metricon referred to several factors, namely two pebble gardens at the front of the house installed by the Softleys, the Softleys' failure to create a pathway at the rear corners of the house, and a leaking drainpipe behind the garage and in the vicinity of the distress hotspot at bedroom 2, the laundry and the WC.

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96 Ibid.

97 Ibid [25].

145 The Tribunal found that the cause of the cracked drainpipe was not disclosed on the evidence. The Tribunal considered the possible explanations for the cracked drainpipe and found that 'this sort of abnormal water conditions cannot be regarded as outside the builder's responsibility'.[98] The Tribunal rejected Metricon's arguments in relation to the pebble gardens and the pathway. It was not persuaded that these factors were causative of the distress with which the Tribunal was dealing.

Alleged breaches

146 The Softleys relevantly alleged that Metricon breached its obligations in failing to install a drainage system at the time the residence was completed and failing to ensure that during construction water could not 'pond' against or near the footing or near the immediate perimeter of the footing. They said that downpipes should have been installed once the roof was placed on the residence.

147 The Tribunal referred to the absence of temporary downpipes when the roof was installed. The Tribunal found that no steps were taken by Metricon to channel rainwater away from the edge of the slab following the pouring of the slab. The Tribunal found that '[t]he evidence showed that flexible fittings had not been applied to the drainage pipes which allowed uncontrolled water penetration of and around the slab edge during construction and generally'.[99] The Tribunal accepted that the completed drainage system was required to be installed only at the conclusion of the build, but found that adequate surface and subsurface drainage should have been provided prior to the commencement of construction. The Tribunal relied on a statement of one of Metricon's own experts, Mr McFarlane, 'with a special interest in residential slab and footing systems on reactive clay' that '[i]t was clear to me that there were some drainage issues early on otherwise we would not have had that heave'.[100]

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98 Ibid [49].

99 Ibid [54].

100 Ibid [63].

148 The Tribunal found that the matters above constituted breaches by Metricon which were causative of the structural distress which had been experienced by the house and were causative of the Softleys' loss and damage.

149 The Tribunal said as follows:

> In our view, all of these matters are indicative of a departure from proper standards of workmanship in construction. Again, it was common ground that the heave which has been experienced by the structure occurred because of the expansion of the highly reactive clay subsoil following an extended period of draught [sic] affecting metropolitan Melbourne back to the 1990s. These matters constitute contract breaches which are apt to be causative of the structural distress which has been experienced by this house. We agree with the view expressed, albeit with some reluctance by Mr McFarlane, that they are therefore causative of the Softleys' loss and damage.[101]

150 The Tribunal found that Metricon's breaches had led to abnormal water conditions for which Metricon was responsible. The Tribunal found that it was these conditions which had led to the 'heave' due to the expansion of the 'highly reactive' soils. It follows that the Tribunal found that Metricon's breaches had therefore caused the continuing 'structural distress' in the house.

151 In conclusion, the Tribunal found that in light of the breaches by Metricon of the warranty as to workmanship found expressly in the contract under the *Domestic Building Contracts Act 1995*, the Softleys were entitled to recover damages against Metricon.

Summary of the Tribunal's findings on liability and causation

152 As referred to above, the Tribunal found that the movement of the property continues and that the precise pattern of the movement was difficult to summarise. The Tribunal described the damage they observed in the property at the time of their inspection.[102]

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101 Ibid [69].

102 See above at [142].

153 The Tribunal found that Metricon failed to comply with its obligations to the Softleys and that the abnormal water conditions at the property were within its responsibility.

154 The Tribunal found that the water ingress caused the 'heave' in the property, which, it could be inferred, caused the 'structural distress' the Tribunal found was continuing.

155 The Tribunal found that Metricon was responsible for the Softleys' loss and damage with respect to that structural distress.

156 The Tribunal rejected the contention that the Softleys had failed to mitigate their loss.[103]

157 The Tribunal then considered how it should calculate damages.[104] It ultimately calculated damages on the basis of the cost of demolishing and rebuilding the house at 7 Long Tree Drive, Melton West.

Authorities in relation to review of the Tribunal's reasons

158 As indicated above, the main thrust of the application for leave to appeal is the contention that the Tribunal did not properly apply the principles established in *Bellgrove v Eldridge*[105] in relation to assessing damages, and that the Tribunal erred in not providing proper reasons for its decision. It is convenient to deal with the relevant authorities before turning to the precise grounds of appeal.

159 Metricon relied on several authorities as to the requirement to provide proper reasons, including *State of Victoria v Turner,*[106] a decision dealing with the obligation of the Tribunal to provide reasons.

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103 Tribunal Reasons [103].

104 See below at [224]–[229].

105 (1954) 90 CLR 613 ('*Bellgrove*').

106 (2009) 23 VR 110 ('*Turner*').

160 In *Turner*, the State of Victoria appealed from a decision of the Tribunal partially upholding a complaint under the *Equal Opportunity Act 1995* of indirect discrimination in the provision of state education to a student with a severe learning disorder.

161 Section 117(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act') required the Tribunal to give reasons for its decision, and s 117(5) required the Tribunal to include in its written reasons for decision its findings on material questions of fact.

162 The State of Victoria contended that the Tribunal had erred in awarding compensation for the student's depression. Kyrou J held that the Tribunal erred in law under s 117 in awarding such compensation in circumstances where it did not make a finding that the contravention of the State contributed to the depression.

163 Kyrou J considered whether non-compliance with s 117 of the VCAT Act constituted a separate error of law which would enable the Tribunal's reasons to be overturned.

164 His Honour cited the decision of the Court of Appeal, constituted by Buchanan JA, Ashley JA and Smith AJA, in Secretary to the Department of Treasury and *Finance v Dalla-Riva*[107] (discussed below) in which the Court held that:

> It is necessary that a tribunal's reasons disclose the findings and reasoning upon which the tribunal's conclusion is based. Failure to provide such reasons, which frustrates the ability to review the tribunal's decision, constitutes an error of law.[108]

165 His Honour considered what is required for reasons to disclose the findings and reasoning upon which the Tribunal's conclusion is based, referring to the Court of Appeal decision in *Franklin v Ubaldi Foods Pty Ltd.*[109] In *Franklin*, the Court of Appeal was hearing an appeal from an order of the County Court. Ashley JA, with

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107 (2007) VAR 96 ('*Dalla-Riva*').

108 Ibid [23].

109 [2005] VSCA 317 ('*Franklin*').

whom Warren CJ and Nettle JA agreed, said:

> Reasons must be such as reveal — although in a particular case it may be by necessary inference — the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.[110]

166 In *Turner*, Kyrou J concluded that in relation to s 117 'where the tribunal fails to give reasons or gives reasons which omit a finding on a material question of fact or otherwise fail to disclose its path of reasoning for reaching its decision, it commits a vitiating error of law'.[111]

167 In *Dalla-Riva*, the Court of Appeal heard an appeal from an order of VCAT that a document in the possession of the appellant be released to the respondent on the basis that it did not fall within the cabinet documents exemption in the *Freedom of Information Act 1982*.

