Civil and Administrative Tribunal

New South Wales

Case Name:	Davenport v The Owners – Strata Plan 536;; The Owners – Strata Plan 536 v Davenport
Medium Neutral Citation:	[2018] NSWCATAP 301
Hearing Date(s):	17 April 2018, 27 July 2018
Date of Orders:	19 December 2018
Decision Date:	19 December 2018
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member J Kearney, Senior Member
Decision:	1. The time to file appeal AP 18/22843 is extended to 11 May 2018. 2. Leave to appeal is granted and the appeal is allowed. 3. The orders made in applications SC 17/14533 and SC 17/24903 are set aside. 4. In lieu thereof the following orders are made: a) The Owners Corporation is, at its cost, to repair the balcony attached to Lot 1 and carry out all necessary incidental work in accordance with the scope of work contained at pages 10 - 12 of the Ellis Constructions Report dated 15 June 2017 found in volume 2, pages 380-382 of the appeal bundle filed in appeal AP 18/08518 (the Works). b) The Owners Corporation is to take such steps as are necessary to obtain all relevant Council and other approvals as may be required to undertake the Works.

c) Subject to any application to extend time, which application may be made to the Tribunal at first instance, the Works are to be completed on or before 30 April 2019.

d) Liberty to apply to the Tribunal at first instance for directions concerning the implementation of these orders.

5. Resolution 11 made 13 September 2016 is invalid and of no effect.

6. Save as provided above, the appeals are dismissed.

7. Any application for costs by either party is to be made in accordance with the following timetable:

a) The applicant for costs (Cost Applicant) is to file and serve any application, evidence and submissions within 14 days from the date of these reasons.

b) The respondent to any costs application is to file and serve any evidence and submissions in response to the costs application within 28 days from the date of these reasons.

c) The Costs Applicant is to file and serve any submissions in reply within 35 days from the date of these reasons.

d) The parties' submissions are to include submissions about whether an order should be made dispensing with a hearing of the costs application pursuant to s 50(2) of the Civil and Administrative Tribunal Act, 2013.

Catchwords:

STRATA SCHEMES – Common property – resolution to authorise work to alter common property – obligation to repair – s 106(3) of the Strata Schemes Management Act 2015 (NSW) – power to determine repairs and maintenance are inappropriate – circumstances in which demolition is authorised – unauthorised alterations.

MEETINGS – loss of records – presumption of

	regularity – available inferences of past conduct based on proven facts.
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) Conveyancing (Strata Titles) Act, 1961 (NSW) Environmental Planning and Assessment Act, 1979 (NSW) Real Property Act 1900 (NSW) Strata Schemes Development Act, 2015 (NSW) Strata Schemes (Freehold Development) Act, 1973 (NSW) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act, 2015 (NSW) Strata Titles Act, 1973 (NSW)
Cases Cited:	Al-Daouk v Mr Pine t/as Furnco Bankstown [2015] NSWCATAP 111 Collins v Urban [2014] NSWCATAP 17 Hill v. Woollahra Municipal Council & Ors. [2003] NSWCA 106 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Margiz Pty Ltd v Proprietors Strata Plan 30234 (1993) 30 NSWLR 362 McLean Brothers & Rigg Ltd. v. Grice (1906) 4 CLR 835 Ridis v Strata Plan 10308 [2005] NSWCA 246; 63 NSWLR 449 The Owners – Strata Plan 21702 v Krimbogiannis [2014] NSWCA 411 The Owners – Strata Plan 76269 v Draybi Bros Pty Ltd [2014] NSWCATAP 29 The Owners – Strata Plan No. 50276 v Thoo [2013] NSWCA 270 Travis v Proprietors – Strata Plan No. 3740 [1969] 2 NSWR 304
Texts Cited:	Rath, Chime and Moore, Strata Titles, The Law Book Co (1966)
Category:	Principal judgment
Parties:	In appeal AP 18/08518 Appellant: Carolyn Anne Davenport Respondent: The Owners – Strata Plan 536

	In appeal AP 18/22843
	Appellant: The Owners – Strata Plan 536 Respondent: Carolyn Anne Davenport
Representation:	In appeal AP 18/08518
	Counsel H Durham (Appellant) T Hollo (Respondent)
	Solicitors: Philip Davenport (Appellant)
	In appeal AP 18/22843 Counsel T Hollo (Appellant) H Durham (Respondent)
	Solicitors: Philip Davenport (Respondent)
File Number(s):	AP 18/08518, AP 18/22843
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	24 January 2018
Before:	G Meadows, Senior Member
File Number(s):	SC 17/14533, SC 17/24903

REASONS FOR DECISION

Introduction

1 These appeals concern a balcony which forms part of the building located on a property at Rose Bay (property), being part of Strata Plan 536.

2 The strata scheme consists of four Lots.

3 The balcony is accessible from Lot 1 only, which is owned by Ms Davenport (whom we will refer to as the appellant). It has fallen into a state of disrepair.

4 A dispute arose between the appellant and the Owners Corporation (who we will refer to as the respondent) about who was liable to repair the balcony and/or whether it should be demolished.

5 On 24 March 2017 the appellant filed application SC 17/14533 in the Tribunal. That application sought the following order:

> An order under s 232 of the Strata Schemes Management Act 2015 to settle a dispute about the failure of the Owners Corporation to maintain and repair the common property in breach of s 106 of the Act.

6 It would appear that at the hearing of the proceedings at first instance the orders sought by the appellant were in different terms. In this regard, under the heading "Relief sought" in submissions dated 19 July 2017 provided by Counsel on her behalf (Appeal Bundle (AB) Vol 1 p 26-27), the appellant said:

> To resolve the dispute between the parties, the [appellant] accordingly seeks the following orders:
>
> a) that the [respondent] accept that Resolution 6 (sic) of the Annual General Meeting of 4 August 2015 was not validly made;
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> b) that the [respondent] accept that Resolution 11 of the Annual General Meeting of 13 September 2016 was not validly made; and
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> c) that the [respondent] refrain from resolving to demolish the balcony in future unless and until:
>
> > (i) it resolves to improve and enhance the common property generally and develops is a plan (sic) for same that does not operate a presently on the [appellant] (that is to say, where she is not disproportionately prejudiced relative to other owners); or
> >
> > (ii) the owner from time to time of Lot 1 consents.

7 On 1 June 2018, the respondent filed application SC 18/24903. In that application the respondent sought the following orders:

> 1. An order under section 232, or alternatively section 229 of the Strata Schemes Management Act 2015 (NSW) that the Owner of Lot 1 of registered Strata Plan 536 is retrospectively authorised by the Owners Corporation to make changes to the common property of registered Strata Plan 536 by erecting and adding an external balcony to Lot 1 on the common property (Balcony) on condition that:

a. The Owner from time to time of Lot 1 obtain all necessary approvals from all relevant authorities in respect of the Balcony and those approvals be provided to the Owners Corporation upon request.

b. The repair work identified by the Owners Corporation is carried out in proper and workmanlike manner and in accordance with the Building Code of Australia, Australian Standards, and workplace health and safety requirements by Ellis Constructions or such other licensed builder that might be approved by the Owners Corporation and all appropriate insurances for the repair work are effected by the contractor.

c. Prior to any repair work, the Owner from time to time of Lot 1 obtain, effect and maintain all appropriate insurances for the carrying out of the repair work;

d. After completion of the repair work, all common property is thoroughly cleaned and reinstated to the condition prior to commencement of the repair work;

e. All costs of and incidental to carrying out the repair works are the responsibility of and are to be paid by the Owner from time to time of Lot 1;

f. The Owner from time to time of Lot 1 do all things necessary to cause the registered Strata Plan 536 to be changed or amended such that the Balcony is properly indicated as common property on registered Strata Plan 536;

g. The Owner from time to time of Lot 1 complete and satisfy all of the conditions in a. to f. Above no later than 12 months from the date of this Order;

h. The Owner from time to time of Lot 1 agreed to be responsible for the ongoing maintenance of the Balcony once the repair works have been completed in accordance with Order to (below).

2. An order under section 149 of the Strata Schemes Management Act 2015 (NSW) that the Owner from time to time of Lot 1:

a. Is and shall be responsible for the ongoing maintenance of the Balcony in accordance with a maintenance plan to be provided by the Owners Corporation;

b. Is to obtain, effect and maintain all appropriate insurances for the balcony as common property of Strata Plan 536.

3. In the alternative to Orders 1 and 2 above, an order pursuant to section 232 of the Strata Schemes Management Act 2015 (NSW) that the Owners Corporation is authorised to take steps to remove the Balcony by engaging Ellis Constructions to perform such work in accordance with the Quote dated 20 February 2016.

4. Costs.

8 Applications SC 17/14533 and SC 17/24903 were heard together on 25 October 2017.

9 Issues which appear to have been raised in the proceedings at first instance include:

(1) the circumstances in which the balcony came to be constructed;

(2) who constructed the balcony,

(3) whether the respondent approved its construction,

(4) whether the balcony is common property,

(5) who is responsible for repair and maintenance of the balcony;

(6) is the respondent entitled to demolish the balcony due to its current state and reinstate the building to the position as depicted in the original strata plan.

(7) what rights (if any) did the appellant (and the predecessors in title to the appellant) have to use and occupy the balcony; and

(8) the operation of various strata schemes legislation which may affect these issues, the strata plan being first registered in 1964;

(9) the validity of various resolutions of the respondent in general meeting.

10 On 24 January 2018 the Tribunal made the following orders (Orders):

> 1. The Owners Corporation is to demolish the balcony at its expense and return the common property, being the front wall of the building, to the condition it was in at the date the strata plan was registered.
>
> 2. Order 1 above is subject to any decision of the Owners Corporation to repair and make safe the balcony at its expense and to agree to any request of Ms Davenport for an exclusive use by-law which may be conditional on the owner of Unit 1 from time to time, indemnifying the Owners Corporation in future from any expense in relation to the proper repair and maintenance of the balcony.
>
> 3. The parties may negotiate a special by-law in relation to exclusive use of the balcony on the basis that the Owners Corporation is to repair the balcony at its expense while the owner from time to time of Lot 1 agrees to indemnify the Owners Corporation for ongoing repair and maintenance of the balcony, until 28 February 2018.
>
> 4. If agreement is reached by 28 February 2018, the Owners Corporation is to immediately retain an appropriate contract or to repair and make safe the balcony, such works to be completed no later than 30 April 2018.
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> 5. If agreement is not reached by 28 February 2018, the Owners Corporation is to immediately retain an appropriate contractor to demolish the balcony, such works to be completed no later than 30 April 2018.
>
> 6. Both applications are otherwise dismissed.

11 The Tribunal provided written reasons for its decision (Reasons).

12 The appellant and the respondent each appealed the Tribunal's decision.

13 The appellant commenced appeal AP 18/08518 (appellant's appeal) by Notice of Appeal dated 20 February 2018. On 11 May 2018, the respondent commenced appeal AP 18/22843 by Notice of Appeal dated 11 May 2018 (respondent's appeal).

History of the strata scheme

14 It is convenient to set out a history of the strata scheme and record some matters that do not appear to be in dispute in this appeal.

15 It is also relevant to note that, in the proceedings at first instance, the appellant had issued a summons for the production of documents by the local council in connection with the construction of the balcony. Documents were not then produced by the Woollahra Municipal Council (the Council). Those documents concerned the strata scheme and applications made to the Council for the carrying out of building works, but not in respect of the balcony. The documents that were then produced did not indicate that an application for approval to construct the balcony had been sought or obtained from the Council.

16 However, prior to the second day of the hearing of the appeal on 27 July 2018, the Council located documents concerning the construction of the balcony. These documents became exhibit A in the appeal. The documents, dated about 1966-8, include plans to construct the balcony and a building application (No 1072/66) seeking Council approval (Building Application).

17 In respect of this material, an application to adduce fresh evidence in the appeal was made by the appellant. As part of this application, the appellant sought to rely on searches showing the ownership of the Lots at the time the balcony was constructed (see appellant's submissions (AS) 8 June 2018-application to adduce fresh evidence). We will return to the relevance of these documents and that application below.

18 The following matters appear to be uncontroversial:

(1) The strata plan was registered on 29 April 1964 (see appellant's chronology). A copy of the strata plan is found in the AB Vol 2 pp 298-299. Registration of the strata plan occurred under the *Conveyancing (Strata Titles) Act, 1961 (NSW)* (1961 Act).

(2) The strata plan, as registered, did not show the balcony. The balcony was not constructed as part of the original building and was not in existence at the time the strata plan was registered.

(3) There is no evidence that any amendment to the strata plan showing the balcony was subsequently registered under the 1961 Act as an alteration to the building.

(4) The 1961 Act was repealed and replaced by a series of legislation including the *Strata Schemes (Freehold Development) Act, 1973 (NSW)* (1973 FD Act) and the *Strata Schemes Management Act, 1996 (NSW)* (1996 Management Act).

