

# Choosing the Right Building Inspector for Your Dilapidation Report

The NCAT Appeal panel made 2 recent decisions that expert witnesses should be aware of. In this article, we analyse the 2 Appeal Panel decisions of:

1. Vidler v Northern Rivers Landscaping; and
2. Vujica v TNM Roofing

To assist expert witnesses who practise in NCAT, we provide an analysis of one of landmark decisions that Courts and Tribunals refer to when considering whether to accept, reject, or assess the weight of expert witness evidence. In particular, we analyse the principles of Makita v Spowles.

## Vidler v Lee t/as Northern Rivers Landscaping [2023] NSWCATAP 52

In the Vidler v Northern Rivers Landscaping case, the Appellant (Tracey Vidler) sought to appeal the decision of the Tribunal, arguing that the Tribunal's decision was not fair and equitable.

The appellant's primary contentions were that the:

1. Tribunal did not consider the fact that the respondent carried out the work as an unlicensed trade contractor;
2. Respondent's work was not done with the diligence or to an acceptable or professional standard; and
3. Appellant remains without compensation for the defective and failing retaining walls.

The Appellant also took issue with the weight given to the evidence by the Tribunal.

The presiding members, I R Coleman SC ADCJ (Principal Member) and M Gracie (Senior Member) in the Appeal Panel found that the Tribunal failed to apply the same standards and considerations when evaluating the weight to be given to the expert evidence.

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The presiding members also noted that the Tribunal failed to have regard to or deal with the evidence of the Appellant’s expert set out in the appellant’s letter, which went to the basis of the Appellant’s claims.

The Appeal Panel concluded that the approach taken by the Tribunal was “inconsistent, unexplained, and productive of unfairness”. As a result, the Appeal Panel found that it would be unjust to allow the Tribunal’s findings to stand. The Appeal Panel determined that it would be in the interests of justice to remit the matter for a [new hearing](#).

The Appeal was allowed and remitted to a differently constituted Tribunal upon the evidence already adduced and any further evidence as the Tribunal may allow.

#### Vidler v Northern Rivers Landscaping Summary

Summary Issue	Case Extracts
The Tribunal failed to apply the same standards and considerations when evaluating the weight to be given to the expert evidence.	40. Having regard to the Tribunal’s reasons for not giving any weight to the statement of Mr Worthington, we are of the view that the Tribunal failed to apply the same or equally relevant and rigorous considerations by allowing and accepting as determinative, all the evidence of Mr McQueen on behalf of the respondent.
The Tribunal failed to have regard to or deal with the evidence of the appellant’s expert set out in the appellant’s letter.	45. We are satisfied that the decision of the Tribunal under appeal was not fair and equitable. The Tribunal failed to have regard to or deal with the evidence of the appellant’s expert set out in the appellant’s letter to the respondent dated 9 May 2022. The Tribunal did not balance the evidence and opinions of Mr Worthington in that letter with the evidence of Mr McQueen, who did not refer to that evidence. Instead, the Tribunal gave no regard to that evidence given by the appellant and gave no weight to the other evidence of Mr Worthington for reasons that applied with equal force to the evidence of Mr McQueen.

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<p>The approach taken by the Tribunal was inconsistent, unexplained, and productive of unfairness.</p>	<p>46. ...In the context of Mr McQueen's failure to comply with the fundamental requirements of PD 3, especially those set out at [19] in relation to the content of expert reports, the approach taken by the Tribunal was inconsistent, unexplained and productive of unfairness. In those circumstances, it was not reasonably open to the Tribunal to have accepted Mr McQueen's evidence as determinative of the issues in <a href="#">dispute</a> in favour of the respondent.</p>
<p>The matter should be remitted for a new hearing before a differently constituted Tribunal.</p>	<p>"We are of the view that it would be unjust to allow the Tribunal's findings to stand where the Tribunal went about the fact-finding process in such a way that it was likely to have produced an unfair result. We are satisfied that it would be in the interests of justice to remit the matter for a new <a href="#">hearing</a> before a differently constituted Tribunal."</p>

## Vujica v TNM Roofing Pty Ltd [2022] NSWCATAP 305

The proceedings concern two applications related to residential building work carried out on the appellants' property (homeowners).

### First Application

The first application (HB 21/49598) was initiated by the builder, TNM Roofing Pty Ltd, [seeking payment](#) of \$28,800, which represents the unpaid contract sum (including \$8,800 for variations). The work involved repairs and alterations to the roof of a residential premises.

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## Second Application

The second application (HB 21/52061) was commenced by the homeowners, claiming that the builder's work was defective or incomplete. The homeowners sought an order stating they did not have to pay the sum of \$28,800. They argued that they did not agree to the variations of \$8,800 and that the defective work would cost \$20,000 to repair.

## Original Decision

On 19 May 2022, the Tribunal determined both building applications and made specific orders. However, the Tribunal rejected the Scott Report, an expert report submitted by the homeowners, based on it not being dated and signed. The decision to reject the report led to an appeal in which the Appeal Panel found that the Tribunal was in error for rejecting the report on those grounds.