168 The respondent sought access to a report on the proposed Mitcham-Frankston freeway project and four other documents. The Tribunal held that the four other documents were exempt but that the report on the proposed Mitcham-Frankston freeway project should be released to the respondent. The appellant submitted that the Tribunal erred in failing to find it was exempt from releasing the documents under, inter alia, s 28 of the Act. The appellant had relied on evidence of one of its own employees and one of the employees of the authority charged with managing the project as to whether the purpose of the report was such that it fell within the cabinet documents exemption.

169 The Tribunal, constituted by a Vice President, rejected the evidence that the substantial purpose of the report was for cabinet consideration or for briefing the Minister on issues to be considered by cabinet.

170 The Court of Appeal held that the Tribunal's reasons for concluding that the

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110 Ibid [38] (citations omitted).

111 *Turner* (2009) 23 VR 110, 173 [240].

report was not exempt were insufficient. The Court held that the Tribunal's reasons did not disclose how the Tribunal treated the evidence of the employees as to the purpose for which the report was prepared. Buchanan JA (with Ashley JA and Smith AJA agreeing), said that 'it is not sufficient to state baldly that an exemption has not been established without dealing in terms with evidence which is directed to establishing the exemption'.[112] Following the passage extracted by Kyrou JA in *Turner* (see paragraph 164 above), Buchanan JA continued:

> In the present case, in the absence of express findings as to critical factual issues, it is not possible to discern the basis upon which the appellant failed to satisfy the tribunal that the report met the terms of the exemption provision.[113]

171 In *Franklin*, the Court of Appeal heard an appeal against the order of a County Court judge dismissing an application under s 134AB(16)(b) of the *Accident Compensation Act 1985* for leave to bring a proceeding alleging serious injury arising from the appellant's employment. The County Court held that under s 134AB(16)(b), the appellant had to establish, inter alia, that he suffered a serious injury sustained in employment on or after 20 October 1999.

172 Section 134AE of the Act provided:

> The reasons given by the court in deciding an application under section 134AB(16)(b) shall not be summary reasons but shall be detailed reasons which are as extensive and complete as the court would give on the trial of an action.

173 After setting out the test extracted in the reasons of Kyrou J in *Turner* (see paragraph 165 above), the Court of Appeal found that the learned judge's reasons did not satisfy the 'path of reasoning' requirement[114] because, inter alia, they failed to say whether he accepted or rejected material evidence of the appellant and the evidence of his medical history, and they did not address other objective

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112 *Dalla-Riva* (2007) VAR 96, [21].

113 Ibid [23].

114 *Franklin* [2005] VSCA 317, [39].

circumstances which gave the appellant's account support.[115] The Court of Appeal therefore held that the learned judge had erred in law.

174 The Softleys relied on *Miller v Jennings*[116] as to the principles for dealing with an appeal specifically on the question of damages. Although conceding that the decision concerned a different factual scenario, involving damages for personal injury, the Softleys submitted that the principles espoused by Dixon CJ and Kitto J are applicable in the present case.

175 Dixon CJ and Kitto J stated that 'the fact that we ourselves might have assessed the damages at a greater sum, had we been in the position of the judge at the trial, is not a sufficient reason for interfering with his determination'.[117] Dixon CJ and Kitto J said:

> In *Davies v Powell Duffryn Associated Colleries Ltd,* Lord Wright explained the function of a court of appeal with reference to an award of damages for personal injuries made by a judge. Lord Wright said: 'An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate.' No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to the amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact.
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> …
>
> It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.[118]

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115 Ibid [40]–[41].

116 (1954) 92 CLR 190.

117 Ibid 195.

118 Ibid 195–6 (citations omitted).

176 This Court has not been asked to directly review the quantum of the damages awarded to the Softleys as in *Miller v Jennings*, but rather this appeal concerns the adequacy of the Tribunal's reasons in determining the measure of the damages and whether the Tribunal correctly applied the principles in *Bellgrove*.

177 *Miller v Jennings* expresses a general reluctance to interfere with the reasoning as well as the substance of the decisions of lower courts as to matters of fact and, in particular, damages, which reluctance must frame this Court's consideration of whether the Tribunal's reasons demonstrate the errors alleged.

Authorities on the issue of measure of damages

178 In *Bellgrove*[119] the High Court (Dixon CJ, Webb and Taylor JJ) considered an appeal from O'Bryan J of the Supreme Court of Victoria. The appellant, the builder, had contracted with the respondent to build her a two-storey 'brick house villa' for £3,500. The respondent had paid the builder £3,100 in progress payments by the time a dispute over the building arose. The builder sued for the balance of the price. The respondent claimed, by way of cross action, damages in respect of substantial departures from the specifications which, it was alleged, had taken place and which, it was said, resulted in grave instability in the building erected.

179 The builder failed entirely in his claim and judgment was given for the respondent in the action for £4,950. The only issue addressed by the High Court was the assessment of damages made by the learned trial judge upon the cross action.

180 The respondent's complaint related to the composition of the concrete in the foundations of the building and of the mortar used in the erection of the brick walls. The evidence established that the mortar used in the erection of the brick walls and the concrete in the foundations substantially departed from the specifications, resulting in grave instability in the building.

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119 (1954) 90 CLR 613.

181 The builder contended that the matter could be remedied in two ways. The building might be underpinned, or the foundations might be removed and replaced piecemeal. The trial judge was not satisfied that either of these two operations could be carried out successfully. The trial judge said that the difficulties of such an operation were aggravated by the paucity of the cement in the mortar and by the wet conditions on the ground upon which the building stood.

182 The trial judge said the weakness in the mortar may cause a collapse in the brickwork if the underpinning were carried out as proposed.

183 The trial judge inspected the building and said that the only remedy for the faulty foundations was to underpin the existing foundations in small sections and replace them by new foundations. He said that it was extremely doubtful if this work could be successfully done or would be a proper remedy for the defects. He said it would be a hazardous operation at least.

184 The trial judge said that the respondent was entitled to have her contract fulfilled and 'if it is not, to be awarded such damages as will enable her to have at least a substantial fulfilment of her contract' by the builder. The trial judge said that:

> In this case the departure from contract is in my opinion so substantial that the only remedy which will place the plaintiff in substantially the position in which she would be if the contract were carried out, is to award her such damages as will enable her to have this building demolished and a new building erected in accordance with the contract and specifications.[120]

185 In the result, the trial judge gave judgment for the respondent for £4,950, which represented the cost of demolishing and re-erecting the building in accordance with the plans and specifications, together with certain consequential losses, less the demolition value of the house and moneys unpaid under the contract.

186 The builder unsuccessfully appealed to the High Court.

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120 Ibid 615.