(5) The 1973 FD Act and the 1996 Management Act were in turn repealed and replaced by the *Strata Schemes Development Act, 2015 (NSW)* (2015 Development Act) and the *Strata Schemes Management Act, 2015 (NSW)* (2015 Management Act).

(6) The records of meetings of the respondent and resolutions passed at about the time the balcony was constructed have been lost or are not available.

(7) In 1994 a dispute arose with the Council concerning the carrying out of building work in the strata scheme. At that time, the balcony had been constructed. The renovation then being carried out was the internal reconfiguration of various Lots, including Lot 1: see "existing layout" and "renovated layout" shown on Torpey Vander Have Pty Ltd drawing 9498 – 1 AB Vol 1 p 127 (Torpey Plans). In this regard we note the "existing layout" of Lot 1, as shown in the Torpey Plans, appears different to that recorded on the strata plan as registered: see AB Vol 2 p 299.

(8) Since registration of the strata plan, Lot 1 has been owned by various people including the following (see first schedule of copy of Certificate of Title Vol 3236 Fol 142 being part of bundle attached to the statement of Mr Philip Davenport dated 8 June 2018 at p 12):

    (a) William Victor McCall, Georgina Bessie McCall, Annabelle Mary Baldwin and William George McCall as joint tenants - prior to 29 May 1964

    (b) William Victor McCall, , Annabelle Mary Baldwin and William George McCall as surviving joint tenants - instrument dated 29 May 1964;

    (c) Joseph Catts, Rosa Catts, Keith Fine and Patricia Fine as joint tenants– transfer dated 9 March 1965 (being instrument number J929540); and

    (d) Robert McKelvey- transfer dated 20 June 1973;

    (e) Robin McKelvey- transmission registered 3 August 1982;

    (f) Hazel Parker-transfer registered 18 February 1983.

The searches also show that Joseph Catts, Rosa Catts, Keith Fine and Patricia Fine together owned Lots 2, 3 and 4 from 1965 until 1973 as joint tenants,

those Lots having been transferred to them by instrument number J929540 as well. The searches also show the predecessors in title (the McCalls and Baldwin) also owned all four lots as joint tenants.

(9) There is no evidence of a special use by-law having been passed under the 1996 Management Act or the 2015 Management Act granting special rights to any predecessor in title of Lot 1 to use the balcony and no such by-law has been registered on the title of the property.

(10) The appellant became registered proprietor of Lot 1 following her purchase at auction on 17 February 2001 (para 3- appellant's statement dated 24 March 2017, AB Vol 1 p 4).

(11) There is no evidence that the appellant sought or was given express permission to occupy the balcony by resolution of the respondent (special by-law or otherwise) at the time of or subsequently to her acquisition of the property and any entitlement she has to do so arose from the rights (if any) of her predecessors in title or by operation of law.

(12) Reports were prepared by WS Benchmark Building Services Pty Ltd dated 11 April 2013 (AB Vol 1 p57 and following) and Accor Consultants Pty Ltd dated 17 December 2014 (AB Vol 1 p57 and following) concerning the state of the balcony and its balustrade.

(13) The balustrade and balcony were the subject of various resolutions at general meetings of the respondent held on 4 August 2015 (Minutes AB Vol 1 p 104 and following - resolutions 6, 7, 8 and 9) and 13 September 2016 (AB Vol 1 p 155 and following - resolution 11).

(14) The appellant does not contend the balcony is part of Lot 1: see para 1.4 AS dated 16 March 2018).

19 In addition, there appears no dispute that the balcony is capable of being repaired, although the costs of repair appear to be greater than the cost of demolition and "reinstatement" of the facade of the building.

Notices of Appeal and submissions

20 It is convenient to set out the orders sought and grounds of appeal raised by each of parties in the appellant's appeal and the respondent's appeal.

Appellant's appeal

21 The appellant challenges orders 1 and 5 of the Orders. In her Notice of Appeal, the appellant says the Appeal Panel should make the following orders:

(1) That the Owners accept and record that Resolution 7 of the Annual General Meeting of 4 August 2015 was not validly made;

(2) That the Owners accept and record that Resolution 11 of the Annual General Meeting of 13 September 2016 was not validly made; and

(3) That the parties be heard on the question of costs.

22 There were originally 12 grounds of appeal:

(1) The Tribunal has no jurisdiction to order the Owners to carry out building works for which no development approval has been sought or granted.

(2) The Tribunal has no jurisdiction to order that the balcony be demolished or repaired, as the case may be, within any particular time because there was no dispute about, or complaint in relation to, the time for affecting either repair or demolition of the balcony.

(3) The Tribunal erred in law by considering an irrelevant matter, namely, whether the balcony was constructed without Council approval.

(4) Alternatively, the Tribunal erred in law by inferring – from the Owner's failure to adduce any evidence of Council approval – that the balcony was constructed without Council approval when:

(a) that inference was not open without evidence that, if the balcony had been approved, there would still be a record of it, that the appropriate searches were carried out and that no such document was found;

(b) there was no evidence of that sort; and

(c) there is a presumption that all things that would to have been done are presumed to have been done until proved otherwise.

(5) Alternatively, the Tribunal erred in law in finding that "Ms Davenport conceded that she was aware of the possibility that the balcony was not authorised prior to purchasing the unit" when she did not.

(6) The Tribunal erred in law by inferring – from the Owner's failure to adduce any evidence that the Owners had authorised the construction of the balcony – that the balcony was constructed without that authorisation when:

(a) there was no finding that such authorisation would exist otherwise than in the Owners' records;

(b) the evidence was that the Owners held no records more than 7 years old – that is to say, no records of anything that occurred before 2010;

(c) it was common ground that the balcony was constructed in all before 1994; and

(d) there is a presumption that all things that ought to have been done are presumed to have been done until proved otherwise.

(7) The Tribunal erred in law by identifying the wrong issue in that the Tribunal found that Ms Davenport sought an order that the Owners comply with its statutory duty to repair when Ms Davenport clearly and

repeatedly submitted that she sought orders about the validity of two resolutions purportedly made by the Owners.

(8) The Tribunal erred in law in finding that the Owners had a duty to restore the facade of the building because, by virtue of s 106(3) of the 2015 Management Act, the Owners' duty to repair and maintain is only strict where the safety of any building, structure or common property, or the appearance of any property, is in issue and because its correlate powers are subject to other restrictions, specifically, that they not constitute a fraud on a minority.

(9) The Tribunal erred in law by failing to accord Ms Davenport procedural fairness in that it decided her application on a basis not contended for by either party, and without giving either party an opportunity to be heard in relation to that in that the Tribunal decided Ms Davenport's application on the basis that the Owners' statutory duty to repair and maintain the common property required it to restore the building to the condition it was in at the date the strata plan was registered. Had Ms Davenport been given the opportunity to be heard, she would have raised her oppression point in this context, and raised various equitable defences, including estoppel by silence or acquiescence, and laches, based on the fact that the Owners took no steps to demolish the balcony in the 7 years it existed before Ms Davenport bought her apartment.

(10) The Tribunal erred in law by finding that Ms Davenport filed the additional evidence listed at [26] of the Reasons when she also filed evidence addressing the impact the demolition of the balcony would have on the value of her apartment.

(11) To the extent the Tribunal relies on Ms Davenport's failure to adduce any evidence of Council approval or Owner authorisation of the balcony, the Tribunal erred in law by reversing the onus of proof.

(12) The Tribunal erred in law by finding that "both parties provided as much evidence as was available" as there was no evidence of the scope of available evidence.

23 By application made to the Appeal Panel under cover of a letter from Ms Davenport's Solicitor dated 26 April 2018, the appellant sought to amend her Notice of Appeal (First Amendment) in the following terms:

> 5. In Ground 9 of her Notice of Appeal, Ms Davenport asserts that, in taking the approach it did, the Tribunal decided her application on a basis not contended for by either party, and without giving either party an opportunity to be heard, that this constitutes a denial of procedural fairness, and that had she been accorded procedural fairness, was Davenport would have raised various matters against the Tribunal proceeding under section 106.
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> 6. Ms Davenport would also have raised other matters including that:
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> > a) to the extent the Owners rely on a lack of Council approval, they seek to remedy a breach of whatever Act, if any, governed

development at the time the balcony was constructed, and cannot obtain that relief either by way of "self-help" or in the Tribunal.

b) to the extent of the Owners seek orders, the time for bringing any action based on breach of a statute, or trespass, has expired;

c) save for the powers set out in section 132 of the SSMA, the Tribunal has no power to remedy an alleged trespass past by an owner or occupier; and

d) to the extent [*The Owners – Strata Plan 21702 v Krimbogiannis* [2014] NSWCA 411 (*Krimbogiannis*)] enlarges the circumstances in which a party may resort to self-help, it was wrongly decided.

24 By submissions dated 8 June 2018, the appellant sought to further amend her grounds of appeal (Second Amendment) in the following terms:

a) adding a 13th ground of appeal in the following terms:

13. The Tribunal erred in law in assuming that the construction of the balcony required body corporate approval when it did not; and

b) amending Ground 9 to include in the additional matters Ms Davenport would have raised the fact that the owner approval was not required and that the notion of "illegal" alterations discussed in *Thoo* and *Krimbogiannis* did not apply.

25 The appellant sought leave to appeal. For present purposes, it is sufficient to record that the appellant, in part, sought to rely on fresh evidence, being the Building Application, and to challenge the factual findings that there had been no approval for the construction of the balcony.

26 Finally, we note that on day 2 of the hearing, in the context of the proposed new evidence and the Appeal Panel seeking clarification of the orders sought by the appellant, the appellant reiterated that resolution 6 and 11 had not been validly passed, the issue remained as to whether the balcony was lawfully constructed and, absent a special by-law, the respondent was required to maintain the balcony after it was constructed.

Respondent's appeal

27 The respondent's appeal was premised on the basis that the Appeal Panel decides that the Tribunal's orders to demolish the balcony, orders 1 and 5, should be set aside.

28 The respondent then seeks the following orders:

(1) The Owners Corporation is to take steps forthwith to demolish the balcony and to affect demolition of the balcony substantially in

accordance with the mock up diagram at page 25 attached to the Statement of Michael William Becker dated 13 June 2017.

(2) The Owners Corporation has liberty to apply to the Appeal Panel on 3 days' notice to seek to vary Order 1 as may be necessary if any issue arises in complying with Order 1, including as to the requirements of development or construction approval by Woollahra Municipal Council.

29 The Notice of Appeal raised one ground of appeal as follows:

(1) The Tribunal erred by failing to decide a material issue raised by the respondent below, namely, that if the balcony was held to be common property of the Strata Scheme with the consequence that the respondent was otherwise responsible for the repair and maintenance under the 2015 Management Act, the respondent was and is entitled in the circumstances:

(a) not to maintain, renew, replace or repair the balcony under s 106 (3) of the 2015 Management Act; and

(b) to remove the balcony from the common property of the Strata Scheme.

30 The parties filed comprehensive submissions and made oral submissions about the matters in dispute. Some of these submissions bear little or no relevance to a resolution of the real issues in dispute. Having regard to their length, it is unhelpful to set out the full terms of what each party said. Rather, we will address relevant submissions as required in order to resolve this appeal.

Consideration

31 The real issues in dispute, that need to be determined in order to resolve this appeal, are the following:

(1) Was the balcony an illegal structure and does it form part of the common property of the strata scheme?

(2) If it is common property, was the respondent obliged to repair the structure at its cost?

(3) Is resolution 11 validly passed, thereby enabling the respondent to demolish the balcony and reinstate the premises to that which existed at the time the strata plan was registered under the 1961 Act or in some other configuration of the building?

32 In resolving these issues, there is a preliminary matter that needs to be determined, namely whether the appellant should be given leave to adduce fresh evidence in the form of the documents produced by the Council concerning construction of the balcony. It is also convenient to first deal with

the issue of the respondent's general obligations under the 2015 Management Act to repair and maintain, in order to put in context the relevance of the issue of illegality.

33 In making its decision to order demolition of the balcony, subject to any special by-law, the Tribunal made the following findings in its Reasons:

(1) the building, including the balcony are "at least superficially, very neat and well maintained, apart from an area of what appears to (be) spalling render on the left wall of the building adjacent to the balcony": at [16];

(2) "the balcony was in position when [the appellant] purchased her lot in 2001 and that otherwise there are no records at all as to the history of the construction of the balcony and any investigations or approvals related thereto, including in relation to any development application or approval": at [17];

(3) the first documentary record obtained by either party about the balcony was a letter from the Council in relation to "unauthorised works, including a diagram dated 09 August 1994 noting the existence of the balcony", however nothing was done "either by the council or by the owners in relation to the balcony": at [18];

(4) because of the "absence of any evidence of any source considered by the parties of approval or authorisation of the balcony works" the Tribunal inferred there was no such approval or authorisation: at [44]. Rather, the Tribunal concluded the balcony was not authorised because "the evidence from the Council's documents suggest the balcony was not an authorised development": at [45];

(5) the balcony is common property, being an "unapproved and unauthorised addition to the common property, made at a time that cannot now be determined": at [46];

(6) because the balcony does not appear on a copy of the strata plan, it cannot be lot property: at [47];

(7) because it is an illegal structure, the respondent is not obliged to repair or maintain the structure, such obligation to maintain the property being by reference to the registered Strata Plan. Rather, the respondent is under a duty to reinstate the premises to its state to the "reference point" recorded in the strata plan when registered, there being no other "reference point" as that expression was used by Barrett JA in *The Owners – Strata Plan No. 50276 v Thoo* [2013] NSWCA 270 (*Thoo*): [54]-[60].

