Civil and Administrative Tribunal

New South Wales

Case Name:	Chen v Owners Strata Plan No. 55792
Medium Neutral Citation:	[2019] NSWCATAP 135
Hearing Date(s):	2 May 2019
Date of Orders:	4 June 2019
Decision Date:	4 June 2019
Jurisdiction:	Appeal Panel
Before:	G K Burton SC, Senior Member P H Molony, Senior Member
Decision:	(1) Leave to Appeal is refused to the extent that leave is required. (2) Appeal is allowed for an error of law. (3) On a reconsideration of the matter by the Appeal Panel: (a) vary order 3 made by the Tribunal on 23 January 2019 to delete "three new security keys for access to the Applicant's lot 597 and" before "two garage remotes", and to delete "the security keys and" before "garage remotes"; (b) add a new order "(3A) On or before 12 June 2019, the Applicant will be issued with sufficient activated security keys such that there is on issue to the Applicant a total of six activated security keys for access to the Applicant's lot 597.". (4) Pursuant to s 63 of the Civil and Administrative Tribunal Act 2013 (NSW), in order 3 change "restricted" to "restrictive". (5) By consent of the respondent, and without admission by the respondent, vary order 1 made by the Tribunal on 23 January 2019 to add at the end ", such works to be completed by 31 December 2020". (6) Make no variation to the order concerning costs made at the primary hearing. (7) Order that each party is to pay her or its own costs

	of the appeal.
Catchwords:	Strata management - by-laws and covenants - interpretation - maintenance and repairs
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	AAI Ltd t/as GIO v McGiffen (2016) 77 MVR 348, [2016] NSWCA 229 at [81] Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443, [2012] NSWCA 244 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578 Collins v Urban [2014] NSWCATAP 17 Craig v South Australia (1995) 184 CLR 163 Eadie v Harvey [2017] NSWCATAP 201 House v The King (1936) 55 CLR 499 Jegatheeswaran v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 263, [2001] FCA 865 Lee v Commissioner of Police, NSW Police Force [2017] NSWSC 1849 Legal Profession Complaints Committee v Rayney [2017] WASCA 78 Mifsud v Campbell (1991) 21 NSWLR 725 at 728 Minister for Immigration and Border Protection v SZVFW [2018] HCA 30 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332 Owen v Kim [2017] NSWCATAP 26 Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256 Pholi v Wearne [2014] NSWCATAP 78 Pilbara Infrastructure Pty Ltd v Economic Regulation Authority [2014] WASC 346 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Rodger v De Gelder (2015) 71 MVR 514, [2015] NSWCA 211 at [86] Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39

	Wehi v Minister for Immigration and Border Protection [2018] FCA 1176
Category:	Principal judgment
Parties:	Yan Ping Chen (Appellant) Owners SP 55792 (Respondent)
Representation:	Counsel: Yan Ping Chen (Appellant self-represented) D Knoll AM (Respondents) Solicitors: Appellant self-represented D Edwards of DEA Lawyers (Respondent)
File Number(s):	AP 19/06671
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	23 January 2019
Before:	S McDonald, Senior Member
File Number(s):	SC 17/18203

REASONS FOR DECISION

Background to appeal

1 The appellant (who was the applicant) has owned for a number of years a strata lot being one of four penthouses on level 52 of an apartment tower (with commercial use at ground level) in Pitt Street, Sydney, NSW. The Respondent was the owners corporation of the strata scheme.

2 On 23 January 2019, from a primary hearing on 20 August 2018, the primary member granted relief within the scope of one of the appellant's main complaints. That was, on provision of access by the appellant within parameters specified in the orders, the respondent was to arrange for

appropriately qualified engineers and consultants to prepare a scope of works, quotations and tender process based on an existing engineering report dated 20 April 2018. The purpose was to address remediation of water entry into the appellant's lot.

3 The appellant also obtained partial relief on another aspect of her claim: on surrendering her existing security keys (which the respondent had rendered inoperable) she was to be issued with three replacement security keys to access her lot and two garage remotes to access her two car spaces. This was on condition "that the [appellant] must comply with, and take reasonable steps to ensure that her family members comply at all times, in relation to the use of the security keys and garage remotes with first, the by-laws of SP55792 and secondly, the restricted [sic] covenant on the common property title".