187 On appeal, the builder contended that accepting all the findings of the trial judge, there was evidence that the building was of some value over and above the demolition value, at the time of the breach. In particular, it was said that the building as it stood was saleable, at least, to some builders who were prepared to attempt the rectification of the existing defects by methods less drastic than demolition of the building. It was contended that in that case, the proper measure of damages was the difference between the value of the house — and presumably the land upon which it stood — ascertained by reference to the amount which could be obtained for it on such a sale and the value which it would have borne if erected in accordance with the plans and specifications.

188 In support of that contention, the builder's counsel referred to the general proposition that damages when awarded should be of such an amount as will put an injured party in the position he would have been in if he had not sustained the injury for which the damages are claimed. Accordingly, it was argued that damages should have been assessed by reference to the value of the building as it stood and the value it would have borne if erected in accordance with the plans and specifications. This, it was said, was the true measure of the respondent's financial loss.

189 I interpolate at this point to mention that this argument was also dealt with by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*,[121] which I will come to shortly.

190 The High Court rejected the builder's argument in *Bellgrove*. The Court said:

> It is true that a difference in the values indicated may, in one sense, represent the respondent's financial loss. But it is not in any real sense so represented. In assessing damages in cases which are concerned with the sale of goods the measure, prima facie, to be applied where defective goods have been tendered and *accepted*, is the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract. But in such cases the plaintiff sues for damages for a breach of warranty with respect to marketable commodities and this is in no real sense the position in cases such as the present. In the present case, the respondent

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121 (2009) 236 CLR 272 ('*Tabcorp*').

> was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building of her land which is substantially in accordance with the contract.[122]

191 The High Court gave an example to show that the prima facie rule for assessing damages for breach of warranty upon the sale of goods had no application to the case before them. The Court said:

> Departures from the plans and specifications forming part of a contract for the erection of a building may result in the completion of a building which, whilst differing in some particulars from that contracted for, is no less valuable. For instance, particular rooms in such a building may be finished in one colour instead of quite a different colour as specified. Is the owner in these circumstances without a remedy? In our opinion he is not; he is entitled to the reasonable cost of rectifying the departure or defect so far as that is possible.[123]

192 The Court said that subject to a qualification the rule was correctly stated in *Hudson on Building Contracts*:

> The measure of the damages recoverable by the building owner for the breach of a building contract is, it is submitted, the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach.[124]

193 The Court accepted that the work necessary to remedy defects in a building so as to produce conformity with the plans and specifications may involve removal and demolition of a more or less substantial part of the building. In the case before them, the Court accepted that the only practical method of producing conformity with the specifications was the demolition of the whole building.

194 The Court said:

> In none of these cases is anything more done than that work which is

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122 (1954) 90 CLR 613, 617 (emphasis in original).

123 Ibid.

124 Ibid 617–18, quoting *Hudson on Building Contracts* (7th ed, 1946) 343.

> required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner's loss.[125]

195 The qualification to which the rule was subject was said to be 'that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt'.[126]

196 The Court then turned to an example of where the cost of demolishing the work that did not comply with the contract would be unreasonable. The Court said:

> No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute 'economic waste'. (See *Restatement of the Law of Contracts*, (1932) par. 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions 'necessary' and 'reasonable', for the expression 'economic waste' appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.[127]

197 The example given by the Court was later described by the High Court in *Tabcorp* as 'exceptional circumstances'.[128] The fact that the new bricks were used rather than second-hand bricks (as specified) in circumstances where the colour could not be seen as the bricks were to be rendered, does suggest that the demolition would be 'quite unreasonable'.

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125 *Bellgrove* (1954) 90 CLR 613, 618.

126 Ibid.

127 Ibid 618–19.

128 (2009) 236 CLR 272, 288 [17].

198 The Court in *Bellgrove* then addressed whether in the case before them the work was necessary and reasonable, saying:

> As to what remedial work is both 'necessary' and 'reasonable' in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. That work, in such circumstances, is obviously reasonable and in our opinion, may be undertaken at the expense of the builder.[129]

199 The Court upheld the trial judge's decision that it was not practical to remove the faulty foundations and put in new ones.

200 The Court concluded that:

> To give to the respondent the cost of a doubtful remedy would by no means adequately compensate her, for the employment of such a remedy could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations.[130]

201 The Court finally addressed an argument that the respondent may or may not demolish the existing house and re-erect another. It was said that if she did not, she would still have the house with the cost of erecting another one. The Court said that this circumstance was quite immaterial and was but one variation of a feature which so often presented itself in the assessment of damages in cases where 'they must be assessed once and for all'.[131]

202 *Bellgrove* was further explained in *Tabcorp*.[132] In *Tabcorp*, the High Court (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) dismissed an appeal involving a tenant who had been ordered to pay its landlord some $1.38 million for alterations made to the leased premises without the landlord's consent, as required by the lease.

203 The landlord leased to Tabcorp an office premises for 10 years. As indicated,

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129 (1954) 90 CLR 613, 619.

130 Ibid 620.

131 Ibid.

132 (2009) 236 CLR 272.

the lease contained a provision that the tenant was not to make or permit to be made any substantial alteration to the premises without the prior written approval of the landlord (which was not to be unreasonably withheld).

204 The tenant applied for permission to make significant alterations to the foyer. The landlord had gone to considerable trouble and expense in fitting out the foyer with special marble. The landlord told the tenant that its application to carry out the works could not be considered until the proposed alterations were examined at a site meeting. When the director of the landlord attended the site meeting she discovered that substantial work had been undertaken by the tenant including destroying the marble fittings in the foyer.

205 The landlord did not consent to the alterations and sued for damages. The Federal Court at first instance awarded damages of $34,820, most of which was an assessment of the difference between the value of the premises at the end of the term if the old foyer had been retained and the value with the new foyer constructed by the tenant. On appeal, the damages were increased to $1.38 million, comprising $580,000 as the costs of restoring the foyer to its original condition and $800,000 for rent lost during the restoration period.

206 An appeal to the High Court by the tenant was dismissed. The tenant argued that the proper measure of damages was the diminution in value by reason of the work done to the foyer. The High Court rejected that proposition, saying that argument misunderstood the common law in relation to damages for breach of contract. The Court said:

> Underlying the Tenant's submission that the appropriate measure of damages was the diminution in value of the reversion was an assumption that anyone who enters into a contract is at complete liberty to break it provided damages adequate to compensate the innocent party are paid. It is an assumption which at least one distinguished mind has shared. It has been dignified as 'the doctrine of efficient breach'. It led, in the Landlord's submission, to an attempt 'arrogantly [to] impose a form of "economic rationalism"' on the unwilling Landlord. The assumption underlying the Tenant's submission takes no account of the existence of equitable remedies, like decrees of specific performance and injunction, which ensure or encourage the performance of contracts rather than the payment of damages for breach. It is an assumption

> which underrates the extent to which those remedies are available. However, even if the assumption were correct it would not assist the Tenant. The Tenant's submission misunderstands the common law in relation to damages for breach of contract. The 'ruling principle', confirmed in this Court on numerous occasions, with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*:
>
> > The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[133]