34 It is in the context of these findings that the Tribunal concluded there was a power to order demolition and reinstatement by the Owners' Corporation in consequence of the respondent's obligation to repair and maintain the common property.

Section 106 – Duty of Owners Corporation to maintain and repair property.

35 In respect of the obligation to maintain and repair, it is reference should be made to the decisions of *Thoo* and *Krimbogiannis*, the first of which the Tribunal referred to in the Reasons and the second to which the parties have made reference in this appeal.

36 These decisions deal with the obligation to repair and maintain found in s 62(1) and (2) of the 1996 Management Act, which is in the same terms as that now found in s 106(1) and (2) of the 2015 Management Act which regulates the present dispute.

37 In *Thoo*, the Court was required to consider the extent of the obligation to repair and maintain common property in circumstances where Dr Thoo contended there was an obligation to upgrade a mechanical exhaust ventilation system (MEVS), which was common property, to a capacity that met his requirements for use of his lot property, the existing system otherwise operating correctly and at its original design capacity.

38 In respect of the obligations imposed by s 62(2) of the 1996 Management Act (being in the same terms as s 106(2) of the 2015 Management Act), which related to fixtures and fittings, Tobias JA said at [127]-[130]:

> 127 In the present case, as the Owners Corporation correctly submits, the renewal or replacement of the existing MEVS for the purpose of enhancing its capacity to the point where it will be capable of servicing the anticipated reasonable demands of all lots within the Food Court and/or the basement area of the Building, goes beyond the requirements of s 62(2) and thus cannot proceed without compliance with the requirements of s 65A.
>
> 128 There is a clear relationship between subsections 62(1) and (2). The former applies to any part of the common property; the latter to any fixtures or fittings comprised in the common property. However, it does not follow that a fixture or fitting that is not in a state of good and serviceable repair must be renewed or replaced.
>
> 129 The first obligation on the owners corporation is to keep the fixtures and fittings in such a state. But if that cannot be achieved, then the defective fixture or fitting must be renewed or replaced subject, of course, to s 62(3). The point is that s 62(3) is only engaged when the fixture or fitting can no longer be kept in a state of good and serviceable repair. This is consistent with McColl JA's dicta in *Ridis* that both subsections are directed and, I would add, only directed, to the circumstances where a fixture or fitting is no longer operating effectively or at all, or has fallen into disrepair.
>
> 130 I would therefore accept the submission of the Owners Corporation that common property fixtures or fittings must be renewed or replaced under s

> 62(2) only when they are no longer operating effectively or have fallen into disrepair to the point where their renewal or replacement is called for as they can no longer be kept in a state of good and serviceable repair pursuant to s 62(1). Once it was found, as his Honour did, that the system had not fallen into disrepair but was operating according to its original design capacity, there could be no breach of s 62(2) by reason of the refusal of the Owners Corporation to replace the system. Accordingly, in my respectful opinion the statement by his Honour at [115] of his reasons that there was a specific duty on the Owners Corporation under s 62(2) to keep common property operating efficiently so it could be used and enjoyed by all lot owners, subject only to the passing of a special resolution for its exclusive use, is too broad.

39 Similarly, Barrett JA said at [6]-[8]:

> 6 In determining how s 62(2) and s 65A apply at any particular time, regard must be had to the attributes of the common property at some earlier reference point. The question of what amounts to renewal, replacement, alteration or addition must be answered by a process of comparison with the position that prevailed at the earlier reference point. The first such reference point is the time at which the strata plan is registered and the common property comes into being. The initial attributes are fixed at that time; and it is from that base that characterisation as renewal, replacement, alteration or addition is to be approached. Once any addition or alteration is made in accordance with the Act, the attributes of the common property are changed, a new reference point is identified and future questions of renewal, replacement, alteration and addition fall to be assessed by reference to the changed state at that new reference point.
>
> 7 Generally speaking, renewal or replacement of fixtures or fittings will, of its nature, involve improvement because old will be superseded by new. It may also entail alteration or addition, in that the new or replacement item may be larger than or otherwise different from the old. To the extent that alteration or addition is, in that way, incidental to renewal or replacement, s 62(2) both requires and allows it. But s 62(2) does not, at a particular time, impose a positive requirement for superior functionality, compared with that inherent in the nature and quality of the relevant part of common property as most recently fixed in the way I have mentioned.
>
> 8 In the present case, the duty imposed by s 62(2) in relation to the mechanical exhaust ventilation system did not require, at any given time, any alteration or addition for the purpose of improvement or enhancement. The duty was discharged by renewal or replacement that produced performance and functional efficiency at least equivalent to those that had pertained at the time that was, in the sense to which I have referred, the then most recent reference point. While the degree of performance and functional efficiency as at that most recent reference point continued, s 62(2) was not the source of any duty to act.

40 The other member of the Court, Preston CJ of LEC, agreed with Tobias JA and the additional reasons of Barrett JA.

41 In short, the Court found that the obligation to repair, renew or reinstate was to the state of the relevant property at a “reference point” (per Barrett JA), that reference point being the point in time the relevant strata plan was registered,

or, if subsequently, changes were lawfully made to the common property, that later point in time.

42 Secondly, in *Krimbogiannis*, the Court was required to consider the obligations of the owners corporation to repair and maintain where tenants of a lot Owner had carried out unauthorised alterations to a glass panel which was an external wall and common property: per Basten JA at [2].

43 There, the Court determined the owners corporation was entitled to an order for access to remove unauthorised work and restore the common property to its original state.

44 Basten JA, with whom Macfarlan and Meagher JJA agreed, said at [15],

> 15 Section 62 imposes an obligation to "maintain" the common property. Read in its statutory context, having regard to the nature of the common property vested in the owners' corporation, and the functions of the owners' corporation with respect to that property, the obligation carries with it the powers necessary for its performance: *Interpretation Act 1987* (NSW), s 50(1)(e). The reasoning in the District Court sought to read down the meaning of "maintain" by reference to the following words, namely "keep in a state of good and serviceable repair". However, "maintain" is not so limited in its meaning. Keeping in good repair assumes the continued existence of the property in question; maintaining the property includes preserving it by not removing, replacing or destroying the property. So much is clear from the dictionary definition relied on by McColl JA in *Ridis* at [158].

45 In doing so, having referred to the decision of the Court of Appeal in *Ridis v Strata Plan 10308* [2005] NSWCA 246; 63 NSWLR 449, Basten JA explained at [19] and following why the decision in *Ridis* did not otherwise limit the obligations on an owners corporation:

> 19 Given the issue requiring resolution in *Ridis*, namely whether the general law duty of care, read in the context of the statutory obligation in s 62(1), extended to require the replacement of existing common property, the question of unauthorised removal and replacement by a lot owner simply did not arise. To infer from the absence of discussion of any obligation under s 62 with respect to the restoration of unauthorised replacement of common property that s 62 does not apply in such circumstances is to misunderstand the judgment: it had nothing to say about circumstances which were remote from the issue before the Court. If (which is not the case) the Court had purported to chart the limits of the duty imposed by s 62(1), to that extent the reasons could readily be disregarded. As concisely explained by Hodgson JA, *Ridis* turned on a limited question as to whether, acting reasonably, the owners' corporation should have been aware of the risk that the door would shatter: at [7].
>
> 20 Indeed, the limited scope of the observation relied upon is apparent from the fact that McColl JA referred, at [160] and with evident approval, to the

decision of the Queensland Court of Appeal in *Sattel v The Proprietors - Be Bees Tropical Apartments Building Units Plan No 71593 (No 2)* [2001] QCA 560; [2002] 2 Qd R 427. The specific reference was to a passage in the judgment of de Jersey CJ in relation to the Queensland equivalent to s 62(1), namely s 37(1)(c) of the *Building Units and Group Titles Act 1980* (Qld), which stated that a body corporate shall "properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary renew or replace the whole or part thereof) - ... the common property." The issue was whether, that being an obligation of the body corporate, the expenses of cleaning and tidying up the reception area fell within the scope of that obligation. The Chief Justice stated at [27]:

> "My conclusion is that this cleaning and tidying activity does not fall within s 37(1)(c). The obligation under that provision to 'maintain and keep in a state of good ... repair ...', is quite different in kind from mere cleaning and tidying. It centres on the preservation of the fabric of the premises."

21 McColl JA's citation of this passage demonstrates that her identification of "keeping the common property operational" extended to its preservation.

22 The respondents sought support for their reliance on the statement in *Ridis* from the judgment of Tobias AJA (with whom Barrett JA and Preston CJ of LEC) agreed in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 at [84] (and certain subsequent references to similar effect). There Tobias AJA stated:

> "It was not in dispute that, as McColl JA noted in *Ridis* at [158], s 62(1) is directed to keeping the common property operational and to restoring something which is defective."

23 This statement does not assist the respondents, for two principal reasons. First, as the matter was said not to be in dispute, the statement did not involve any considered reappraisal of the proposition. Secondly, and more importantly, this was another case in which the issue was whether s 62 imposed on the owners' corporation an obligation to upgrade part of the common property, in that case a ventilation system. That reading was rejected. Like *Ridis*, *Thoo* was not concerned with the present issue: so much was expressly recognised by Tobias AJA at [102].

Fresh Evidence Application

46 Leave to appeal is required on grounds other than a question of law: see s 80(2)(b) of the *Civil and Administrative Tribunal Act, 2013 (NSW)* (NCAT Act). Because these proceedings are an appeal against a decision of the Tribunal made in the Consumer and Commercial Division, Sch4 cl 12(1) of the NCAT Act applies.

47 In order to obtain leave to appeal, the appellant must demonstrate she may have suffered a substantial miscarriage of justice. In respect of fresh evidence, cl 12(1)(c) provides leave may be granted because:

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

48 The parties have referred to the relevant authorities concerning the interpretation of this clause. They include

(1) *Collins v Urban* [2014] NSWCATAP 17 (*Collins*);

(2) *The Owners Strata Plan 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29 (*Draybi Bros*);

(3) *Al-Daouk v Mr Pine t/as Furnco Bankstown* [2015] NSWCATAP 111(*Al-Daouk*).

49 The appellant says that she issued a summons to the Council to produce any applications in relation to building works on the property. While documents were produced, they did not include the Building Application. These documents were only produced following enquiries made by Mr Davenport during the course of getting the appeal proceedings ready for hearing. Otherwise, the appellant says that there were no documents in the material originally provided by the Council in answer to the summons which had been issued which would indicate the existence of the Building Application. Consequently, the appellant says the evidence was not reasonably available as that expression is used in Sch 4 cl12 (1)(c).

50 The appellant submits the evidence is significant, going to the question of whether or not the balcony is an illegal structure and would therefore fit within the principles enunciated in *Collins v Urban* which would warrant the grant of leave.

51 In reply, the respondent contends:

(1) The affidavit of Mr Davenport explaining the circumstances in which he became aware of the evidence indicates, in part, that he was alerted to the fact files might be missing upon review of all documents produced by the Council, an activity which could have been undertaken prior to the hearing of the proceedings at first instance.

(2) Even if the evidence was allowed, there was not a “significant possibility” or a “chance which was fairly open” of a more favourable result for the appellant. This is because:

(a) the strata plan was not amended and relevant notice was not provided of any alteration as required by s 3(b) of the 1961 Act.

Therefore there could be no "lawful addition to the common property".

(b) The works required approval in the form of a by-law because there was an alteration to the "building" and there was no by-law. The requirement for the by-law was said to arise because of s 13(4) of the 1961 Act.

52 The respondent submitted that the owners could not simply ignore the strata legislation and, absent appropriate resolutions, "there was no power under the 1961 Act to lawfully alter the building as the owners did in 1967/8".

53 Further, an inference is available that "it is likely that the owners at the time were not aware of (or, if they were aware, chose not to abide by) the requirements of the 1961 Act". In any event, the respondent submitted that:

> The exclusive use of the balcony to Lot 1 occasioned by its physical annexation so as to be exclusively used and enjoyed by Lot 1 should have been the subject of an appropriate by-law if it was to properly be part of the common property: see Rath, Chime and Moore, *Strata Titles*, The Law Book Co (1966) at p.16 for an analysis of the analogous situation of a garage remaining common property with an "exclusive occupation" by-law under the 1961 Act.

