Civil and Administrative Tribunal

New South Wales

Case Name:	Morgan-Jones & Ufert v The Owners Strata Plan No 15599
Medium Neutral Citation:	[2019] NSWCATAP 187
Hearing Date(s):	4 July 2019
Date of Orders:	24 July 2019
Decision Date:	24 July 2019
Jurisdiction:	Appeal Panel
Before:	G K Burton SC, Senior Member P H Molony, Senior Member
Decision:	(1) Leave to Appeal out of time is refused. (2) Leave to appeal on an alleged error of fact is refused. (3) Appeal dismissed. (4) Order that the appellants pay the respondents' costs of the appeal on the ordinary basis as agreed or assessed.
Catchwords:	Strata management - compulsory strata manager - standing of lot owners to challenge by-law under SSMA s 150
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	AAI Ltd t/as GIO v McGiffen (2016) 77 MVR 348, [2016] NSWCA 229 at [81] Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443, [2012] NSWCA 244 Aon Risk Services Aust Ltd v ANU (2009) 239 CLR 175, [2009] HCA 27 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578
Collins v Urban [2014] NSWCATAP 17
Craig v South Australia (1995) 184 CLR 163
Eadie v Harvey [2017] NSWCATAP 201
Ferraro v DBN Holdings Aust PL t/as Sports Auto Group [2015] FCA 1127
House v The King (1936) 55 CLR 499
Jegatheeswaran v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 263, [2001] FCA 865
Ku-ring-gai Council v Chan [2017] NSWCA 226
Lee v Commissioner of Police, NSW Police Force [2017] NSWSC 1849
Legal Profession Complaints Committee v Rayney [2017] WASCA 78
Mifsud v Campbell (1991) 21 NSWLR 725 at 728
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
OC SP 68751 v CA DP 270281 [2015] NSWCATCD 99
Owen v Kim [2017] NSWCATAP 26
Pilbara Infrastructure Pty Ltd v Economic Regulation Authority [2014] WASC 346
Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Rodger v De Gelder (2015) 71 MVR 514, [2015] NSWCA 211 at [86]
Rozenblit v Vainer [2018] HCA 23
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Safi v Heartland Motors PL t/as Heartland Chrysler [2016] NSWCATAP 80
UBS AG v Tyne [2018] HCA 45
Wehi v Minister for Immigration and Border Protection [2018] FCA 1176

Texts Cited: None cited

Category: Principal judgment

Parties: Philomena Morgan-Jones and Eugen Gunter Ufert (Appellants)

	Owners SP 15559 (Respondent)
Representation:	Counsel: P Morgan-Jones (Appellants self-represented) S Saw (Respondent) Solicitors: Speirs Ryan Solicitors (Respondent)
File Number(s):	AP 19/20161
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	28 February 2019
Before:	G Meadows, Senior Member
File Number(s):	SC18/48013

REASONS FOR DECISION

Background to appeal

1 In an application lodged originally in November 2018 the applicants, who own lot 11 in the strata scheme at Eastwood NSW registered 23 June 1980, sought, under s 150 of the *Strata Schemes Management Act 2015* (NSW) (SSMA), to amend two by-laws (2 and 4). Those by-laws relevantly dealt with installation by lot owners of individual split-system airconditioners. Proposed by-law 4 sought to specify higher maximum sound pressure levels of external condensors than in the preceding version of the by-law. It was drafted with the assistance of a report in November 2018 by an expert consultant. Both the appellants and the respondent owners corporation (OC) accepted the expertise and opinions of the consultant, who had provided a previous report in 2006. By-law 2 permitted airconditioners with an acceptable sound rating as specified

by the strata committee and not to exceed original specifications in respect of the building.

2 There was an application to include in by-laws the recommendations in a 2011 asbestos report which appears not to have been pressed as an issue. The report appeared to recommend no action where the risk from sealed asbestos was found and was said to be low, and found no asbestos in other areas. It was not clear if anything had been proposed as a by-law or sought to be voted upon. An asbestos by-law may have suffered from the same standing issue discussed below, a matter on which we can express no opinion as it was not dealt with at primary hearing and the absence of dealing with it was not the subject of appeal.

3 The primary member dismissed the application with oral reasons which he summarised in writing as part of his orders. The transcript of hearing was consistent with the summary.

4 The primary member dismissed the application on the ground that the appellants, who were then the applicants, had no standing to bring it while there was in place a compulsory strata manager with full powers of governance of the strata committee (SC) and OC. Those full governance powers were the terms on which the appellants had successfully obtained the appointment of the compulsory strata manager for a defined term in earlier proceedings.

5 The primary member said that such broad powers removed the power of lot owners to vote on a by-law because there was no requirement for the compulsory strata manager to put a proposal to such a vote of lot owners, and SSMA s 150 gave standing only to those entitled to vote on the challenged by-law.