207 The High Court approved what Oliver J said in *Radford v De Froberville*, where his Honour said that 'the same situation, with respect to damages, as if the contract had been performed' does not mean 'as good a *financial* position as if the contract had been performed'.[134] The High Court said:

> In some circumstances putting the innocent party into 'the same situation … as if the contract had been performed' will coincide with placing the party into the same financial situation. Thus, in the case of the supply of defective goods, the prima facie measure of damages is the difference in value between the contract goods and the goods supplied. But as Staughton LJ explained in *Ruxley Electronics Ltd v Forsyth* such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. The buyer is thus placed in the 'same situation … as if the contract had been performed', with the loss being the difference in market value. However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the 'same situation … as if the contract had been performed'.[135]

208 The High Court said that similar thinking underlay the statement made by the High Court in *Bellgrove*, where in the passage quoted above the High Court said that the owner was entitled to have a building erected upon her land in accordance with contract and the plans and specifications. The High Court in *Tabcorp* said that in the case before it the landlord was contractually entitled to the preservation of the foyer without alterations not consented to and the landlord's measure of damages was the

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133 Ibid 285–6 (citations omitted).

134 *Tabcorp* (2009) 236 CLR 272, 286 [13] (emphasis in original), quoting *Radford v De Froberville* [1977] 1 WLR 1262, 1273.

135 *Tabcorp* (2009) 236 CLR 272, 286 [13] (citations omitted).

loss sustained by the failure of the tenant to perform that obligation.

209 The tenant submitted that the landlord erected and leased the building for commercial purposes and that it was an investment property and that the landlord's loss was only its financial loss. The High Court said that the answer to this submission was put by Oliver J in *Radford v De Froberville* where he said:

> Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. *Pacta sunt servanda*. If he contracts for the supply of that which he thinks serves his interests — be they commercial, aesthetic or merely eccentric — then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.[136]

210 The tenant referred to the qualification in *Bellgrove* that 'not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt' and said it was not reasonable to award damages as the Full Court had. The Court referred to the second-hand brick example given by the High Court in *Bellgrove*, discussed above, and said '[t]hat tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances'.[137]

211 The Court in *Tabcorp* said:

> The example given by the Court [in *Bellgrove*] aligns closely with what Oliver J said in *Radford v De Froberville*, that is, that the diminution in value measure of damages will only apply where the innocent party is 'merely using a technical breach to secure an uncovenanted profit'. It is also important to note that the 'reasonableness' exception was not found to exist in *Bellgrove v Eldridge*. Nothing in the reasoning in that case suggested that where the reasoning is applied to the present circumstances, the course which the Landlord proposed is unnecessary or unreasonable.[138]

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136 Ibid 288 [16], quoting *Radford v De Froberville* [1977] 1 WLR 1262, 1270.

137 *Tabcorp* (2009) 236 CLR 272, 288 [17].

138 Ibid 288–9 [17].

212 The Court in *Tabcorp* addressed the decision in *Ruxley Electronics & Construction Ltd v Forsyth*.[139] In that case, the House of Lords rejected an appeal against the decision of the trial judge to reject a claim for damages of £21,560 based on demolishing a pool and rebuilding it, and instead awarded £2,500 for loss of amenity. In that case, the builder had built a pool 6 feet deep when the specifications provided for a pool 7 foot 6 inches deep.

213 The High Court noted that the House of Lords referred to *Bellgrove* and *Radford v De Froberville* without dissent and said that on one view their Lordships arrived at a result inconsistent with the principles in those cases. The High Court concluded that it was sufficient to say that the facts of *Ruxley*, 'which were evidently seen by their Lordships as quite exceptional',[140] were plainly distinguishable from those in the appeal before them.

214 The Court held that the tenant's submission in *Tabcorp* misconstrued what was said by the High Court in *Bellgrove*:

> The 'qualification' referred to in the passage quoted above that the 'work undertaken be necessary to produce conformity' meant, in that case, apt to conform with the plans and specifications which had not been conformed with. Applied to this case, the expression 'necessary to produce conformity' means 'apt to bring about conformity between the foyer as it would become after the damages had been spent in rebuilding it and the foyer as it was at the start of the lease'. And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution in value was unreasonable. The Tenant's submissions rested on a loose principle of 'reasonableness' which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted.
>
> If the benefit of the covenant in cl 2.13 [not to make alterations without consent] were to be secured to the Landlord, it is necessary that reinstatement damages be paid, and it is not unreasonable for the Landlord to insist on their payment.[141]

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139 [1996] AC 344 (*'Ruxley'*).

140 *Tabcorp* (2009) 236 CLR 272, 289 [18].

141 Ibid 289–90 [19] (citations omitted).

215 Reference should also be made to *Kirkby v Coote*,[142] a decision of the Court of Appeal of the Supreme Court of Queensland. The respondents were the owners of a three-storey timber-framed pole house built on steeply sloping land. After heavy rains, 11 of the footings of the house subsided causing substantial damage to the house. As a result, the respondents brought an action against the first appellant who designed the footings of the house and his employer the second appellant. The trial judge upheld the respondents' claim and made an award of damages in favour of the respondents against the appellants for $581,200, which represented the reasonable cost of demolition and reconstruction of the house.

216 The appellants did not contest the primary judge's findings on the issue of negligence. Rather, the appellants sought to have the damages reduced to $193,200, which represented the reasonable cost of the partial underpinning of the house in the area where the 11 footings actually failed. The learned trial judge found, however, that there was a risk, although he could not be certain as to its magnitude, that a movement of other footings would occur in the future. The trial judge said the risk was a real one and in no way fanciful. The trial judge found that it was a risk that the respondents should not be required to bear.

217 As a result of these findings, the trial judge concluded that the only reasonable way to rectify the defects in the footings of the house was either to underpin the whole of the house, and not just the part the appellants contended should be underpinned, or to demolish and rebuild the house. It was common ground that the underpinning of the whole house would be more expensive than demolition and rebuilding and accordingly his Honour assessed damages on the latter basis.

218 The appellants argued that the risk of failure of the footings which had not yet failed was so slight as to make the cost of demolition and reconstruction unreasonable as a measure of damages.

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142 [2006] QCA 61 ('*Kirkby*').