54 While not vesting legal ownership of the common property in the body corporate (see s 9(1) of the 1961 Act) the control, management and administration of the common property was the responsibility of the body corporate (see s 14(3) of the 1961 Act). As such, the 1961 Act curtailed the proprietors' common law rights in relation to the control, management, administration, use and enjoyment of the common property. The respondent said that the appellant's "contention that legal ownership trumps the statutory strata title regime would render the statute materially inoperative and ineffective" and should be rejected.

55 As to the evidence itself, the respondent said that:

(1) the evidence is insufficient to show that the works were completed in the form approved; and

(2) in any event, the evidence was reasonably available. The fact that the Building Application had been subsequently found following enquiries by Mr Davenport demonstrates it was reasonably available in the sense of the cases to which we were referred. In this regard, the respondent relied particularly on the decisions in *Draybi Bros* and *Al-Daouk*.

56 In relation to the question of whether the evidence was not reasonably available, as that expression is used in cl 12(1)(c), the Appeal Panel said in *Al-Daouk* at [20]:

> 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.

57 The respondent relied on *Draybi Bros* to support the proposition the where documents could have been produced on summons that the Appeal Panel might not be satisfied the documents were not reasonably available.

58 While this might be correct, the problem with the submission in the present case is that a summons was issued and production of the relevant documents was not made by the Council at that time. To the contrary, material available to the Appeal Panel indicates that while some documents were produced, that production was incomplete.

59 We have not been referred to any documents in those which were originally produced to indicate that production by the Council was, on its face, insufficient or that there was any other information that would have suggested the particular documents now produced were in existence. Rather, it seems to us that the appellant took steps which any party would reasonably take to obtain the necessary evidence and, through no fault that could be attributed to the appellant, there has been a failure to produce relevant evidence.

60 While it is true that some of the enquiries made by Mr Davenport could have been undertaken prior to the original hearing, which may have given rise to a suspicion concerning the adequacy of production in respect of applications for

this property, none of this evidence would have indicated that the Building Application file existed. Rather, the only material at the time of the original hearing was to the effect that Council had not approved the construction of the balcony.

61 In these circumstances, we are satisfied that the Building Application, being exhibit A, is fresh evidence that was not reasonably available at the time of the original hearing.

62 Further, while various legal arguments have been advanced by the respondent as to why this evidence will not ultimately affect the outcome of these proceedings, issues to which we will return below, it seems clear to us there was an issue in the proceedings concerning whether or not the construction of the balcony was illegal works which had not been approved by the body corporate and/or the Council and that the evidence now sought to be relied upon goes directly to this issue. Having regard to the finding of the Tribunal that the works had not been approved by the body corporate or by the Council, we are satisfied that the appellant may have suffered a substantial miscarriage of justice because she may have lost "a chance that was fairly open of achieving a better outcome than occurred": *Collins* at [71].

63 Consequently, leave to appeal should be granted and the appellant allowed to rely on the fresh evidence.

Was the balcony an illegal structure or does it form part of the common property of the strata scheme?

64 The Tribunal decided at [60] of the reasons that the respondent had "a duty to return the common property to its original condition which must be as it existed at the date the strata plan was registered".

65 In reaching this conclusion, the Tribunal made the following findings (at [40]-[47] and [55]-[56]).

> 40 Both parties provided as much evidence as was available, it appears, in relation to the history of the balcony. There was in fact very little detail available, but sufficient to accept that the balcony was not on the strata plan as registered and there was no evidence at all as to when and how the balcony was or was not approved and authorised and constructed. The evidence did disclose, however, that balcony was in existence in 1994.

> 41 In cross examination, Ms Davenport conceded that she was aware of the possibility that the balcony was not authorised prior to purchasing the unit but stated that she considered that was an issue for the Owners Corporation, her position being that the balcony was common property.
>
> 42 Having considered the available evidence and the submissions of the parties, I make the following findings.
>
> 43 The balcony was not constructed before the strata plan was registered. The balcony was (obviously) constructed sometime after the strata plan was registered and before 1994.
>
> 44 The absence of any evidence from any source considered by the parties of approval or authorisation of the balcony works means I infer there was no such approval or authorisation.
>
> 45 The evidence from Woollahra Council's documents suggests the balcony was not an authorised development and I make that finding also.
>
> 46 Relying on the definition of "common property" from time to time in the relevant strata legislation, which, although the formulation may have changed slightly over the years, to the effect that common property is any property not being lot property, I find the balcony is common property. The fact that the balcony never appears on the strata plan does not mean it ceases to exist or falls into some limbo preventing the Owners Corporation or any other person from dealing with it. I find the balcony is an unapproved and unauthorised addition to common property, made at a time that cannot now be determined.
>
> 47 It is not disputed that the balcony does not appear on any copy of the strata plan. Therefore it cannot be lot property.
>
> …
>
> 55 In these proceedings, there is no evidence which would support a "reference point" other than the date the strata plan was registered, for the reasons given above.
>
> 56 That still leaves the [respondent] of having to deal with an illegal balcony.

66 The appellant challenged the inferences drawn by the Tribunal in relation to the lack of approval by the Council (appeal ground 4) and the lack of authorisation by the respondent (appeal ground 5).

67 On the other hand, the respondent said in [5] of the respondent's submissions (RS) dated 9 April 2018:

> Significantly, no challenge is made to the finding that if the Balcony is illegal the [respondent] has a duty to remove it and restore the common property – what is challenged is whether the Tribunal could infer from the evidence that neither Council nor [the respondent] approval was obtained and whether the Tribunal has jurisdiction to make the orders it did with respect to the time for demolition and without Council approval for such works.

68 It needs to be remembered that the Notice of Appeal was filed at a point in time when the Council had not yet produced exhibit A. So to, the position adopted

by the respondent in its written submissions above was at a time before Exhibit A was produced.

69 However, despite the new evidence in exhibit A, the respondent maintains its position that the balcony was relevantly "illegal" and that the respondent is therefore entitled to demolish the balcony and reinstate the building. In making this submission, the respondent relies on the following facts (RS dated 9 April 2018, para 28):

(1) the registered Strata plan has not been amended although the physical properties of the building have been altered by the construction of the balcony;

(2) there is no evidence of any resolution of the respondent approving the construction of the balcony (it being common ground there are no historical records of the body corporate from the 1960s);

(3) historically, there was no evidence of the appellant challenging these matters.

70 The respondent also relied on correspondence from the Council in about 1999 indicating the Council thought the balcony had not been approved by it and was an illegal structure. We will return below to the issue of the Council documents in the context of the new evidence.

71 In written and oral argument, the respondent developed its submissions on leave to appeal and illegality as follows:

(1) Any "amendments" to the common property required notification on the strata plan pursuant to s 3(b) of the 1961 Act. There was no amendment of the registered strata plan so as to alter the building and make an addition to the common property. In this regard the respondent referred to the definition of "common property" found in s 2 of the 1961 Act and to the definition of "land" which, as prescribed by the *Real Property Act 1900* (NSW) (RP Act), includes "messuages" being dwelling buildings on the land.

(2) The works to construct the balcony required an alteration to the building and there was no such by-law to approve this alteration. There had been a change to the outer wall of the building, which included removing brickwork and pinning a steel and concrete structure into the building to support the balcony structure. A by-law was required because of s 13(1) of the 1961 Act, which provides that the building will be regulated by the by-laws. In this regard the respondent referred to s 2 of the 1961 Act which defines building to mean "the building or buildings shown in a strata plan". Notice of such a by-law was required to be given to the Registrar-General and referred to on the strata plan as required by s

13(4) of the 1961 Act. Absent such a by-law, the proprietors from time to time were bound by the existing by-laws found in the first and second Schedules of the 1961 Act. In this regard, the respondents submitted at para 17 of RS dated 22 June 2018:

> In the absence of any change to the by-laws subs 13(6) stipulate that the by-laws for the time being in force (that is, those in First and Second Schedules) bound the proprietors (and the body corporate) as if a deed had been entered into between them. That is to say, there was no source of authority or power under the 1961 Act for an alteration to the building by the construction of a balcony (even if the 4 owners of each of the 4 lots were the same individuals): see Travis V Proprietors – Strata Plan No 3740 [1969] 2 NSWR 304.

The owners from time to time could not simply ignore the strata title legislation and make an alteration without it being registered or recorded by the registration of an amended strata plan or the registration of an appropriate change to the statutory by laws that prevailed at the time. The consequence of a different conclusion would be that successors in title would not have been made aware of any changes to the building.

(3) As to the facts in the present case, the respondent made the following submission concerning the evidence of what had occurred:

> Plainly, the proprietors at the time did not turn their mind to any formalities under the 1961 Act or otherwise.

Having made reference in a footnote to the fact that "the applications to the Council for the WC and the balcony were all made in the name of only one of the co-owners, Mr Catts and Ms Fine respectively", the respondent continued:

> That is made further evident by the fact that no exclusive use by-law and attendant obligation of maintenance was registered despite the balcony only being accessible by the owner of unit 1.

Consequently, the respondent submitted:

> The above two contentions are consistent with the inference that it is likely that the owners at the time were not aware of (or, if they were aware, choose not to abide by) the requirement under the 1961 Act. The exclusive use of the balcony of Lot 1 occasioned by its physical annexation so as to be exclusively used and enjoyed by Lot 1 should have been the subject of an appropriate by-law if it was to properly be part of the common property: see Rath, Grimes and Moore, *Strata Titles*, The Law Book Co (1966) at p.16 for an analysis of the analogous situation of a garage remaining common property with an "exclusive occupation" by-law under the 1961 Act.

(4) While not vesting legal ownership of the property in the body corporate, s 14(3) of the 1961 Act did repose control, management and administration of the common property in the body corporate. In

addition, s 13(2) of the 1961 Act provided that the building would be regulated by the by-laws which themselves would provide for the control, management, administration, use and enjoyment of the lots and common property. Consequently, even though the proprietors held the common property as tenants in common, control of the common property was by the body corporate and the proprietors' common law rights in relation to control, management, administration, use and enjoyment of the common property were otherwise curtailed.

(5) Any action by an individual owner, without observance of the requirements of the 1961 Act was not permissible. Rather, the proper applicant for any works to alter the common property was the body corporate, which controlled the common property and not any individual proprietor or group of proprietors.

72 Having regard to the above, the respondent submitted the balcony was an illegal addition to the common property under the 1961 Act.

73 Finally, the respondent says that the new evidence does not establish the Council gave final approval for the construction of the balcony. In this regard the respondent submits that the note dated 29 March 1969 from the "Building Surveyor's Department" which records "works completed" and a "further cryptic note on 3 November 1968 which may record "F.1294/3/12/68" do not establish this fact. Rather, the respondent says the evidence:

> comes to an end at the final stage of construction and there is no further evidence of Council's final approval of occupation or, critically, approval by Council recording that the works have been completed in accordance with the Permit to Build. That is not inconsistent with Council's position in 1994, 1999 and 2002 that the building works were carried out without prior approval of the Council.

74 The first question to deal with is whether there was approval to construct the balcony, both by the body corporate and/or the owners of the Lots and the Council. This requires consideration of all the evidence and what inferences can be drawn from the new evidence concerning these matters in circumstances where the respondent does not now have the records of:

(1) the general meetings of body corporate as existed under the 1961 Act; or

(2) the meetings of any council of the body corporate as may have been appointed under the by-laws at this time.

75 In considering these matters, various legal principles concerning inferences and presumptions are relevant.

76 In *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, Dixon J (as he then was), when considering the circumstances in which inferences might be drawn, said at [2]:

> "In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind. It is true that "you need only circumstances raising a more probable inference in favour of what is alleged". But "they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture". These phrases are taken from an unreported judgment of this Court in Bradshaw v. McEwans Pty. Ltd. (Unreported, delivered 27th April 1951). which is referred to in Holloway v. McFeeters (1956) 94 CLR 470 , by Williams, Webb and Taylor JJ. The passage continues: "All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood." (1956) 94 CLR, at pp 480, 481. But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied. (at p305). "

77 In an earlier decision of the High Court in *McLean Brothers & Rigg Ltd. v. Grice* (1906) 4 CLR 835, in respect of the presumption of regularity, Griffiths CJ said at 849-51:

> There is also a presumption which arises from the ordinary course of business. In regard to that, I will read two passages from *Starkie on Evidence*, 10th ed., at p. 741. First:—"A presumption may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature, that as soon as the existence of the one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject." And again, at the conclusion of the chapter, at p. 762:—"It would, however, be a vain endeavour to attempt to specify the numerous presumptions with which the knowledge of a jury, conversant in the common affairs and course of dealing in society, necessarily supplies them; it is obvious that such presumptions are co-extensive with the common experience and observation of mankind." Another statement of some authority on the same point is found in the judgment of Mr. Justice Brewer *in Knox County v. Ninth National Bank*[3]:—"It is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the

prior act." A very well-known illustration of that rule is that acting as owner of property is *primâ facie* evidence of ownership. Now, what is the ordinary course of affairs in human nature when a meeting is held, and it is necessary that there should be a certain number of persons present? The first thing, whether in a legislative body or otherwise, is to ascertain the presence of a quorum of competent members, or, as it is sometimes called, to verify their powers, which is done before they proceed to business. *Primâ facie*, then, in the ordinary course of business, when persons with specifically prescribed powers meet together, the first thing they would naturally do would be to verify their powers, and then proceed to act, and the fact of acting is *primâ facie* evidence that they had authority to act, just as a person who attempts to deal with property is regarded *primâ facie* as the owner.