4 Those orders were substantially in the form put forward at the primary hearing by the respondent. The primary member declined to deal with other complaints made by the appellant. This was because of one of the following reasons: the complaint was dismissed in an earlier adjudication; moving costs while work was done were premature; the claim was not pressed in the amended points of claim dated 13 December 2017 even if in the original claim lodged 21 April 2017 and initial points of claim; the claim was not supported by evidence.

5 The relief was granted in respect of two main areas of complaint: water damage (which the appellant said had started not long after she bought the apartment) to tiling in kitchen and bathroom from external entry; de-activation in March 2017 of access keys to garage door operation and the common property.

6 On the water complaint, the respondent objected to the appellant's lack of expert evidence. The primary member however referred to the duty, under s 106 of the *Strata Schemes Management Act 2016* (NSW) (SSMA), on the respondent properly to maintain and keep in a state of good and serviceable repair the common property and said this extended to water ingress to any unit in the strata scheme. This ongoing duty removed any need to consider the effect of the previous adjudication when taken with the evidence mentioned in the following paragraph.

7 The primary member then noted that the respondent had obtained an expert report, served in April 2018, which pinpointed seven points of water entry on the level of the appellant's apartment (one of four on that level, in a building over 20 years old) and which "appeared to give new life to the issue".

8 The primary member also noted that the respondent had advised him that, since receipt of the report, a programme of works "were being arranged for repair of leaks to the roof which appear to be the cause of the [appellant's] water leakage issues which are at the centre of the Application". The primary member recorded evidence from a member of the strata committee as to the difficulty in performing such work 52 floors above ground level and obtaining experts with suitable competence and skill to perform the work safely. The evidence was that the work was costly and was currently being scoped and specified, would then be tendered, and would be performed when funds were in place. The primary member said: "This evidence was unsurprising and in keeping with the duties and obligations of an owners corporation of a large, modern building" such as the strata schemed owned.

9 On the security keys, the primary member pointed to the withdrawal of access to the garage because of non-compliance with a restrictive covenant on the registered title: That covenant said:

> "No car space forming a lot or part of any lot may be used by persons who are not a registered proprietor, occupant or tenant of a lot, not being a utility lot, or a visitor of a registered proprietor, occupant or tenant of a lot, not being a utility lot, or who are not involved on a regular basis in the operation of one or more of the shops or other facilities within the strata scheme. The registered proprietor or tenant of a lot must not grant or permit to be granted any lease, licence or sublease or otherwise part with possession of any car space forming a lot or part of a lot other than to a registered proprietor, tenant or occupier of a lot not being a utility lot except in conjunction with the lease, licence or transfer of a lot, not being a utility lot."

By-law 4, of which the appellant acknowledged she had a copy before purchase of the strata lot, required compliance with all laws relating to the lot. By-law 3 required owners or occupiers of a lot to take all reasonable steps to ensure that invitees, licensees and lessees complied with the by-laws.

10 The primary member referred to the security access records which indicated daily use of the appellant's car spaces but no access into the building itself.

11 The primary member referred to the appellant's evidence of tenancy agreements with two relatives whom she said occupied a bedroom of the apartment occasionally during the week when they worked late in the city.

12 The primary member said that he found the access records "compelling". He said that he was satisfied on the respondent's evidence that the garage access remotes were provided to third parties who did not reside in the appellant's strata lot in breach of the by-laws. On this basis, he was prepared to make orders in the form proposed by the respondent, which was reflected in the order already quoted in relation to the two garage remote access keys.

13 The primary member made no order as to costs after considering costs arguments in his reasons. Costs are considered separately, below

Grounds of appeal

14 The Notice of Appeal lodged, within time, on 11 February 2019, challenged the orders concerning proposed works but did not on its face challenge the order concerning access keys.

15 The appellant filed an Amended Notice of Appeal on 26 February 2019, with leave. The respondent replied to that notice on 13 March 2019 and said that was what it came prepared to meet at the appeal hearing.

16 The Amended Notice of Appeal simply contained a list of orders that the appellant wished to have made. However those orders included in effect material on grounds of appeal and argument in support of those grounds. Having regard to the approach taken in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 in a situation where there was no overt legal representation, we have sought to discern the substance of the grounds.

17 The grounds for the challenge were, in summary and leaving aside costs for present, as follows:

(1) The consultants should be ordered to include the engineer who provided the expert report in April 2018, the appellant was entitled to a rectification order for the appellant's internal tiles and waterproofing based on the April 2018 report, to be completed within two years from the date of that report, being 20 April 2020.