219 In his judgment Keane JA (with whom Williams JA agreed) referred to *Bellgrove* on the measure of damages. The appellants, relying on *Bellgrove,* argued that the risk to stability was not grave, and there must be a serious risk of failure of the foundations to justify demolition and reconstruction. Keane JA agreed that the threat to stability may not have been 'grave' in the sense of obvious and immediate, but it was 'real'.[143]

220 After referring to the High Court's reference in *Bellgrove* to underpinning or replacement of the footings as a 'doubtful remedy', Keane JA said:

> In speaking of the reluctance of the law to confine a plaintiff to a 'doubtful remedy', the High Court was contrasting the case before it with a case where it is clear that the expenditure imposed on the defendant is disproportionate to any benefit to the plaintiff in terms of the vindication of the plaintiff's right to recover its actual loss from the defendant. In this case, the damages recovered by the respondents are not disproportionate to the benefit to the respondents in terms of respondents' entitlement to have a house structure which will be, as it should have been, free from risk to its stability so far as its foundations are concerned. It is only by this level of expenditure that the respondents can now achieve a structure which is as stable as it would have been had it not been for the negligence of the first appellant. It is only by this expenditure that the respondents can be freed of a real risk of catastrophic failure with serious consequences for life, limb and property. His Honour found that the risk identified by the respondents' witnesses was a real risk to the stability of the structure which could only be obviated, and the respondents' right to a stable house thereby vindicated, by the demolition and reconstruction of the house.[144]

221 His Honour then considered whether it was unreasonable to recover the costs of demolition and reconstruction where the defective work had affected the stability of the house. He said:

> It should be noted here that the researches of counsel for both sides have been unable to identify any case in which it has been held to be unreasonable for a plaintiff to recover the costs of demolition and reconstruction where the defendant's defective work has affected the stability of a house structure. This suggests that the courts will be slow to characterise as unreasonable the position of a plaintiff who is unwilling to 'live with' the risk of the serious consequences which may result from substandard work which affects the stability of a structure. There is no support in principle or authority for the proposition that a court will determine a level of risk of instability which it is 'reasonable' for a plaintiff to be required to endure when the plaintiff has

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143 Ibid [50].

144 Ibid [52].

> bargained for a level of stability which is, for all practical purposes, risk free.[145]

222 Keane JA said the task before the trial judge was not to determine whether it was more probable than not that a landslip would occur in the future. His Honour said that all that was required was to find a real risk in the sense of a 'degree of instability which, though not likely to be disastrous, was real'.[146] His Honour said that:

> In this regard, even if one accepts at face value Mr Murdoch's quantitative assessment of a 1:20 chance of future failure, the respondents are entitled to be compensated by an award that obviates that risk.[147]

223 Keane JA also referred to the necessity to assess damages 'once and for all', as emphasised in *Bellgrove* and added that:

> the law must be astute to ensure that the measure of damages accurately reflects the restoration of the respondents to the position they would have been in had the appellants not failed in their duty. The respondents should recover the amount of damages necessary to enable them to own a house free of risk so far as its stability was concerned. As McLure JA, with whom Steytler P and Wheeler JA agreed, said in *J-Corp Pty Ltd v Gilmour*: 'Reasonableness does not require the respondent to carry those risks.'[148]

The Tribunal's findings and reasons on damages — basis of liability

224 The Tribunal referred to *Bellgrove* and *Tabcorp*. The Tribunal cited the High Court's consideration in *Tabcorp* of the tenant's arguments that, on the basis of the 'doctrine of efficient breach', the landlord should only be entitled to damages referable to its loss assessed on a purely economic basis, and that since the reconstructed foyer was no less valuable than the original foyer which was destroyed, the landlord should be entitled only to nominal damages.

225 The Tribunal referred to the High Court's statements that such a measure of damages would only be appropriate 'where the innocent party is "merely using a

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145 Ibid [53].

146 Ibid [54]

147 Ibid

148 Ibid [59] (citations omitted).

technical breach to secure an uncovenanted profit"'.

226 The Tribunal continued:

> This passage has sometimes been used to argue that once a 'disconformity' is shown between building work done under a building contract and the contract requirements, it will only be in exceptional circumstances that a measure of damages other than the cost of rebuilding will be appropriate. Later in the judgment their Honours referred to what was necessary to produce conformity as being the damages which would be necessary to fund the reconstruction of the foyer as it had originally been built and as it was when the tenant took possession. …
>
> Their Honours continued on the same page:
>
> > And the Landlord also correctly submitted that the requirement of reasonableness did not mean that any excess over the amount recoverable on a diminution and value was unreasonable. The Tenant's submissions rested on a loose principle of 'reasonableness' which would radically undercut the bargain which the innocent party had contracted for and make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted.[149]

227 The Tribunal concluded on the test in *Bellgrove*:

> The result is that, despite the reconsideration of *Bellgrove* by the Court in the *Tabcorp* case, it remains to be applied according to its original terms in the case of ordinary building contractual disputes such as the one before us now. There is certainly no greater reluctance following the *Tabcorp* case to award damages to fund demolition and rebuilding.[150]

228 The Tribunal referred to the passages of the judgment of Keane JA in *Kirkby* set out in paragraphs 221 and 223 above.

229 The Tribunal concluded:

> [The submission of counsel for the Softleys] was that in the circumstances it was reasonable to require an award of damages sufficient to fund demolition and re-erection of the house because to do otherwise would leave the Softleys bearing the risk of future distress in the structure.
>
> [Counsel for Metricon] referred to the possibility of further claims being made under Metricon's Structural Guarantee or perhaps some further general contractual claim if additional problems were encountered. In our view, the proper approach here is to regard ourselves as assessing damages once and

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149 Tribunal Reasons [92]–[93] (citations omitted).

150 Ibid [94].

for all without making any allowance for the possibility of future claims. It would require a lengthy exposition at this point to examine all of the considerations which might be brought into play relative to the doctrine of res judicata and the operation of the limitation provisions to be found in the *Building Act 1993* without concluding that there definitely could not be any further claims relative to distress in the structure. Even a cursory consideration of the matters just mentioned would indicate that it is far from clear that any further claim could be made.

The choice which confronts us, therefore, in framing an appropriate remedy in damages is to determine whether, in the circumstances, it should be concluded that the worst is over and that the damage and distress which the structure has suffered already are referrable to 'one off' events during construction and that further large scale movements will not occur having regard to the 'covered structure' phenomenon and the protective effect of the pathways constructed by the Softleys. Or on the other hand if there are further factors in play that perhaps had not been fully explained, with the result that further movement beyond the parameters assumed to be reasonable in accordance with AS2870 will occur.

If the former conclusion is reached then damages should be awarded sufficient to fund a rectification of the existing structure. If the latter conclusion is reached, then the funding should be sufficient to allow for a demolition and reconstruction.

The most significant factor here is a consideration where the most significant distress is now manifesting itself. This is in the area on the eastern wall in the vicinity of bedroom 2, the laundry and WC. This is the area where, even according to Metricon's case, some of the external brickwork is in need of demolition and replacement viz. a section of approximately 7 to 8m above the windows varying from two to four courses. Apparently, there was some rectification work carried out here in 2011 but the distress and cracking has re-manifested itself. This area is remote from either of the pebble gardens. It is also protected by a concrete path. There is a related 'hotspot' of distress on the eastern side of the kitchen manifesting itself at the cornice level which is in the relatively close vicinity of the main area of distress. The persistence of these problems, despite a rectification work, to our mind, gives the lie to the contention that the worst is over and any future movement will be within what are regarded as acceptable parameters in accordance with AS2870. In accordance with the principles stated by the High Court in *Bellgrove* it is reasonable to fix the measure of damages by reference to the cost of demolition and a re-erection in these circumstances. To quote their Honours in the context of *Bellgrove* itself:

> To give to the respondent the cost of a doubtful remedy would be [sic] no means adequately compensate her, for the employment of such a remedy could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations.