There is high authority for saying that this presumption is applicable to the proceedings of corporations. In the case of the *Bank of United States v. Dandridge*[4], already cited, it was said:—"The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter... If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed... In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty." This passage was quoted by the same Court in *Knox County v. Ninth National Bank*[5]. Therefore, on these three different lines of presumptive evidence, there was *primâ facie* evidence that a quorum was present. How has it been rebutted? By evidence to show that there were not ten members present in person. That fact is wholly irrelevant. The question is whether there were ten members present in person, or by proxy or attorney, and holding ten thousand shares. In my opinion, effect ought to be given to the presumption, apart altogether from the great preponderance of probability in the direct evidence.

78 In the present case, the following facts are relevant in considering what inferences should be drawn about the approval by both the body corporate and the Council:

(1) Pursuant to transfer J929540, from 9 March 1965 until 20 June 1973, Joseph Catts, Rosa Catts, Keith Fine and Patricia Fine as joint tenants were the registered proprietors of Lot 1, now owned by the appellant. By the same transfer J929540, those same persons, as joint tenants, were also the registered proprietors of all other lots in the strata scheme.

(2) An application to construct the balcony, No 1072/66, dated 30 November 1966, was lodged on behalf of Mrs PA Fines. The builder was Sterling Homes Corporations Ltd: exhibit A p 1.

(3) The plans were reviewed by a building surveyor for the Council, a report dated 31 January 1967 being prepared by the Building Surveyor's Department of the Council: exhibit A p10. Building application 1072/66

was approved by the Council on 28 February 1967 and a building permit was issued: exhibit A p 1, 12.

(4) The plans for the work included the removal of windows and other features of the then existing building, the excavation and construction of foundations, pursuant to plans prepared by Sterling Homes Constructions Pty Ltd and Aquila Steel Co Pty Ltd: see e.g. exhibit A pp 3-6 and 14-15. The work was above and about the access point to the building's garage.

(5) The notes of the Council building inspector, Mr Harkness, record that the slab was checked and found satisfactory. The notes also record "29-3-68 Work Completed": exhibit A p 21

(6) There were other applications lodged by the proprietors at about this time being for additions or alterations to the property. This material was not originally produced by the Council under summons. Rather, the documents were produce by the Council at the time exhibit A was produced. We have been provided with additional documents in the appeal that show the applications lodged at about this time included:

    (a) 168/65 J.Catts;

    (b) 775/65 Mr Catts

    (c) 798/67 Mrs Catts.

In respect of application 775/65, the documents record this was for the construction of a toilet on common property, although the circumstances surrounding this application are not presently relevant. However, those documents include a letter from the Council dated 28 September 1965 requesting additional information. The information being requested was the "written consent from the owners of the building to carry out the proposed work". In addition, the Building Surveyor's Department report notes "the owners as per rate book are shown as The Proprietors Strata Plan No 536" (see bundle pp 39 and 41 respectively).

(7) In 1994 there were "structural alterations within the existing dwellings on the ground floor and the first floor areas" and a direction was made to the respondent to stop work by letter from the Council dated 15 December 1994. This was because the Council said there was no appropriate approval to carry out the renovations: AB Vol 1 p 108-9. The Council documents at this time record a sketch plan of the appellant's property showing the balcony. It would appear from this sketch plan that renovations were being made to internal walls of Lot 1: AB Vol 1 p 110. The work for the internal refurbishment of Lot 1 became the subject of development application 95/1141: AB Vol 1 p 100. Work was being done to all units at this time, each of the then owners of Lots 1-4 providing various letters to the Council authorising the respective

renovation work: see eg AB Vol 1 pp 103-106. The development application was approved: AB Vol 1 p100-1. However, it would also appear that the building application, BA 233/95, was ultimately refused because work had already been carried out without the approval of the Council. Notwithstanding this refusal, Council indicated it would not take any action to require removal of the work if the then owner (Beachidol Pty Ltd), complied with Essential Services requirements specified by the Council: AB Vol 1 pp 98-99.

(8) In 1999, a request was made for a Building Certificate for Lot 1 pursuant to s 149 of the *Environmental Planning and Assessment Act, 1979* (NSW). On 12 October to 1999 the Council wrote to the solicitor for the applicant concerning an inspection that had been carried out for the purpose of issuing the Building Certificate: AB Vol 2 p 411. In that letter the Council said:

> The front balcony does not appear to have prior consent from Council. You are required to submit a Development Application to council seeking approval for the balcony, including separate plans of the work as executed together with necessary fees.

At this time, the Compliance Officer's Report records that the Council had regard to the information in Building Application BA 233/95 and a survey report prepared by Kenneth John Morran dated 21 December 1962: AB Vol 2 p 412. This reference is to the survey report certifying the strata plan originally registered. Relevantly, no reference was made to the Building Application (No 1072/66), the inference being that the Council in 1999 did not then have that material. The letter from Council also required the applicant to submit a Development Application and seek approval for the balcony. The solicitor for the applicant for the Building Certificate responded that such a request should be forwarded to the respondent.

The Council wrote to the respondent on 29 October 1999. That letter asserted the balcony had been constructed without prior approval of the Council and required the respondent to lodge a Development Application: AB Vol 1 p 86.

No action was subsequently taken by the respondent to seek such approval, nor did the Council take further action.

79 The above evidence establishes the following matters:

(1) A building application was submitted for the construction of the balcony in 1966. It was lodged on behalf of Mrs PA Fine, one of four people who owned Lot 1 as joint tenants. The building application was approved by Council being BA 1072/66.

(2) At all material times prior to and during the construction of the balcony, the four joint tenants of Lot 1 owned all four Lots in the strata scheme. Each Lot was owned by those four people as joint tenants, having had all four Lots transferred to them under a single transfer.

(3) The balcony was completed no later than 29 March 1968, Council having carried out inspections during the course of the works including checking the slab. The Council records indicate that the work was "completed" and there is no evidence to suggest the work was unsatisfactory or otherwise not built in accordance with the plans and specifications as approved by Council.

(4) There is evidence that, at the time the balcony was constructed, work was being undertaken to other Lots in the strata scheme. In connection with some of this other work, the applicant was not Mrs Fine.

(5) There is evidence to suggest that when approving various applications for the property in the 1960's, the Council was aware of the need for consent from the owners of the building, although there is no direct evidence that the Council sought and obtained consent of all joint tenants in BA 1072/66.

(6) There is no evidence that the balcony was subsequently altered by the respondent, any subsequent owners of Lot 1 or any other person. However, there is evidence that after the balcony was constructed various refurbishment work was done internally to Lot 1. In this regard, in 1994 there is evidence that various of the Lots were being renovated and there is some evidence of mutual consent being provided by each of the Lot owners in respect of work being done to the other Lots.

(7) The statements made by the Council in its correspondence in about October 1999, that it had not previously approve construction of the balcony, is plainly wrong and must have been made in error, there being no reference to the Building Application (No 1072/66) which the Council had approved.

80 In addition to the above evidence, we have been provided photographic evidence which depicts the balcony. An example is Image 04 in the Ellis construction report dated 15 June 2017: AB Vol 2 p 377. It is clear from this photograph, the plans originally approved for construction of the balcony and from other photographs of the balcony, that it was constructed so as to attach to the original building above the entrances to the garages for the property. It provides cover to the garage entrances. It is supported at various positions along its front face in the manner depicted by the engineering drawing of Aquila Steel (Exhibit A p 15) being one of the drawings submitted to Council as part of BA 1072/66. All of this work is outside Lot 1 and is on common property.

81 As is obvious from the photographs and the drawings the construction of the balcony would have been apparent to anybody attending the property. It could not have been constructed without the knowledge of the owners or anyone attending the site at this time.

82 As stated above, at the time the balcony was constructed, all Lots were owned by the same people. It is improbable that, if any of those joint tenants objected to the work, they would have sat idly round and taken no steps to prevent the work from being carried out.

83 There is evidence that Council, at around the time the balcony was constructed, recognised that there was a need to obtain the consent of the owners in order to carry out the work. We would infer that Council had received or was otherwise satisfied that such consent was given by those having relevant authority to approve the work, which is clearly on common property.

84 This conclusion is supported by the presumption of regularity. In *Hill v. Woollahra Municipal Council & Ors.* [2003] NSWCA 106 is relevant. At [50]-[52], Hodgson JA (with whom the JA and Davies AJA agreed) said:

> 50 The cases of Ligon 302 and Zhang are authority for the proposition that, where a body such as a local council is required by a statute to address a question posed by that statute or by an instrument referred to by the statute, it must address that very question. If it does not do so, it will be in breach of the statute, even though it may have adverted to the topic of the question.
>
> 51 However, when a court comes to consider whether or not such a breach has occurred, the court will have regard to the presumption of regularity. This presumption was relevantly stated as follows by McHugh JA in Minister for Natural Resources v. NSW Aboriginal Land Council (1987) 9 NSWLR 154 at 164 at follows:
>
> > Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.
>
> See also Morris v. Kanssen [1946] AC 459 at 475; Western Stores Ltd. v. Orange City Council [1971] 2 NSWLR 36 at 46-7.
>
> 52 I do not accept Mr. Walker's submission that this does no more than identify where the onus of proof lies. The presumption is a presumption of fact, associated with a reasonable inference based on what ordinarily happens in the ordinary course of human affairs: see McLean Brothers & Rigg Ltd. v. Grice (1906) 4 CLR 835 at 849-51 per Griffiths CJ. In deciding whether the presumption of regularity is rebutted, this inference from the ordinary course of human affairs carries some weight, which may vary according to the proved circumstances.

85 Further, it follows from the facts we have found that an inference should be drawn that the works were consented to by all the joint tenants who owned all the Lots in the strata scheme at the time the balcony was constructed.

86 The respondent submitted that the structure is nonetheless "illegal" by reason of the provisions of the 1961 Act.

87 First, the respondent said that there had been no amendment to the strata plan registered with the Registrar-General to show an alteration to the building. Reliance is placed on:

(1) the definition of building,

(2) the requirements for the contents of a strata plan found in s 4 of the 1961 Act; and

(3) s 3 of the 1961 Act that permits subdivision.

88 Section 2 provides "Building" means "the building or buildings shown in the strata plan.

89 *Inter-alia*, s 4 requires a strata plan to:

(1) delineate the external surface boundaries of the parcel and the location of the building in relation thereto: s 4(a);

(2) include a drawing illustrating the lots and distinguishing such lots by numbers or other symbols: s 4(c);

(3) defined the boundaries of each lot in the building by reference to floors, walls, and ceilings, provided that it shall not be necessary to show any bearing or dimensions of a lot: s 4(d).

90 Section 3 permits subdivision of land into lots by registering a strata plan, s 3(3)(b) providing:

> A strata plan shall, for the purposes of the Real Property Act, 1900, as amended by subsequent Acts, be deemed upon registration to be embodied in the register book; and notwithstanding the provisions of that Act, as so amended, a proprietor shall hold his lot and his share in the common property subject to any interests affecting the same for the time being notified on the registered Strata plan and subject to any amendments to lot or common property shown on plan.

91 In effect, the respondent submits that any alterations to the building must be the subject of an amended strata plan. This is because the interest of the lot owners in the common property is regulated by the strata plan and the rights attached to the building depicted therein.

92 In our view, this submission misconstrues those provisions of the 1961 Act and the purpose of that Act.

93 Section 3 of the 1961 Act permits subdivision of "Land" into lots and common property by registration of a strata plan.

94 The essence of the strata plan is to record those parts of the land which are lot property and those parts of the land which are common property. Lot property within the land is defined in a three-dimensional manner as required by s 4(d). Otherwise, that part of the land not defined as lot property is common property: see s 2 definition of "Common property". In this way, lot property is a space defined by three-dimensional coordinates (the land on which the strata scheme is located otherwise being defined by two-dimensional coordinates). Lot property may be transferred to a new owner, together with any rights attached to that lot property in respect of the common property.

95 There is no express power in the 1961 Act to amend the strata plan once registered. As the authors of *Strata Titles* (1966 Edition) point out at p 102:

> … there is no provision for amendment of a plan (except by the Registrar-General in certain circumstances).

96 The circumstances to which the authors refer is s 19 of the 1961 Act. This section permits amendment to a strata plan where orders are made by the Court in respect of "destruction of the building".

97 Otherwise, the only circumstances in which a strata plan can be altered is if:

(1) there is a re-subdivision, that is, the boundaries between common property and lot property or the boundaries between different lots are to be altered. This is permitted pursuant to s 3 of the 1961 Act, a re-subdivision itself being a subdivision of the land to which the strata scheme applies. In this regard, at p 106, the authors of Strata Titles discuss the requirements for that strata plan, including marking the areas on the building which are to be redefined by reason of the re-subdivision; or

(2) the common property is transferred under s 10 pursuant to a unanimous resolution of the lot owners and is no longer part of the strata scheme (a possibility not presently relevant).