## Analysis of the Vujica v TNM Roof Case

The Appeal Panel's Presiding Members were M Harrowell (Deputy President) and G Blake AM SC (Senior Member). The Appeal Panel determined that the Tribunal was in error in rejecting the Scott Report based on it not being dated and signed, as this should not have affected the admissibility of the report in the proceedings. This led to the decision to set aside orders 2 and 3 of the Orders and remit the proceedings for rehearing.

Key Factual Point or Chain of Reasoning	Verbatim Case Extracts
<p>The Tribunal was in error in rejecting the Scott report based on it not being dated and signed, as this should not have affected the admissibility of the report in the proceedings. This led to the decision to set aside orders 2 and 3 of the Orders and remit the proceedings for rehearing.</p>	<p>35. The Tribunal was in error in rejecting the report for the following reasons. 36. First, the reliance upon the need for signatures and other obligations that might arise under the Evidence Act 1995 (NSW) was misplaced. The rules of evidence do not apply to these proceedings: s 38(2) of the NCAT Act. To use the requirements of the Evidence Act to determine questions of admissibility in these circumstances was an error.</p>

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	38. Procedural Direction 3 does not require an expert to sign and date their report. While this may be desirable, it is not mandatory.
	39. Even if the procedural direction is not complied with, the report is not rendered inadmissible.
	42. Consequently, in exercising its discretion in rejecting the Scott report the Tribunal fell into error in the following respects: <ol style="list-style-type: none"> <li>1. The Tribunal failed to consider whether, to the extent Procedural Direction 3 applied, any technical non-compliance of the witness should be excused..."</li> </ol>

## Analysis of Principles from Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 regarding Expert Evidence as applied to Building Disputes

#	Principle	Extract from the Case	Application to Building Disputes
1	Admissibility of expert opinion evidence	85. In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study, or experience, the witness has become an expert...	In <a href="#">building disputes</a> , expert evidence must come from someone with specialised knowledge in the relevant field (e.g. construction, engineering, or architecture) due to their training, study, or experience.

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2	Expert opinion must be based on facts with a proper foundation	85. ...the opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”; so far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it...	In <a href="#">building disputes</a> , the expert’s opinion should be based on observable facts or established assumptions, and the expert must demonstrate that these facts are relevant and form a proper foundation for their opinion.
3	The expert’s opinion must explain the basis of the conclusion	85. ...the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed to produce the opinion propounded.	In <a href="#">building disputes</a> , the expert must explain how their specialised knowledge applies to the observed or assumed facts and leads them to their conclusion, providing a clear and logical explanation for their opinion.

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4	The court is not obliged to accept expert opinion as conclusive	87. But, given that the court is not obliged to take the opinion of an expert as conclusive even though no other expert is called to contradict it, can it be said that Professor Morton's report goes beyond a series of oracular pronouncements?	In <a href="#">building disputes</a> , the court can question the expert's opinion, even if it's unchallenged by other experts. The court should consider whether the expert's report provides a sound and convincing basis for its conclusions.
5	The expert's opinion should not usurp the function of the trier of fact	87. Does it usurp the function of the trier of fact?	In <a href="#">building disputes</a> , the expert's opinion should assist the court in understanding complex technical matters, but it should not replace the court's role in determining the facts and reaching a final judgement.
6	The expert's report should provide scientific criteria for testing the accuracy of its conclusions	87. More vitally, did it furnish the trial judge with the necessary scientific criteria for testing the accuracy of its conclusions? Did it enable him to form his own independent judgement by applying the criteria furnished to the facts proved? Was it intelligible, convincing and tested?	In <a href="#">building disputes</a> , the expert's report should provide the court with scientific criteria or a clear methodology for testing the accuracy of its conclusions, enabling the court to form an independent judgement based on the expert's analysis.

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7	The court must critically assess the expert's opinion	89. However, even though Professor Morton's evidence was uncontradicted, the trial judge was not bound to accept it, and nor is this Court, particularly where it was on ultimate issues...	In <a href="#">building disputes</a> , the court must critically assess the expert's opinion, even if it is unchallenged by other experts, to ensure it is based on sound reasoning and does not overreach the expert's area of specialised knowledge.
8	Consideration of the expert's opinion as a whole	89. Counsel for the plaintiff correctly said that an assessment of the merits of Professor Morton's evidence called for consideration of it in detail and as a whole.	In <a href="#">building disputes</a> , it is important to consider the expert's opinion in detail and as a whole, rather than focusing on isolated aspects, to properly evaluate the merits and validity of the expert's conclusions.

If you are an expert witness that requires instructions or training on your expert witness duties, then reach out to our law firm.

## Conclusion

In conclusion, the recent NCAT Appeal Panel decisions in *Vidler v Northern Rivers Landscaping* and *Vujica v TNM Roofing* provide important insights for expert witnesses who practice in NCAT. These decisions highlight the importance of applying the principles of *Makita v Sprowles*, which require that expert evidence must come from someone with specialized knowledge, be based on facts with a proper foundation, explain the basis of the conclusion, and provide scientific criteria for testing the accuracy of its conclusions.

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The court is not obliged to accept expert opinion as conclusive, and the expert's opinion should not usurp the function of the trier of fact. The court must critically assess the expert's opinion and consider it as a whole. If you are an expert witness, it is essential to be aware of these principles and follow them in your expert reports and testimony. For further guidance and support, expert witnesses may reach out to our law firm for instructions and training on their expert witness duties.

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