These principles apply equally here as between the Softleys and Metricon.[151]

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151 Ibid [98]–[102].

Analysis of the Tribunal's reasoning

230 Metricon's appeal concerned only the Tribunal's findings and reasons as to damages. Metricon did not appeal against the findings of the Tribunal on liability and causation. Metricon contended that the Tribunal erred in law in determining the measure of damages by reference to the cost of demolition and reconstruction.

231 The Tribunal found that Metricon breached the building contract with the Softleys during the construction of the Softleys' home. The Tribunal found that defective workmanship led to water ingress under the slab during its construction which caused 'heave' in the slab structure following expansion of the highly reactive clay subsoil following an extended period of drought affecting metropolitan Melbourne.

232 The Tribunal found that the slab had not in the past and was not now performing as the relevant performance standard for the slab, AS2870, suggested it should[152] having regard to the cracking and differential movement in the property.[153]

233 The Tribunal found that serious distress existed in the structure.[154] The Tribunal found that movement of the property continued, as evidenced by a large number of spot level surveys that had been undertaken over the years.[155] The Tribunal found that there remained cracking outside the limits of the performance criterion laid down by standard AS2870 despite rectification work being carried out in 2011.[156]

234 The Tribunal recognised that its decision on that issue of damages was governed by the authorities cited above and, in particular, the test in *Bellgrove*. In short, in the case of defective building construction, the owner is entitled to damages sufficient to produce conformity to the contract, subject to the condition that the

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152 Ibid [47].

153 Ibid [39].

154 Ibid [49].

155 Ibid [25].

156 Ibid [41].

work undertaken be necessary to produce conformity and must be a reasonable course to adopt. As is clear from *Bellgrove*, '[a]s to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact'. In accordance with *Bellgrove*, the Tribunal accepted that it had to assess damages once and for all and should not award a 'doubtful' remedy.

235 The Tribunal cited the relevant authorities, including *Bellgrove*, in its reasons.[157] The Tribunal identified the test in *Bellgrove* and then applied that test noting that 'despite reconsideration of *Bellgrove* by the High Court in the *Tabcorp* case, it remained to be applied *according to its original terms* in the case of ordinary building contractual disputes such as the one before us now'.[158]

236 The Tribunal considered *Kirkby* on the issue of whether it was reasonable to award damages on the basis of demolition and reconstruction. The Tribunal said:

> [Counsel for the Softleys] placed primary reliance upon a decision of the Queensland Court of Appeal in *Kirkby v Coote* [2006] QCA 61, in particular in the judgment of Keane JA (as he then was) where His Honour said at [53]:
>
> > [53] It should be noted here that the researches of counsel for both sides have been unable to identify any case in which it has been held to be unreasonable for a plaintiff to recover the costs of demolition and reconstruction where the defendant's defective work has affected the stability of a house structure. This suggests that the courts will be slow to characterise as unreasonable the position of a plaintiff who is unwilling to 'live with' the risk of the serious consequences which may result from substandard work which affects the stability of a structure. There is no support in principle or authority for the proposition that a court will determine a level of risk of instability which it is 'reasonable' for a plaintiff to be required to endure when the plaintiff has bargained for a level of stability which is, for all practical purposes, risk free.
>
> [Counsel for Metricon] submitted that His Honour's remarks had to be seen in their proper context. The house in *Kirkby's* case was erected on steeply sloping land and heavy rains had led to some of the footings subsiding. At paragraph [54] His Honour assessed the chance of future failure as at least 1 in 20.
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> In closing, [counsel for the Softleys] referred us to another paragraph from the

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157 Ibid [90]–[97].

158 Ibid [94] (emphasis added).

judgment of Keane JA in *Kirkby's* case where His Honour said:

> [59] As the High Court emphasised in the passage from *Bellgrove v Eldridge* cited above, because the respondents' damages are assessed 'once and for all', the law must be astute to ensure that the measure of damages accurately reflects the restoration of the respondents to the position they would have been in had the appellants not failed in their duty. The respondents should recover the amount of damages necessary to enable them to own a house free of risk so far as its stability was concerned. As McLure JA, with whom Steytler P and Wheeler JA agreed, said in *J-Corp Pty Ltd v Gilmour*: 'Reasonableness does not require the respondent to carry those risks.'

Their submission was that in the circumstances it was reasonable to require an award of damages sufficient to fund demolition and re-erection of the house because to do otherwise would leave the Softleys bearing the risk of future distress in the structure. [159]

237 In my opinion, it is clear that the Tribunal accepted the submissions on behalf of the Softleys that it was inappropriate to leave the Softleys bearing the risk of future distress in the structure.

238 Following its consideration of *Kirkby*, the Tribunal stated that it would assess damages 'once and for all'.[160] The reference to 'once and for all' damages is taken from *Kirkby*. The Tribunal said that it considered the proper approach in the case before it was to assess 'damages once and for all without making any allowance for the possibility of future claims'.[161] In calculating damages on that basis, the Tribunal accepted that the owner was not obliged to carry the real risk of future unacceptable damage to the building.

239 According to the reasons of Keane JA in *Kirkby*, adopted by the Tribunal, that risk of future damage need not be such that there is a likely or probable risk of further damage to the structure, but rather it is sufficient to compensate the owner on the basis of demolition and reconstruction where there is a real risk of damage to the structure in the future.

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159 Ibid [95]–[98].

160 Ibid [99].

161 Ibid.

240 The Tribunal thus accepted that an award of damages for demolition and reconstruction is necessary and reasonable where there are real risks to the continuing stability of a house in the future that the owner would not have been required to bear if the contract between the owner and the builder had been properly performed by the builder.

241 In my view it is clear that the Tribunal in its reasoning found it was required to avoid awarding a 'doubtful remedy' according to the principles laid down in *Bellgrove*. The Tribunal said:

> In accordance with the principles stated by the High Court in *Bellgrove* it is reasonable to fix the measure of damages by reference to the cost of demolition and a re-erection in these circumstances. To quote their Honours in the context of *Bellgrove* itself:
>
> > To give to the respondent the cost of a doubtful remedy would be [sic] no means adequately compensate her, for the employment of such a remedy could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations.
>
> These principles apply equally here as between the Softleys and Metricon. [162]

242 In my view, the Tribunal properly applied the principles laid down in *Bellgrove* and considered whether an award of damages for demolition and reconstruction was necessary and reasonable and in so doing, the Tribunal had regard to whether the award of a remedy, other than damages based on demolition and reconstruction, would constitute a doubtful remedy. I consider that the approach of the Tribunal follows the approach of Keane JA, namely determining whether damages based on demolition and reconstruction was an appropriate measure of damages, and assessing whether there was a real risk to the continuing stability of the property in the future.