98 In the present case, there is no evidence to suggest that the balcony was to become part of Lot 1. Rather, it is a structure constructed on common property which provided both a balcony area accessible only by Lot 1, a cover to the

entrances to the garages below and an altered façade to the building. In the absence of a plan of re-subdivision, there is no basis to conclude the balcony was to become part of Lot 1 rather than to remain common property. As such, there was no requirement for re-subdivision and, otherwise, no provision in the 1961 Act to amend the registered strata plan in so far as it depicted a building constituted by lot and common property.

99 Accordingly, there is no basis to conclude that the failure to lodge an amended strata plan depicting the balcony as part of the building meant that the balcony was illegal.

100 Further, and in any event, even if there was an obligation to amend the strata plan, in our view the failure to do so could not render the construction of the balcony is illegal. This is because an amended plan could never be lodged until the balcony was constructed. As such, the legality of constructing the balcony could not have been conditioned upon the structure being depicted in the strata plan.

101 The second reason advanced for illegality was that there was no resolution of the body corporate to approve that work.

102 The respondent said that it was necessary for the then body corporate to pass a resolution to approve the construction of the balcony and there was no evidence such a resolution had been passed.

103 The respondent also submitted that a by-law to approve construction of the balcony was necessary and that this by-law would have been registered on the title of the property with the Registrar-General.

104 In making this submission the respondent relied on the decision of the Street J (as he then was) in *Travis v Proprietors – Strata Plan No. 3740* [1969] 2 NSWR 304. That case involved an application for declaratory and injunctive relief by one of the lot owners in the strata scheme, Mr Travis, who challenged a resolution of the council of the body corporate to construct a swimming pool on the common property and to lease back from an intermediary company the pool fittings, plant and the like for a rental of $45 per month.

105 There are a number of problems with the submissions made on this aspect.

106 In *Travis*, when considering the power of the body corporate to pass this resolution, Street J was required to consider the powers of the body corporate in the context of ss 9(1), 13(2), 13(6), 14(3), 15(1) and 15(2) of the 1961 Act and the by-laws in the First Schedule.

107 Section 9 (1) provided:

> The common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective lots.

108 Section 13(2) provided:

> The by-laws shall provide for the control, management, administration, use and enjoyment of the lots and the common property and shall include:
>
> (a) the by-laws set forth in the First Schedule of this Act which shall not be added to, amended or repealed except by **unanimous resolution** (emphasis added).

109 Section 14(3) provided:

> Subject to this Act the body corporate shall be responsible for enforcement of the by-laws and the control, management and administration of the common property.

110 Having referred to s 15 of the 1961 Act, which relates to the duties and certain powers of the body corporate, and to by-law 2 and 3, which relates to further duties and powers of the body corporate, his Honour continued at 306 :

> Thus far the scheme of the Act is clear. The ownership of the common property is in the proprietors of the various lots as tenants in common. The control, management, administration, use and enjoyment of the common property is to be subject to the provisions of the by-laws. The body corporate is responsible for enforcing the by-laws. It has specific duties and powers both under the act and under the by-laws.

111 In construing these powers and duties, Street J then said at 307:

> The duties and powers in the statute and the First Schedule are not exhaustive. It is contemplated by the legislature that such of those duties and powers as are contained in by-laws 2 and 3 may be altered to meet the unanimous wish of all the proprietors. There are, in effect, 3 stages: first, the basic and unchangeable duties and powers in the statute, these being relatively limited and covering basic essentials; second, the further duties and powers of the First Schedule, these being necessary but of a more flexible nature, and third, such alterations of the First Schedule duties and powers as all the proprietors may agree upon, these being controlled in scope by such limitations as are expressed or implicit in the provisions of the Act itself.

112 That is, the Court concluded that the body corporate did not have unlimited powers or unlimited control and management of the common property vested in it by the 1961 Act.

113 Having concluded that the proposed resolution was:

(1) outside the repair and maintenance obligations of the body corporate and the obligations of the body corporate to "establish and maintain suitable lawns and gardens on the common property" in by-law 2; and

(2) outside the power to purchase, hire or otherwise acquire personal property or to borrow, secure the repayment of or invest money is forming the administration fun or to make an agreement with any proprietor or occupier for the provision of amenities or services etc as found in by-law 3,

Street J said:

> I am not able to conclude that the building of this swimming-pool falls within the legitimate scope of the functions of the body corporate. I shall refrain from discussing the sections of the Act. Questions such as the interaction of various sections and the extent to which they may control the power to amend the by-laws raise problems that do not necessarily fall for decision in the present case. The sole question for determination is whether by-law 2(a), with or without by-law 3(g), provides authority for constructing this swimming pool. These by-laws are at least as extensive as any provision in the sections of the Act as a source of authority. If they are not sufficient to support the body corporate's present proposal, then there is nothing in the sections of the Act taking the matter any further.

114 His Honour reached this view having accepted, at 308, that the obligation to "control manage and administer common property found in by-law 2(a) might also have implied into it a power to do "all things reasonably necessary", arguably making by-law 3(g) (which expressly granted these ancillary powers) unnecessary. Such an implication was accepted by Powell J in *Margiz Pty Ltd v Proprietors Strata Plan 30234* (1993) 30 NSWLR 362 at 37, Powell J referring to the passage in *Travis* with approval. However, as Street J found, such an express of implied power "to do all things necessary" did not extend the subject matter to which the grant applied.

115 Consequently, his Honour said the proposed expenditure to construct the swimming pool "falls outside the present scope of its functions, whether one describes them as duties or as powers". Accordingly the Court found that the resolution was invalid and granted the declaratory and injunctive relief.

116 In reaching this conclusion, Street J noted at 308:

> At the opposite end, expenditure in respect, of for example, the erection of a large multi-storey building containing garages for proprietors' cars would seem clearly enough to fall outside the scope of by-law 2(a).

117 The respondents suggest that a special by-law was required to approve the construction of the balcony. The reasoning in *Travis* does not support this interpretation. The submission misconstrues the provisions of the 1961 Act and First Schedule and what is required to approve the construction of the balcony.

118 By-laws in the First Schedule of the 1961 Act are in the nature of constitutional powers that might apply to any body corporate to permit it to do something. Subject to the 1961 Act, these may be amended by unanimous resolution.

119 The permissions or limitations on the use of lot property and common property are found in the Second Schedule of the 1961 Act, which may be amended by special resolution.

120 Hence, in *Travis*, Street J talked of the power to pass a resolution to permit the carrying out the work, the source of which needed to be found in the constitutional documents for the body corporate being the 1961 Act, or the First Schedule by-laws.

121 There is no evidence the by-laws for the body corporate of Strata Plan No. 536 as found in the First Schedule of the 1961 Act, were amended by unanimous resolution as permitted by s 13(2)(a) of the 1961 Act. The by-laws were the standard by-laws found and the First and Second Schedules of the 1961 Act, the same as the position in *Travis*. It follows that the body corporate in the present case had no authority to pass an ordinary or special resolution to approve the construction of the balcony in general meeting or for the council to pass such a resolution. Rather, what would be required to authorise such an ordinary or special resolution was for the body corporate to first pass a unanimous resolution to amend the First Schedule by-laws so as to grant to the body corporate, in general meeting or in council meeting, authority to pass an ordinary or special resolution on this subject matter.

122 Such a new by-law would be required to be registered on the title. As this has not occurred, it is improbable such a resolution was passed. Consequently we conclude there was no power to pass an ordinary or special resolution to approve the construction the balcony and it was unlikely this occurred.

123 However, that is not the end of the matter. In our view, rather than to amend the by-laws, there was power for the body corporate in general meeting or the lot owners to pass a unanimous resolution to approve the construction of the balcony and thereby alter the building.

124 While the respondent relied on the decision in *Travis* to submit a special by-law was required, that decision is only authority for the proposition that such approval by the body corporate could not be by way of resolution of the council of the body corporate or by ordinary or special resolution of the body corporate in general meeting under the by-laws as then approved. This is because such a resolution was not "within the scope of the functions of the body corporate". In this regard, it should be remembered that Mr Travis was challenging a resolution of the council of that body corporate, not a resolution of the body corporate in general meeting and, obviously, not a unanimous resolution of all proprietors of that strata scheme in general meeting or otherwise.

125 Despite the limitation identified in *Travis* to approve by ordinary or special resolution the construction of a new structure or common property, insofar as a body corporate under the 1961 Act thought fit to construct new work on the common property or approve one of the lot owners doing so, there is no express provision in the 1961 Act or the Schedules that prevented such a resolution, at least in so far as it was a unanimous resolution of all proprietors, from being approved without first amending the by-laws. This construction is supported by the following matters:

(1) The 1961 Act did not expressly remove a power from all the Lot owners, who collectively held the common property as tenants in common as provided in s 9 of the 1961 Act, from passing a resolution dealing with the common property; and

(2) The 1961 Act expressly granted all those lot owners in a strata scheme (referred to as proprietors in the 1961 Act) a power "by unanimous resolution to direct the body corporate to transfer or lease common property, or any part thereof", in which case no resolution of the body corporate is required: see s 10(1). If satisfied that all lot owners had passed such resolution and all other persons having an interest (as notified to the body corporate) have consented, the 1961 Act provided the body corporate "shall execute the appropriate transfer or lease and the transfer or lease shall be effective without execution by any person having an interest in the common property": s 10.

That is, the body corporate was bound by a resolution of all lot owners, even though such resolution was not required to be passed by the body corporate in general meeting.

(3) The lot owners "by unanimous resolution at a meeting convened by the body corporate" had a power under s 12(1) to direct the body corporate:

(a) To execute on their behalf a grant of easement or a restrictive covenant burdening the parcel;

(b) To accept on their behalf the grant of an easement or a restrictive covenant benefiting the parcel.

In this regard, "parcel" means the land comprised in a strata plan.

(4) The exercise of these powers itself involves the control, management and administration of the common property that did not require the amendment to the by-laws.

126 In short, the 1961 Act did not remove the residual rights of the Lot owners to collectively deal with the common property, which they held as tenants in common, by unanimous resolution. Consequently, by unanimous resolution of the Lot owners, whether in general meeting of the body corporate or otherwise, there was power to pass a resolution to permit the building work in the present case without amending the by-laws generally. Further, the exercise of such property rights did not require an amendment to the by-laws, it simply required a unanimous resolution. If approved in general meeting, there would be a relevant Minute (which are now not available) but not otherwise.

127 A different construction of the 1961 Act would lead to a result that no new structure could ever be constructed on common property unless a special by-law was first passed by unanimous resolution to grant a power to do so to the body corporate. Such a construction would effectively remove rights which owners of land would ordinarily have. Such a construction would create an hiatus in relation to the property rights of the proprietors to collectively deal with their property in the absence of a by-law and is inconsistent with the lot owners owning the legal estate in the common property as tenants in common as provided by s 9(1) of the 1961 Act. Consequently, such a construction should not be preferred.

128 As to what resolution would be necessary to be passed, that resolution might include who was to pay for that work. It would also need to specify what work

was to be carried out. However, it would not be necessary for a special use by-law to passed as to use and maintenance of the balcony when constructed. Rather, the absence of such a by-law would mean any Lot owner could use the new structure when constructed, there being no special rights or obligations attached to that common property, subject to issues of accessibility because of the features of the building and where the common property is located. This is a situation that applies to all common property in strata schemes when it is first constructed. The fact that the common property is not accessible or usable by all Lot owners is irrelevant to this conclusion. Again it is quite usual that some common property, in consequence of its physical features and location, is only usable by one lot owner or a few lot owners. Examples include windows and other boundary openings between lot and common property. So much of a balcony structure above which the Lot property located is also an example as is common property walls which provide boundaries between particular lot and common property areas.

129 It follows, whether in general meeting or otherwise, the lot owners, by unanimous resolution, could approve the construction of the balcony on the common property without the passing a special by-law or amending the by-laws in the First Schedule. Consequently, the absence of a by-law registered on the title of the property does not mean there was an absence of authority to construct the balcony from those entitled to approve that work.

130 On the other hand, the absence of the registration of a special use by-law permitting exclusive use and/or requiring the owners of Lot 1 to maintain and keep the structure in good repair is some evidence that any approval to construct the balcony did not have attached to it such a condition. This absence is hardly surprising when one remembers all lots were held by the same people as joint tenants and there was thus no need, in any event, for such a condition to be imposed to apportion liability for the cost of maintenance between different lot owners.