(2) The respondent by its building manager should be ordered to provide appropriate alternative accommodation for the appellant and her family

during the time taken to repair the property, at the cost of the respondent.

(3) The appellant was to have returned all six security keys and three remote controls to which she said she was entitled, with compensation for lost rental during the time the keys and remotes had been de-activated.

(4) Annual window cleaning must include the appellant's apartment.

(5) The chair and secretary of the strata committee "must resign from the committee immediately and apologise to all the owners of [the scheme]."

18 There was no distinction between what was said to be an error of law and what was said to be an error of fact requiring leave to be pursued.

19 By its reply to appeal lodged 13 March 2019 the respondent, by consent and without admission, consented to an amendment to order 1 to add a time limit to completion of the works by 31 December 2020.

Applicable legal principles

20 Section 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (CATA) states:

> "Any internal appeal may be made:
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> (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
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> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds."

21 Clause 12 of Schedule 4 to CATA states:

> An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
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> (a) the decision of the Tribunal under appeal was not fair and equitable, or
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> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
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> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

22 A Division decision is a primary decision of the Consumer and Commercial Division. The primary decision here is such a decision.

23 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

24 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 at [13], the Appeal Panel enunciated the following as specifically included:

(1) whether the Tribunal provided adequate reasons, which explain the Tribunal's findings of fact and how the Tribunal's ultimate conclusion is based on those findings of fact and relevant legal principle;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

(7) whether there was no evidence to support a finding of fact; and

(8) whether the decision was legally unreasonable.

25 The “no evidence" ground must identify that there is no, or substantially inadequate, evidence to support a “critical” or an “ultimate” fact in order to constitute a jurisdictional error (a form of error of law): *AAI Ltd t/as GIO v McGiffen* (2016) 77 MVR 348, [2016] NSWCA 229 at [81]; *Jegatheeswaran v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 263, [2001] FCA 865 at [52]-[56].

26 A failure to deal with evidence may also in the appropriate circumstances be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence. It is generally not mandatory to consider particular evidence: *Rodger v De Gelder* (2015) 71 MVR 514, [2015] NSWCA 211 at [86]; *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443, [2012] NSWCA 244 at [15] per Basten JA (McColl and Macfarlan JJA

agreeing). However, by s 38(6)(a) of the NCAT Act, the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings." This obligation includes an obligation to have regard to material which has been disclosed to the Tribunal and which is relevant to the facts in issue, at least where that material is of some significance. Further, at common law, where a decision-maker ignores evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker, this is an error of law: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62]-[63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61]-[62].

27 Legal unreasonableness can be concluded if the Panel comes to the view that no reasonable tribunal could have reached the primary decision on the material before it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [68]). A failure properly to exercise a statutory discretion may be legally unreasonable if, upon the facts, the result is unreasonable or plainly unjust: *Li* (2013) 249 CLR 332 at 367 [76]). There is an analogy with the principle in *House v The King* (1936) 55 CLR 499 at 505 that an appellate court may infer that there has been a failure properly to exercise a discretion "if upon the facts [the result] is unreasonable or plainly unjust" and legal unreasonableness as a ground of judicial review: *Li* at 367 [76]. Further, there is some authority to the effect that unreasonableness as a ground of review may apply to factual findings, although this has not been finally resolved: see *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 at [153]; *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176 at [29]; *Legal Profession Complaints Committee v Rayney* [2017] WASCA 78 at [193].

28 The Appeal Panel has stated that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to look at the grounds of appeal generally, and to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations in favour of the respondent: *Prendergast* at [12].

29 Turning to errors of fact, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, an Appeal Panel stated at [76]–[79] and [84(2)] as follows:

> 74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
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> 75 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > 1 If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
> >
> > 2 The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].
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> …
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> 78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
>
> 79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].
>
> 84 The general principles derived from these cases can be summarised as follows: …
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> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

30 The question of what constitutes significant new evidence not reasonably available at the time the proceedings under appeal were being dealt with was considered by an Appeal Panel in *Owen v Kim* [2017] NSWCATAP 26. In that appeal the Appeal Panel stated at [37] –[39]:

> 37 In *Owners - SP 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29 the Appeal Panel stated at [109] in connection with cl 12(1)(c) of Schedule 4 to the *Civil and Administrative Tribunal Act*:
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> 'In order to fall within this paragraph the appellant must be able to point to evidence which:
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> (1) is significant; and
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> (2) has arisen and is new in the sense that it was not reasonably available at the time the proceedings below were being heard.'
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> 38 In *Leisure Brothers Pty Ltd v Smith* [2017] NSWCATAP 11 the Appeal Panel stated at [40]:
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> ‘The meaning of this clause was considered by the Appeal Panel in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111. At [23] – [24] the Appeal Panel said:
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> '23 Unlike the WIM Act, the expression “reasonably available” is not qualified by the words “to the party”. This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence by summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014] NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave under cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the

> appellant at the time of the hearing and could not reasonably be known due to fraud.
>
> 24 Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).'