243 The Tribunal in its reasoning said that in framing an appropriate remedy it should conclude whether the worst was over and the damage and distress which the structure and fabric had suffered already was caused by one-off events during

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162 Ibid [102].

construction and would not happen again, or if there are further factors in play which will result in further unacceptable distress.[163]

244 The Tribunal found that the persistence of the distress it had identified in the structure and fabric of the Softleys' house, despite rectification work being carried out in the past, gave the lie to the first situation the Tribunal had posited where distress to the building would not happen again. In so saying, in my opinion, the Tribunal was finding that it was not satisfied that unacceptable damage and distress to the building would not happen again. The Tribunal did not find, nor was it required to find, that future unacceptable damage would continue to occur to the building.

245 In my opinion, it can be reasonably inferred that the Tribunal found that it could not be satisfied that the unacceptable damage would not happen again in the future as the Tribunal found that there was a real risk that unacceptable damage would happen again in the future. In so finding, it can be reasonably inferred that the Tribunal applied the real risk of damage test adopted in *Kirkby*. This reasoning shows that the Tribunal has applied the correct test.

246 Metricon failed to establish that any lesser remedies would adequately address the real risk of future unacceptable damage to the Softleys' home. Accordingly, the Tribunal correctly decided that demolition and reconstruction are necessary and reasonable.

Grounds 1(a) and (b)

247 Metricon contends that the Tribunal erred in law in its application of the principles of *Bellgrove:*

> (a) in formulating and/or distilling the relevant principles in the terms of paragraph 100 of its reasons;
>
> (b) in treating the choice set out in paragraph 100 of its reasons as the test for assessing liability …

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163 Ibid [100].

248 As discussed above, I find that the Tribunal correctly identified and applied the principles in *Bellgrove*.

249 In my view, the Tribunal did not treat the choice set out at paragraph 100 of its reasons[164] as the test for assessing liability. As set out above, the Tribunal rejected the first situation that there would be no further damage to the building. The Tribunal did not find that future damage would in fact occur. It was not necessary for it to do so. As discussed above, the Tribunal adopted the proper test, as applied in *Kirkby*, that if there is a real risk of future damage then that is inconsistent with a finding that there *will be* no further damage.

250 In those circumstances, as the application of the *Bellgrove* principles establishes, the appropriate measure of damages is the sum necessary to put the Softleys in the position they would have been in if the builder performed the contract according to its terms and conditions. The Tribunal also considered the reasonableness of an award of damages for demolition and reconstruction when it said that the Softleys should not bear the risk of further damage to the house.

251 Even if the structural stability of the house was not threatened (in the sense that the house will not collapse), the High Court's decision in *Tabcorp* makes clear that damages are to be measured by the sum necessary to put the Softleys in the position they would have been in if the builder had observed the building contract. Giving the Softleys a figure calculated on simple financial loss is not necessarily appropriate, as the High Court explained in *Tabcorp*. The issue is: what did the builder promise and what compensation is required to provide the Softleys with what they bargained for, subject of course to the test of reasonableness?

Grounds 1(c), (d) and (e)

252 Metricon contends by its Grounds 1(c) to 1(e) that the Tribunal erred in its application of the principles in *Bellgrove*:

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164 Set out at [229] above.

(c) by failing to address, properly or at all, the prospects of future movement of the slab and the building upon the slab;

(d) by failing to address, properly or at all, the prospect that future movement of the slab would be within acceptable tolerances;

(e) by failing to address, properly or at all, the prospect that future damage to the Softley home would be within acceptable tolerances …

253 Metricon conceded that the Tribunal made 'unequivocal' findings of fact that the slab at the Softley premises had not met the performance standards under AS2870.[165] Metricon, however, emphasised that the Tribunal's findings, such as the finding at paragraph 47 that '[a]ll of the above matters support the view that the slab here has not in the past and is not now, performing as AS2870 suggests it should', were findings as to past and present performance, not future performance.

254 Metricon further complains that the Tribunal's findings on the issue of future damage in paragraph 102 of the Tribunal's reasons[166] do not disclose a clear finding on future movement but rather a 'descriptive' reference to the worst not being over.

255 In my view these grounds should be rejected. As set out above, paragraph 102 must be read along with paragraph 100. As a matter of construction those paragraphs of the Tribunal's reasons, along with the preceding reasons, set out explicitly, or by necessary inference, a finding that there was a real risk of continuing future movement and damage outside acceptable tolerances. That is, a risk that would mean a lesser award of damages would constitute a 'doubtful remedy'. The Tribunal was also not required to make a definitive factual finding that structural failure would in fact happen in the future.

256 The Tribunal's findings in paragraph 102, and its reliance on *Kirkby*, are consistent with finding that there was a real risk that distress and damage outside acceptable tolerances would continue to manifest itself beyond limits permitted under the contract in the future. As indicated in *Kirkby*, that is all that is required to be established. The Tribunal's reasons (which may be reasonably inferred) are

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165 Metricon referred to Tribunal Reasons [39], [41], [42], [47].

166 Set out at [229] above.

sufficient to disclose its reasoning about that continuing risk.

257 In my view, these grounds of appeal fail.

Ground (1)(f)

258 Metricon contends that the Tribunal erred in its application of the *Bellgrove* principles 'by proceeding on the basis that past damage was a proper basis for assuming the likelihood of future damage'.

259 The Tribunal took into account the persistence of the damage despite repairs and rectification work having been undertaken. It did not simply 'assume' past damage was a basis for the likelihood of future damage.

260 In circumstances where the Tribunal made findings that the property suffered structural distress, and that the repair and rectification works undertaken had not averted an unacceptable risk of future movement, there were sufficient reasons for the Tribunal finding in paragraph 102 that any future movement would not be within acceptable parameters.

Ground 1(g)

261 Metricon contends that the Tribunal erred in its application of the *Bellgrove* principles 'by failing to take into account the expert evidence as to the effect of the breakage and subsequent repair of the stormwater pipe on the east side of the Softley home'.

262 In my opinion, this ground should be rejected. The Tribunal concluded that any abnormal moisture during construction was the responsibility of Metricon.[167] The Tribunal concluded it was the failure of Metricon during construction to prevent 'uncontrolled water penetration of and around the slab edge' that caused the edge

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167 Tribunal Reasons [14]–[16], [25], [49]–[50].

heave and structural distress to the Softleys' house.[168] The Tribunal referred to evidence that the broken stormwater drain could have caused the abnormal water conditions. The Tribunal found that the cause of the cracked drainpipe which Metricon said it repaired, and which was in the vicinity of areas of distress, was not disclosed on the evidence but found that 'this sort of abnormal water conditions cannot be regarded as outside the builder's responsibility'.[169]

263 The Tribunal found that the problems with the house[170] persisted despite rectification work. It was not necessary for the Tribunal to specify each and every piece of repair or rectification work that had been undertaken, as despite that work the distress to the structure and fabric of the house persisted. It was that persistence that led to the conclusion that the worst was not over and to the Tribunal deciding that it was not able to conclude that unacceptable damage would not continue to occur in the future.