131 The absence of such an obligation is also supported by the fact that no such by-law was subsequently sought or passed under the 1973 FD Act. Under cl 15 of Sch 4 of the 1973 FD Act, a person who was entitled to special use rights

under a strata scheme regulated by the 1961 Act could apply for a special by-law under the 1996 Management Act. That clause provided:

> **15 Maintenance of exclusive use etc of, and special privileges in respect of, common property**
>
> (1) Where immediately before the appointed day a proprietor of a former lot was entitled, whether pursuant to a resolution of the body corporate under the former Act or pursuant to a former by-law, to a right of exclusive use and enjoyment of, or special privileges in respect of, any of the former common property, the proprietor for the time being of the derived lot that corresponds to that former lot may at any time after that day serve notice on that body corporate, as continued by the operation of clause 4, requiring it to make a by-law, in terms specified in the notice, confirming that right or those special privileges and indicating the method by which the by-law may be amended, added to or repealed.

132 There is no evidence that such a by-law was applied for by any owner from time to time of Lot 1. Rather, the absence of such request suggests that the Lot owners at all times regarded the balcony as common property (it clearly not being part of Lot 1) with no special rights or obligations attaching to the balcony in favour of the owner of Lot 1.

133 In relation to the fact of approval by the body corporate of the Lot owners in 1966, there are no records available from the body corporate as constituted under the 1961 Act, More recently, there are no records of the Owners Corporation as constituted under the 1996 Management Act and the 2015 Management Act, in respect of any relevant resolution to approve the construction of the balcony or the obligations concerning the repair and maintenance of the balcony when constructed.

134 There was evidence before the Tribunal at first instance that there were no relevant records for the strata scheme more than 7 years old. Mr Becker, a witness for the respondent, said in his statement dated 13 June 2017 at [25]-[27]:

> 25. I have conducted a review of the records held by Strata Management that might be relevant to the issue of the construction and existence of the Balcony, including all notices and minutes of meetings of the Owners Corporation.
>
> 26. The records were provided to be by Ms Wood of Strata Management. I am informed by Ms Wood and believe that records after 7 years are not required to be retained under the Strata Schemes Management Act 2015 (NSW) and are no longer held by Strata Management.

> 27. My search and review of those records indicate that there is no record of the Owners Corporation considering or passing any resolution consenting or approving the construction of the Balcony. There is also no record of any application having been made to the Owners Corporation or Executive Committee or any other committee or the Strata Manager for the construction or approval of the Balcony.

135 Despite Mr Becker's evidence that he would make further enquiries concerning these documents, there is no evidence to suggest that the foreshadowed summons or any inquiries subsequently made by Mr Becker on behalf all the Owners Corporation located any records of the body corporate constituted under the 1961 Act concerning the approval of the balcony by the body corporate at the time it was constructed. There is also no evidence to suggest that meetings required under the 1961 Act, including annual general meetings as required by the by-laws in Sch 1 cls 14 and 15 did not take place. Lastly, there is no evidence to suggest that the records required by cl 12 were not otherwise kept as required by the 1961 Act. Rather, the evidence is that any such records have probably been destroyed.

136 In the proceedings at first instance, the respondent submitted at [65] of the submissions dated 21 August 2017:

> There is no record of the Owners Corporation resolving to approve the addition of the Balcony to the common property of the Strata Scheme or indeed of the construction of the Balcony itself. This is unsurprising and caused by the very fact that no Council approval was obtained.

137 That submission gained its force before the Tribunal at first instance because:

(1) there was no evidence of any approval of the construction by the body corporate; and

(2) the only evidence concerning the position of the Council was that, in 1999, the Council asserted it had never approved the work.

138 It was in these circumstances that the Tribunal found at [43] - [45]:

> 43. The balcony was not constructed before the strata plan was registered. The balcony was (obviously) constructed sometime after the strata plan was registered and before 1994.
>
> 44. The absence of any evidence from any source considered by the parties of approval or authorisation of the balcony means I infer there was no such approval or authorisation.
>
> 45. The evidence from Woollahra Council's documents suggests the balcony was not an authorised development and I make that finding also.

139 Consequently, the Tribunal determined the balcony was common property and concluded at [46]:

> … the balcony is an unapproved and unauthorised addition to common property, made at a time that cannot now been determined.

140 However, this conclusion was made at a time when the new evidence, namely that Council had in fact approved the balcony, was unavailable and unknown to the parties or the Tribunal. It was made at a time when the only evidence was that, in October 1999, the Council wrote letters asserting the balcony had not been approved, an assertion which has been demonstrated by the new evidence to be plainly wrong.

141 On the evidence now available, we would infer that the then proprietors, in general meeting or by resolution of the owners of the common property, unanimously resolved to approve the construction of the balcony. In this regard, the presumption of regularity as referred to in *McLean*, as we have applied it to the Council and its actions in this case, ought to equally apply in respect of the body corporate and/or the joint owners approving work to construct the balcony.

142 This inference can be drawn from the following facts:

(1) The joint owners of the four lots would have been aware that the land they owned was subject to the provisions of the 1961 Act, the transfers and certificates of title for each of the Lots recording relevant information.

(2) As joint tenants of each and every lot in the strata scheme, it is probable that decisions made concerning the Lots and there use, were made with the approval of all joint tenants, there being evidence of a number of changes to the building around the time the balcony was constructed.

(3) There is no evidence of dissention of any of the joint tenants at the relevant time.

(4) To the extent the body corporate or its council was responsible for the control and management of the common property and the administration of the strata scheme, there is no evidence to suggest they did not comply with the relevant legislation

(5) The Lots, including Lot 1, were subsequently sold. It seems unlikely the purchasers would have acquired Lots in the strata scheme without first being satisfied:

    (a) relevant legislation had been complied and that the balcony had been lawfully constructed;

(b) that the balcony could be used by the owners of Lot 1; and

(c) what were the rights and obligations attaching to the use of the balcony by Lot 1.

(6) The Council is unlikely to have approved the Building Application without being satisfied relevant approvals were in place. Our view is strengthened by the fact the Council sought confirmation of consent in relation to earlier building application 775/65. Although no documents recording express consent can be found in the documents produced by the Council in respect of the Building Application, having regard to the apparent inadequacies in the Council's retained records, and having regard to the fact the works proceeded in plain view of the owners, the absence of a record of any record of consent on the Council file is not a reason to form a contrary view.

143 For these reasons, we are satisfied the construction of the balcony:

(1) was approved and

(2) became common property of the strata scheme with no conditions attached to its construction in the nature of a special use by-law granting sole use on terms the owner from time to time of Lot 1 was responsible for the repair and maintenance of the balcony.

144 Consequently, we are satisfied the balcony was, when constructed, and is now, common property lawfully constructed, to which the provisions of the 2015 Management Act, particularly s 106, apply.

Is resolution 11 validly passed, thereby enabling the respondent to demolish the balcony and reinstate the premises to that which existed at the time the strata plan was registered under the 1961 Act or in some other configuration of the building?

145 At the annual General meeting of the respondent held on 13 September 2016, the Owners Corporation, in general meeting, purported to pass a resolution to demolish the balcony. Resolution 11 provided:

> 11 Removal of the Balcony
>
> **Resolved That** the balcony located on common property across the front driveway to the building located on SP 536 be removed and following removal of the balcony the front wall that the balcony currently abuts be made good in keeping with the general appearance of the building. All costs to be paid by the Owners Corp. Strata Management Services NSW are hereby requested to obtain 2 quotes in relation to the costs of carrying out the works and based on the quotes raise a special levy to fund the works.

146 The question is whether this resolution was validly passed, particularly in light of the conclusion we have reached concerning whether the balcony was lawfully constructed.

147 As a preliminary matter, we should deal with the application by the respondent to extend the time for it to file the respondent's appeal. There is a single ground of appeal which is in the following terms:

> 1. The Tribunal erred by failing to decide a material issue raised by the [respondent] below, namely, that if the Balcony was held to be common property of the Strata Scheme with the consequence that the [respondent] was otherwise responsible for its repair and maintenance under the *Strata Schemes Management Act 2015* (NSW), the [respondent] was and is entitled in the circumstances:
>
> > a. Not to maintain, renew, replace or repair the balcony under s 106 (3) of the *Strata Schemes Management Act 2015* (NSW); and
> >
> > b. To remove the balcony from the common property of the Strata Scheme.

148 The appellant consented to the extension of time on the second day of the hearing of this appeal. Accordingly, we will make an order to extend the time to file the respondent's appeal to 11 May 2018.

149 Resolution 11 authorises the demolition of the balcony rather than its repair and a "make good in keeping with the general appearance of the building". All costs are to be paid by the respondent.

150 The respondent submitted that the authority to pass this resolution is found in s 106 of the 2015 Management Act. Having referred to s 106(1) and (2), being the obligations to repair and maintain common property, the respondent relied on 106(3) which provides:

> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> > (a) it is inappropriate to maintain, renew, replace or repair the property, and
> >
> > (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

151 In its written submissions in support of its cross-appeal dated 22 June 2018 the respondent referred to the decision of the Court of Appeal of the Supreme Court of New South Wales in *Ridis v Strata Plan 10308* [2005] NSWCA 246; (2005) 63 NSWLR 449, which dealt with similar obligations found in s 62 of the 1996 Management Act. The respondent relied on the statement of McColl JA at [174] and [186] where her Honour indicated that the expression "inappropriate to maintain, renew, replace or repair the property", found in the equivalent to s

106(3), might include consideration of the cost of the repair and maintenance work.

152 The respondent then submitted that:

(1) the cost of remediation was significantly more than the cost of removing the balcony, a difference of $58,707;

(2) removal of the balcony removes a safety issue and also removes "ongoing damage caused by the balcony to the common areas in and around it, including the garage space which itself amounts to $24,827". In this regard reliance was placed on the Ellis Report dated 15 June 2018, AB Vol 2 p 387.

(3) removal of the balcony would not detract from the appearance of the common property, as shown "in the mock up photos".

153 Consequently, the respondent contends, an order for demolition should be made "in accordance with the mock up diagram at page 25 attached to the statement of [Mr Becker] dated 13 June 2017". Otherwise, liberty to apply to the Tribunal for consequential orders should be reserved.

154 The appellant contended that the Tribunal correctly decided that s 106(3) of the 2015 Management Act did not authorise the demolition of the balcony and maintained her position that the balcony should be repaired: see AS 16 April 2018 at para 66 (a) and (e). In the appellant's submissions dated 6 July 2018, para 33-36 the appellant said:

> 33. In the event the panel decides otherwise, and turns to consider the merits of the [respondent's s 106(3) argument, it should readily conclude that the suggestion that s 106(3) of the [2015 Management Act] authorises the removal, destruction or demolition of any part of the common property is not remotely arguable. In both the Tribunal below and in their submissions in support of the cross-appeal, the [respondent] merely referred to or set out:
>
> > ss 106(1), 106(2) and 106(3) of the [2015 Management Act];
> >
> > Two paragraphs off McColl JA's decision in *Ridis; and*
> >
> > various matters they say "strongly point to the desirability" of removing the balcony.
>
> 34. However, the [respondent] singularly [fails] to establish the existence of any power to demolish items of common property, let alone any item of property that the owners have determined by special resolution that it is inappropriate to maintain. The [respondent] also conspicuously [fails] to maintain that the body corporate has never in fact considered, let alone determined by special resolution, that it is inappropriate to maintain the balcony.

> 35. As [the appellant] submitted below, if a decision not to maintain the balcony will not affect the safety of any building, structure or common property in the strata scheme, or detract from the appearance of the property, the [respondent's] clearly entitled to determine by special resolution that it is inappropriate to maintain it. However, they have never done this.
>
> 36. However, it is one thing to cease maintaining the balcony and quite another to demolish it. S 106(3) of the [2015 Management Act] authorises the former, but does not authorise the latter. If the [respondent has] the power to demolish the balcony (which is denied), it must be found else (sic).

155 In relation to the absence of power to remove the balcony, the Tribunal said at [52]-[54]:

> 52. Ms Davenport submits that there is no power in the legislation permitting the Owners Corporation to remove the balcony. Whether the issue is considered under the earlier legislation or the current Strata Schemes Management Act, Ms Davenport submits all that the Owners Corporation can do is repair and maintain the balcony or to enhance and improve the balcony.
>
> 53. I disagree with that submission. As I have found the balcony is common property, there is no doubt that it is the responsibility of the Owners Corporation to deal with it. However, that does not mean that the Owners Corporation's hands are tied in the manner suggested by Ms Davenport.
>
> 54. In [*Thoo*], at [2]-[8] and particularly [6], Barrett JA referred to an Owners Corporation finding an appropriate "reference point" when considering whether common property or any item of common property required repair or maintenance. His Honour suggested the first such reference would be the date the strata plan was registered but also noted that there may be later reference point such as changes to the common property "in accordance with the Act …". In other words, His Honour was suggesting that only legal or authorised changes to common property would be considered. Preston CJ in LEC agreed specifically with Barrett JA. In my opinion, the leading judgement written by Tobias JA, particularly at [126]-[131] proceeds on the same basis. It is implicit in His Honour's detailed reasons that when considering whether the common property or part of it requires repair or maintenance it is necessary to consider the common property at some particular time.

156 It was in this context, having found the balcony was "illegal" and was in a state of disrepair, that the Tribunal determined the balcony could be demolished and the building reinstated to an earlier point in time.