39 As stated at [27] in Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown:

> 'the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.'

31 In *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 an Appeal Panel stated at [10]:

> An appeal does not provide a losing party with the opportunity to run their case again except in the narrow circumstances which we have described. Mr Ryan has not satisfied us that those circumstances apply to his case and we refuse permission for him to appeal.

32 Even if the appellant establishes that he or she may have suffered a substantial miscarriage of justice within cl 12 of Sch 4 to the NCAT Act, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]) The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

33 In dealing with errors of law and errors of fact, the Panel must be cognisant that the two can intermingle. The Panel must also be alert that, under Australian law, there is a different approach to matters between two situations. The first of these is where the particular decision has involved evaluation from findings of primary facts and the drawing of inferences therefrom on which reasonable minds may differ but which must be accepted as legally correct unless overturned or varied on appeal. The second situation arises where there has been an exercise by the primary decision-maker of a discretion or choice embodied in the statute or law being applied, including as to whether relief is to be granted or refused and the form of relief: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [18], [20], [26], [30]-[32], [43]-[45], [48]-[49], [55]-[56], [85]-[87], [127]-[128], [153]-[155].

Error of law

34 We cannot see an error of law in the primary member's treatment of the water penetration issue. The primary member acted upon the respondent's

concession following the April 2018 expert report. The matters raised in the appellant's ground of appeal, that we have set out above, do not appear to have been asked of the primary member. There is no error of law in dealing with water penetration rectification at its source, to prevent further water entry, before remediating the effects of the water entry.

35 There is equally no error of law in the primary member's dealing with the garage access remotes. Reasons were given that were grounded in a comprehensive consideration of the relevant evidence. The covenant clearly could not be fulfilled in the category of visitors if the people parking did not access the apartment to visit. There was no clear evidence to identify the car parkers with the persons named as tenants on the alleged tenancy agreements, or with the unnamed family members who were said to be occasional occupants. The appellant did not say the cars parking were owned by her.

36 At that point, breach of the covenant was established. One did not need to make findings on the genuineness of the leases as documents intended to have legal effect, such as whether rent was paid under them, whether they reflected the appellant's evidence of occasional occupation without exclusive possession of a bedroom, and whether they were held over with the expiry of the fixed term in each of them.

37 However, in our view the primary member appears to have wrapped up, with the relief based on findings about the garage access remotes, similar relief with respect to the apartment security keys but without setting out a basis for that relief. In particular, there was no reference to or consideration of the complex interaction of a series of by-laws relating to means of access to common property.

38 The strata scheme was registered 28 October 1997. Original by-law 1(1)(x) contained a definition of "Security Key" which encompassed both garage door remotes and security keys or cards to access residential levels of the building. Original by-law 12 obliged the respondent to take all reasonable steps to secure the strata scheme from intruders and empowered the respondent to restrict access to parts of the scheme by Security Keys. Original by-law 13

empowered the respondent to make available to owners the number of Security Keys the respondent considered necessary (being not less than two sets for each owner) and to charge a fee for any additional Security Keys.

39 Special by-law 38(1), passed 16 March 2004, defined "Garage Remote" as a subset of "Security Key" operating the carpark entry and exit doors. Special by-law 38(4) required an applicant for a Security Key to provide proof that the applicant was an owner, occupier or tenant, and an applicant for a Garage Remote to prove ownership of a car parking lot and of the vehicle to be parked in that lot. Special by-law 38(8) authorised the building manager to render inoperative Security Keys that were instrumental in a breach of by-laws or applicable carparking rules or which were "manifestly unnecessary". Special by-law 38(9) provided for re-activation or re-issue only if the respondent was satisfied of identity of the recipient as an owner, occupier or tenant entitled to a Security Key and that any identified breach had been remedied and was unlikely to be repeated.