264 I reject this ground of appeal.

Ground 1(h)

265 Metricon contends that the Tribunal erred in its application of the *Bellgrove* principles 'by failing to take into account that the rectification works proposed would fully address and resolve the damage and defects in the Softley home'.

266 Metricon says that it was incumbent on the Tribunal to reach a conclusion as to the reasonableness of awarding damages for demolition and reconstruction by considering the alternative methods of rectification available. It referred to evidence of the Softleys' expert which Metricon contended supported the view that there were alternative means of rectification.

267 Metricon says that the rectification work proposed was provided by the

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168 Ibid [53]–[69].

169 Ibid [49].

170 Referred to in ibid [102].

Softleys' own expert, Mr Peter Yttrup. Metricon submits that that work provided an alternative solution to the option of demolition and rebuilding. Metricon says that this option was contained in Mr Yttrup's expert report, dated 2 October 2015, and was in evidence before the Tribunal.

268 Metricon submits that together with roof truss rectification, the proposed rectification work addressed site drainage and the infiltration of water beneath the slab. Metricon says that Mr Yttrup recommended 'that the soil placed at the edge of the waffle raft be removed and replaced with compacted moist clay as required'.

269 Metricon submits that although the Tribunal had rejected the assertion by the Softleys that this was a requirement of AS2870, Mr Yttrup's opinion provided the Tribunal with a viable rectification method to remedy not only the drainage breaches by Metricon of AS2870 but also, critically, the effects those breaches might have had on the foundation soils which were potentially causative of the 'further factors in play which perhaps have not been fully explained'.

270 I do not accept Metricon's submission that Mr Yttrup's report provided an alternative solution short of demolishing and rebuilding the Softley home. Mr Yttrup was merely addressing work that needed to be done to repair the failure of Metricon to use compacted clay to fill the edge of the footing system. Mr Yttrup said that this was not done. Rather the backfilling was carried out by landscaping contractors after completion of the residence using bricklaying sand and not clay.

271 Mr Yttrup does not suggest this remedial work would have any effect on the past faulty workmanship by the builder in permitting water ingress under the slab during the construction of the house.

272 Metricon was asked at the hearing of the appeal what it proposed for rectification of the Softley property.

273 Counsel for Metricon said that all that needed to be done was further rectification of the existing damage at the property. Metricon said that no work was

required to strengthen the slab itself and that the Tribunal did not make any finding that the slab was defective. Metricon said that there was no need to rip up the house and replace everything because the movement of the slab was reducing and stabilising. Counsel for Metricon said that soil moisture conditions stabilise over time. Counsel for Metricon explained the so-called 'covered structure' phenomenon, which means that soils that are covered after they experience moisture stabilise with time.

274 Metricon did not contend that the soils had stabilised but that they would stabilise. It was Metricon's contention that the rectification work already undertaken to cover and reduce moisture in the soils, such as installation of pathways and the repair of the stormwater drain, was and would have this stabilising effect over time.

275 Metricon submitted that the Tribunal did not properly address the evidence on this issue.

276 In my view, the Tribunal did consider the likely efficacy of the remedial work Metricon relied on including the 'covered structure' phenomenon and the protective effect of the pathways. These matters are specifically mentioned in the first situation described in paragraph 100 of the Tribunal's reasons in which future movement would not occur having regard to those matters. The Tribunal rejected that situation. This conclusion was based on the Tribunal's finding that the problems persisted even after rectification works, including the construction of pathways, had been undertaken several years earlier.

277 It can be necessarily inferred from the Tribunal's reasons that it was not satisfied that the rectification works relied on by Metricon would in the future 'fully address and resolve the damage and defects in the Softley home'.

278 The Tribunal did not need to canvass in full the evidence it rejected in forming that conclusion.

279 I would reject this ground of appeal.

Ground 2

280 Metricon contends that the Tribunal erred in failing to disclose, adequately or at all, the basis upon which it concluded that Metricon's breach of contract in relation to site drainage would result in ongoing/future unacceptable slab movement and consequential damage to the Softley home.

281 The Tribunal did not find that Metricon's breach of contract in relation to site drainage would result in ongoing failure and future unacceptable slab movement and consequential damage to the Softley home. As discussed above, the Tribunal was not required to so find, nor did it do so. Rather, the Tribunal determined that it could not conclude that the worst was over and unacceptable damage in the future would not occur. As explained above, the Tribunal's reliance on *Kirkby* and its acceptance of the submission on behalf of the Softleys that the Softleys should not have to bear the risk of future distress in the structure and fabric of the house, satisfies me that the Tribunal was rightly addressing the issue of whether there was a real risk of the damage occurring in the future, and not the issue of whether such damage would occur.

282 In those circumstances, where the Tribunal had found that the repairs and rectification work to date had not led to the position where the Tribunal could conclude that damage would not occur in the future, I do not find it is incumbent on the Tribunal to spell out the physical forces at play and the relevant engineering principles at play that may explain why the damage was still occurring. All that the Tribunal was required to find, and in my view did find, was that in view of what had been happening since the house was built four years before, and in view of the deficiencies in the workmanship of the builder, there was a real risk that unacceptable damage may continue to occur in the future.

283 The Tribunal's reference to a doubtful remedy is another way of addressing the existence of a real risk of unacceptable damage to the house.

284 I would reject this ground of appeal.

Ground 3

285 Metricon contends that the Tribunal failed to disclose its path of reasoning in determining that the Softley home must be demolished and rebuilt.

286 I would reject this ground of appeal.

287 The Tribunal's path of reasoning as discussed above was clear. The critical finding was that the Tribunal was not satisfied that the worst was over and that unacceptable damage (which had been continuing since the house was built four years previously and was due to the builder's failure to observe its contract) would not continue to occur in the future. That was a finding of fact. There is no appeal against that finding. Once that finding was made, the Tribunal correctly applied the principles espoused in *Bellgrove*, *Tabcorp* and *Kirkby*.

288 I would reject this ground of appeal.

Ground 4

289 Ground 4 was not pressed.

Ground 5

290 Metricon contends that the Tribunal made a finding not open to it in accepting the whole of the costing of Mr Croucher for Mr and Mrs Softley, when the costing included a substantial component for repairing roof trusses, the Tribunal having rejected that aspect of Mr and Mrs Softley's claim.

291 The costings were only relevant if the Tribunal had concluded that the cost of repair was the appropriate measure of damages. As it was, the Tribunal held, and correctly in my view, that the appropriate measure of damages was the cost of demolition and reconstruction of the house.

292 In the circumstances, there is no need to consider this ground further.

Conclusion

293 I have had the benefit of reading in draft the judgment of the Chief Justice. I adopt the test found by her Honour to be the appropriate test for granting leave to appeal from a decision of VCAT to the Court of Appeal. In my opinion, grounds 1, 2 and 3 of the proposed notice of appeal disclosed a real prospect of success.

294 Accordingly, I would grant leave to appeal on grounds 1, 2 and 3 and dismiss the appeal and otherwise, I would dismiss the application for leave to appeal.