157 In *Ridis*, in the context of considering the nature and extent of any duty owed to a resident who was injured when the glass in the front door of the building shattered causing that person injury, McColl JA said at [174]:

> 174 I do not accept that the s 62(3) requirement that an owners corporation considering not to take action under either subs 62(1) or (2) determine by special resolution that that decision is "inappropriate" and "will not affect the safety of any building, structure or common property in the strata scheme…" impose the duty for which the appellant contends. Considering whether an action is "inappropriate" requires the owners corporation to determine, in the

> circumstances, that it is unsuitable to undertake an item of maintenance etc. Considerations relevant to this decision may include the expense of the item of maintenance or repair.
>
> …
>
> 186 The owners corporation, as I have explained, is merely the agent for lot proprietors insofar as its obligations to repair, renew and replace the common property are concerned. Once that is clearly understood, it makes no sense for the legislature to have imposed upon the sum of occupiers a statutory obligation more onerous than that imposed at common law at the time the *Management Act* was passed. There is no necessary implication in s 62, in my view, for construing it as altering the common law of occupier's liability. It is true that it requires a special resolution for the owners corporation to reach a conclusion that a particular act of maintenance is inappropriate. That reinforces the importance of the decision being taken. When it is appreciated, however, that such a resolution is equally required in relation to safety as well as aesthetic issues, the significance of the special resolution requirement is, in my view, to indicate the issues which must be addressed before the owners corporation may decline to act and the weight of opinion which must be marshalled in favour of a decision to decline to act. The marshalling of the opinion of three-quarters of the members of the owners corporation would, no doubt, be considered significant in any challenge under Chapter 5 to its decision.

158 That is, her Honour found that, when passing a resolution under s 62(3) of the 1996 Management Act (the equivalent of s 106(3) of the 2015 Management Act), there was a requirement for an owners corporation determine, in the circumstances, that it was inappropriate to undertake a particular item of maintenance. In this regard her honour said that relevant considerations may include the expense of the item of maintenance or repair.

159 These comments were subsequently considered by the Court of Appeal in *Thoo*. In the context of considering the requirements for a valid resolution under s 62(3) of the 1996 Management Act, having eschewed comments at [58] in his dissenting decision in *Ridis*, Tobias AJA (with whom Barrett JA and Preston CJ in LEC agreed), considered what was required for an owners corporation to determine repair was inappropriate. At [60] and following, his Honour said:

> 160 It was therefore submitted that the word "determines" conveyed a sense of something more than a mere procedural formality. As McColl JA had observed, it was necessary for the Owners Corporation to address the issues referred to in ss 62(3)(a) and (b) before it could decline to act.
>
> 161 Accepting the correctness of her Honour's statement, there is nevertheless nothing in s 62(3) that requires an owners corporation to do anything other than pass a special resolution in such terms as those of Resolution 7. In particular, there is nothing in the subsection that required the

owners corporation to provide reasons for its determination. There is thus no reason to construe the sub-section other than in accordance with its text, which requires a high standard of formality in the form of a special resolution determining, relevantly, that it is inappropriate to renew or replace the relevant item of property, but no more. In my view, it is clear that s 62(3) does not, either expressly or implicitly, require as a pre-condition to an owners corporation making a determination that it specifically form an opinion as to the two matters referred to in sub-clauses (a) and (b).

162 Of course, the exercise of a statutory discretion such as that in s 62(3) by an owners corporation may be challenged on administrative law grounds such as *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 as recently discussed by the High Court in *Minister for Immigration and Citizenship v Lin* [2013] HCA 18), the failure to take into account a relevant consideration or the taking into account of an irrelevant consideration. It is not suggested in the present case that the Owners Corporation's determination by Resolution 7 that to renew or replace the MEVS was inappropriate could be challenged on any of those grounds.

163 In relation to what constitutes a decision that it is "inappropriate" to renew or replace an item of common property, at [141] the primary judge relied upon the following passage at [54] of my reasons in *Ridis*:

> Thirdly, and in furtherance of the views expressed above, subs (3) provides an exception and, in my opinion, the only exception to the absolute and unconditional duties imposed by subs (1) and subs (2). It requires the owners corporation by special resolution to determine that it is inappropriate, for instance, to renew or replace a particular item of property provided that that decision not to renew or replace that item will not affect the safety of the building or the common property. In my opinion, the word "inappropriate" is sufficiently broad to cover a situation where any such renewal or replacement is unnecessary provided that the safety of the item is not compromised.

164 In particular, his Honour relied upon the last sentence of those remarks. However, although I accept that the word "inappropriate" is a broad concept and covers the situation referred to, it is not confined to a situation where the relevant renewal or replacement is unnecessary. The renewal or replacement may be still be "inappropriate" even if it is necessary.

165 According to the Macquarie Dictionary, 5th Edition, "inappropriate", not surprisingly, means "not appropriate". "Appropriate" is relevantly defined as meaning "suitable or fitting for a particular purpose". In its context in s 62(3), it refers to a determination by the owners corporation that, relevantly, the renewal or replacement of a particular fitting or fixture comprised in the common property is not suitable in the circumstances. The latter may include such considerations as the expense involved, whether the relevant objective can be usefully or practicably achieved, whether proceeding with the work may cause unacceptable and/or extensive interference with the businesses of other lot owners and whether there has been a sufficient investigation as to any of the foregoing considerations.

166 I would thus agree with the following remarks of McColl JA in *Ridis* at [174]:

> I do not accept that the s 62(3) requirement that an owners corporation considering not to take action under either s 62(1) or s 62(2) determine by special resolution that that decision is "inappropriate" and "will not

> affect the safety of any building, structure or common property in the strata scheme..." impose the duty for which the appellant contends. Considering whether an action is "inappropriate" requires the owners corporation to determine, in the circumstances, that it is unsuitable to undertake an item of maintenance etc. Considerations relevant to this decision may include the expense of the item of maintenance or repair.

160 In short, his Honour found that:

(1) a valid resolution “requires a high standard of formality in the form of a special resolution” and that an owners corporation must determine that:

(a) repair or maintenance is inappropriate; and

(b) the decision will not affect the safety of any building, structure or common property in the strata scheme;

(2) that a resolution may be challenged on administrative law grounds if relevant considerations are not properly taken account of in the decision-making process; and

(3) relevant considerations may include the expense of carrying out the particular repair or maintenance work.

161 In our view, relevant considerations may also include the fact that particular lot owners have access to or use of the common property,

162 Unless there is such a valid resolution, there is a strict duty to repair and maintain.

163 On the other hand, where there is such a valid resolution, it seems to us that the power to decline to repair and maintain particular common property carries with it the power to demolish a structure which has fallen into disrepair and to make good as necessary. As Powell J said in *Margiz* at 372, when considering the *Strata Titles Act, 1973* (NSW):

> … I am quite unable to accept that, by reason of these matters, the body corporate, when dealing with the common property vested in it, has only such powers as are expressly vested in it by the provisions of the Act. The reason for my inability to do so is not difficult to discern, for, if one were to proceed upon such a basis, one would be obliged to treat as nugatory, and totally devoid of content, many provisions of the Act, the existence of which are clearly at the heart of and critical to the effective operation of, the concept of strata title legislation. A simple sample will suffice – unless it is to be implied from such provisions as s 54(3) and s 68(1)(a), (b), (c), the Act does not confer upon a body corporate a power to repair, yet without such a power, the imposition of a body corporate of a duty to repair would be an exercise in futility.
>
> I do not regard the legislature as being so stupid as to indulge in such an exercise: on the contrary I regard such provisions as those contained in s 68 as carrying with them an implied grant to the relevant body corporate of power

> to do all things necessary to enable the relevant body corporate to perform the several duties cast upon it: see to the same effect *Travis v Proprietors – Strata Plan No. 3740* (at 716; 307-308) per Street J, as he then was.

164 In this way, an owners corporation can give effect to a determination made under s 106(3). Otherwise. The common property would remain in a state of disrepair, which may have consequences including future, more significant, problems.

165 Such a construction is consistent with the comments of McColl JA in *Ridis* at [162] and following, where her Honour makes reference to the decision of Powell J in *Margiz*.

166 Applying these principles in the present case, it seems to us the inevitable conclusion is that resolution 11 is invalid. This is because:

(1) An ordinary resolution to demolish and reinstate the common property was only permissible of the works that had fallen into disrepair were unauthorised: per *Krimbogiannis*;

(2) As the balcony was authorised work that had fallen into disrepair, a special resolution was required to determine repair was inappropriate;

(3) The present resolution was not passed as a special resolution, the minutes of meeting of 13 September 2016 not recording such fact. In this regard we note the Minutes do record special resolutions that were passed as such at that meeting: see eg resolution 8 regarding taking action under s 80 of the 1996 Management Act: AB Vol 1 p156;

(4) by the form of the resolution, it is clear no determination was made by the respondent that:

  (a) it is inappropriate to maintain, renew, replace or repair the balcony; and

  (b) failing to prepare the balcony will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

167 Further, even if the form of the resolution had satisfied the above criteria and been passed as a special resolution, it seems to us that it was susceptible to challenge and should be set aside because the respondent did not, when passing the resolution, have regard to all relevant factors in determining whether it was appropriate not to repair the balcony. In this regard, the evidence to which we have been referred and the submissions which have

been made indicate that any decision made was because the cost of remediation was significantly more than the costs of removing the balcony.

168 Further, it seems likely that the decision was made in circumstances where the lot owners considered the original construction of the balcony was not approved by the proprietors/ body corporate or the Council and that it should be removed because no special by-law had otherwise been passed authorising its construction.

169 While cost is a relevant factor, so too are the rights which a particular Lot owner has to access and use common property exclusively to other lot owners even though the responsibility to repair and maintain the property remains with an owners corporation.

170 For these reasons, we should make an order invalidating resolution 11.

171 Finally, we note the facts to which we have referred would suggest that:

(1) The owners of the other lots, Lots 2-4, would only agree to the repair if:

(a) any repairs were paid for by the owner of Lot 1, and

(b) the owner of Lot 1 agreed to a special by-law to the effect that she be responsible for ongoing repairs and maintenance of the balcony in return for which she would receive special use rights; and

(2) otherwise, the owners corporation was entitled to pass a special resolution under s 106(3) so as to be relieved from an obligation to repair and maintain common property because only one lot owner had access to a particular part of the common property, notwithstanding that such common property had been constructed so as to only be accessible by that lot owner, without any special use by-law having been created.

172 Having regard to the view we have reached above, it is unnecessary to decide whether a resolution under s 106(3) could be invalidated because reliance was placed on these factors in reaching that decision.

Other matters

173 One final matter we should deal with is that the appellant sought to invalidate resolution 6 made on 4 August 2015. This resolution provided:

> Resolved that Lot 1 having undertaken to add to common property by erecting a balustrade without creating a Special bylaw, referred to Section 65B, 52 & 54 of the Strata Schemes Management Act 1996) that the strata manager is to

write to Lot 1 instructing them to have the structure removed within 21 days of the letter.

174 We are unaware whether the required letter was sent in 2015. Whether or not this has occurred, there is no utility in making this order in connection with this resolution as it has no consequence as to the responsibility of the respondent to repair the balcony.

175 This aspect of the appeal should be dismissed.

Orders

176 Having regard to the above, the Appeal Panel makes the following orders:

(1) The time to file appeal AP 18/22843 is extended to 11 May 2018.

(2) Leave to appeal is granted and the appeal is allowed.

(3) The orders made in applications SC 17/14533 and SC 17/24903 are set aside.

(4) In lieu thereof the following orders are made:

(a) The Owners Corporation is, at its cost, to repair the balcony attached to Lot 1 and carry out all necessary incidental work in accordance with the scope of work contained at pages 10- 12 of the Ellis Constructions Report dated 15 June 2017 found in volume 2, pages 380-382 of the appeal bundle filed in appeal AP 18/08518 (the Works).

(b) The Owners Corporation is to take such steps as are necessary to obtain all relevant Council and other approvals as may be required to undertake the Works.

(c) Subject to any application to extend time, which application may be made to the Tribunal at first instance, the Works are to be completed on or before 30 April 2019.

(d) Liberty to apply to the Tribunal at first instance for directions concerning the implementation of these orders.

(e) Resolution 11 made 13 September 2016 is invalid and of no effect.

(f) Save as provided above, the appeals are dismissed.

(5) Any application for costs by either party is to be made in accordance with the following timetable:

(a) The applicant for costs (Cost Applicant) is to file and serve any application, evidence and submissions within 14 days from the date of these orders.

(b) The respondent to any costs application is to file and serve any evidence and submissions in response to the costs application within 28 days from the date of these orders.

(c) The Costs Applicant is to file and serve any submissions in reply within 35 days from the date of these orders.

(d) The parties' submissions are to include submissions about whether an order should be made dispensing with a hearing of the costs application pursuant to s 50(2) of the *Civil and Administrative Tribunal* Act, 2013.

****

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