40 Special by-law 8 was passed 5 March 2008 and was the most recent of the relevant by-laws. It was the only provision referred to by the parties at the appeal. It provided as follows:

> "The Owners Corporation shall provide security passes to provide access to common property to lot owners, tenants and occupants of lots in [the strata scheme], with the number of passes to be issued by the Owners Corporation to be calculated as follows:
>
> (a) two passes for each bedroom within a lot are to be provided to each lot owner; or
>
> (b) a maximum of two passes for each bedroom within a lot are to be provided to the tenant of a lot upon receipt by the Owners Corporation's concierge of an executed copy of a lease of a lot, but if that lease discloses that the total number of occupants under the lease is to be less than 2 persons per bedroom then the tenant is to be provided with a security pass for the total number of occupants of the lot as disclosed in the lease."

41 The term "security passes" was not defined and the evidence before us was silent on the meaning of the term, its relation to the defined term Security Keys, and what was issued under each. The strata lot in question had three bedrooms. If "security passes" was intended to mean the same as Security Keys, then it included garage remotes. It could easily be inferred, from the

distinction in definitions, that only garage remotes provided vehicular access to the carpark.

42 It seems to us to be an error of law to include within order 3 all forms of security key when the reasons dealt only with garage remotes. We deal with correcting that error below.

43 The other three matters - alternative accommodation, annual window cleaning, resignation of officers of the strata committee - were properly not dealt with by the primary member, because they were not before him at all or (in the case of window cleaning) in that generalised form, or (in the case of the allegation about window clearing in a narrower form) was the subject of an earlier application.

Grant of leave to appeal on questions of fact

44 For reasons already given in relation to errors of law, there is no error of fact in the primary member's reasons apart from the absence of reasons to support the relief extending to the security keys to the apartment itself. All the more so, there is no basis to justify a grant of leave.

45 In relation to the water penetration issue, a report obtained since the primary hearing was admitted because it indicated performance to date of an aspect of the relief granted at the primary hearing. It showed an orderly progress in the remediation process which was consistent with the primary member's findings already quoted. There was no evidence to suggest that the timeline urged by the appellant was achievable or appropriate; the time could be shorter or longer. There was no evidence to justify compelling remediation of the effects of the water penetration (such as safety concerns) prior to effecting the remediation of the source of the problem. Without dealing with the source there would probably be duplication of fixing up the effects. There was no evidence to justify imposing any particular expert on the process.

46 Accordingly, we consider there is no basis for a grant of leave and, in our view in any event, no material errors of fact in the primary members conclusions on matters grounding the orders that he made.

Appropriate relief on appeal

47 CATA s 81 provides that, in determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal. The section sets out a list of available orders which is not exhaustive. That list includes: allowing the appeal, setting aside the primary decision and remitting the whole or any part of the case to the primary level of the Tribunal for reconsideration, either with or without further evidence and in accord with the Appeal Panel's directions or under CATA s 81(1)(d) setting aside the decision under appeal and substituting another decision for it.

48 The error of law that we have identified necessitates reconsideration of that very limited aspect. It is appropriate that the Appeal Panel itself engage in that re-determination. The Appeal Panel has before it the limited material by way of evidence and argument necessary for that determination, which really is the by-law 10. It is consistent with the guiding principle in CATA ss 3(d) and 36, that proceedings be resolved justly, quickly, cheaply and with as little formality as possible that it be brought to a conclusion: cp *Lee v Commissioner of Police, NSW Police Force* [2017] NSWSC 1849 at [47].

Reconsideration of limited issue on appeal

49 It seems to us that the latest by-law on security access devices, being special by-law 8, must prevail to the extent of any inconsistency with earlier by-laws on that topic.

50 In our view special by-law 8 is structured by reference to access to the residential strata lot, as distinct from vehicular access to car parking lot(s) attached to that residential lot. It focuses on entitlement by reference to the number of bedrooms. If garage access remotes were intended to be governed by it, illogical inconsistencies would result. A residential lot that had three bedrooms but only one parking lot would end up with an entitlement to more security passes to the residential lot than a three bedroom residential lot with two parking lots (the present case), yet the presence of multiple vehicles would be likely to mean the need for more, not less, security passes to the residential lot.

51 Such an exclusion of garage access remotes from special by-law 8 means that the other two by-laws continue to have work to do in regulating all means of secure access, embraced by the definition of Security Key, and makes sense of why that definition is not applied to special by-law 8.

52 There is no suggestion that para (b) in special by-law 8 has been fulfilled, by provision to the concierge of a tenancy agreement that is current and relates to the entire lot. Although the expired fixed-term leases in the evidence on their face related to the entire lot, it was clear that the appellant and her family also occupied the lot which casts doubt on the nature of the purported tenancy.

53 Accordingly, in our view the appellant is entitled to six security access keys to enable access to the apartment, which contains three bedrooms capable of holding two persons in each, and has at present been given only three. The security access keys being referred to are distinct from and do not interfere with the restriction in the existing order on garage access remotes.

Outcome of substantive appeal

54 The appeal accordingly succeeds on identifying an error of law which we have reconsidered and which necessitates a relatively minor change to the primary orders, but one of practical significance it appears to the appellant. We set out our orders below.

55 We shall also make the variation to primary order one to which the respondent consented in its reply to appeal, and, pursuant to CATA s 63, correct "restricted" in order 3 to "restrictive".

Costs

56 CATA s 60, together with rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the Rules), provide that the ordinary costs rules apply, even in the absence of special circumstances required by s 60, where "the amount claimed or in dispute in the proceedings is more than $30,000". The requirements of CATA s 50 may (or may not) apply to a separate costs determination even when there has been a hearing on the merits of the matter, and require the parties to be given an opportunity to make submissions before a hearing is dispensed with and the matter is determined on written submissions and evidence.

57 Rule 38A of the Rules applies the same costs rules as applied in the Division when there is a departure under the Division rules (such as under Rule 38) from CATA s 60.

58 There may have previously been room to argue that, for some strata decisions, the underlying value of the relief sought was sufficient to satisfy rule 38 even though no direct money order was sought.

59 In *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 esp at [86]-[111] the Appeal Panel has decided (in a case involving re-allocation of unit entitlements) that strata applications such as the present proceedings do not fall within rule 38.

60 Both parties sought their costs of the appeal and the appellant challenged the primary member's decision that each party paid her or its costs of and incidental to the primary application. The appellant had been legally represented by leave until the day before the primary hearing and has since been self-represented. The respondent was legally represented by leave throughout the proceedings, including the appeal proceedings.

61 We discern no error in the primary member's decision on costs, namely, that each party bear her or its own costs of and incidental to the application. Against the lack of success on many issues, and the delay in prosecuting her case, the primary member pointed to the fact that the appellant's determined pursuit of the matter had brought her relief on water penetration in terms of a constructive way forward. The appellant also regained conditional return of garage remotes. There appears to have been no provision to the primary member of offers that might constitute special circumstances.

62 Largely the same position arises on this appeal. As the respondent rightly said, certain aspects of the appeal were hopeless either from the outset or at least from the time of the respondent's reply lodged and served 13 March 2019. However, the appellant has succeeded in recovering unrestricted access to her unconditional entitlement to six, not three, security access keys (not garage remotes), and the respondent has made a concession (without admissions) which is something that the appellant sought on appeal. In those

circumstances, we discern no special circumstance to depart from making no costs order.

63 No party raised on appeal special by-law 14(9) passed 13 April 2011, which obliges a losing owner to indemnify the respondent. That by-law is expressed to be subject to any contrary order of a court or tribunal in the relevant proceedings. We consider that the order below and the order we are about to make are such contrary orders.

Orders

64 The orders we accordingly make are as follows:

(1) Leave to Appeal is refused to the extent that leave is required.

(2) Appeal is allowed for an error of law.

(3) On a reconsideration of the matter by the Appeal Panel: (a) vary order 3 made by the Tribunal on 23 January 2019 to delete "three new security keys for access to the Applicant's lot 597 and" before "two garage remotes", and to delete "the security keys and" before "garage remotes"; (b) add a new order "(3A) On or before 12 June 2019, the Applicant will be issued with sufficient activated security keys such that there is on issue to the Applicant a total of six activated security keys for access to the Applicant's lot 597.".

(4) Pursuant to s 63 of the Civil and Administrative Tribunal Act 2013 (NSW), in order 3 change "restricted" to "restrictive".

(5) By consent of the respondent, and without admission by the respondent, vary order 1 made by the Tribunal on 23 January 2019 to add at the end ", such works to be completed by 31 December 2020".

(6) Make no variation to the order concerning costs made at the primary hearing.

(7) Order that each party is to pay her or its own costs of the appeal.

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

Registrar

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