6 In case he was wrong in that conclusion, which clearly is a question of law, the primary member went on to say that, having read the expert's report and heard the appellants' cross-examination of the expert, he was "satisfied that the meaning of the permitted noise level specified in proposed by-law 4, supported by [the expert's] November 2018 report, is clear and unambiguous and is within statutory guidelines and requirements". That is a finding on at least a mixed

question of fact and law and probably more correctly a finding on a question of fact alone.

7 The primary member noted that there was no current proposal to install an airconditioner and no evidence of current disturbance.

8 The primary member was satisfied that the appellants' case was in effect hopeless from the outset because of absence of standing and "had no substance in any event, as it consisted of no more than the applicants' refusal to accept the expert evidence". He accordingly held there were special circumstances to justify an award of costs in favour of the OC under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (CATA).

9 The primary member ended his summary of reasons with the following: "Given some of the allegations made against the strata manager, I consider it is appropriate to record my opinion that, at least in relation to the issue of air conditioners and the preparation of necessary by-laws, the strata manager's procedures and actions are a clear example of 'best practice' in this area". This appears to have been prompted primarily by the fact that the compulsory manager in effect consulted the lot owners in respect of the proposed by-laws even though it did not need to under its wide grant of powers.

Extension of time

10 The appellants sought an extension of time under CATA s 41 for lodgement of their notice of appeal. It was not lodged until 26 April 2019, just over 8 weeks after the date of the primary decision. The time limit for this type of matter is 4 weeks. There was no indication that the appellants had not received the decision. Indeed, the female appellant presented the case before the primary member (as she did the appeal), so heard the decision and the oral reasons.

11 The appellants said that the male appellant was incapacitated, the female appellant was his full-time carer and she did not have the time with all the challenges to get the appeal on in a timely fashion.

12 While we are sympathetic to the appellants' personal circumstances, the female appellant, who owing to her husband's sad health condition was the

active party at primary level and on appeal and in all preparation, said "I had to wait to get a good assessment report".

13 It therefore seemed that the appellant was able to prosecute the appeal by doing work on preparation (such as obtaining a "good assessment report") despite her other responsibilities. She did not need to wait for that new evidence before lodging the appeal as it could be dealt with by directions after the appeal was lodged. It was clear from what she said that she did so wait, which was the real reason for the delay. Further, she does not seem to have sought to obtain the report with promptness.

14 We consider that there is insufficient explanation in the circumstances just described to justify the grant of leave to appeal. We are reinforced in that conclusion by the weak appeal prospects which we discuss below. We think an extension of the temporary stay on the primary orders (which was not sought) would not have been granted on those grounds.

15 That is sufficient to dispose of the appeal. However, we address the substantive basis below for refusing leave to appeal on alleged questions of fact and the absence of an error of law (which does not require leave to appeal).

Grounds of appeal

16 Having regard to the approach taken in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 in a situation where there was no overt legal representation, we have discerned the substance of the grounds of appeal as follows:

(1) The primary member erred in law in the basis for his finding on the appellants having no standing to bring the application.

(2) The primary member erred in accepting that proposed by-law 4 was sufficiently clearly drafted and drafted in a manner that complied with relevant environmental law.

(3) The expert report obtained after the primary hearing and not previously sought to be obtained demonstrated, contrary to the expert report before the primary member, the error described in (2) and showed that a by-law drafted on the basis of the expert report before the primary member was drafted on an incorrect and non-compliant basis. That belated expert report should be taken into account as it was not reasonably available at the time of the primary hearing.

17 The reply to the notice of appeal disputed the preceding matters.

Applicable legal principles

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

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

19 Clause 12 of Schedule 4 to CATA states:

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

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

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

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

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

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

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

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

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

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

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

(8) whether the decision was legally unreasonable.

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

24 A failure to deal with evidence may also in the appropriate circumstances be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence. It is generally not mandatory to consider particular evidence: *Rodger v De Gelder* (2015) 71 MVR 514, [2015] NSWCA 211 at [86]; *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443, [2012] NSWCA 244 at [15] per Basten JA (McColl and Macfarlan JJA agreeing). However, by s 38(6)(a) of the NCAT Act, the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings." This obligation includes an obligation to have regard to material which has been disclosed to the Tribunal and which is relevant to the facts in issue, at least where that material is of some significance. Further, at common law, where a decision-maker ignores evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker, this is an error of law: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62]-[63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61]-[62].

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

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

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

> 74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
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> 75 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > 1 If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v*

CTTT [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].

2 The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].

…

78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.

79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].

84 The general principles derived from these cases can be summarised as follows: …

(2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

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

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

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

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

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

> 37 In *Owners - SP 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29 the Appeal Panel stated at [109] in connection with cl 12(1)(c) of Schedule 4 to the *Civil and Administrative Tribunal Act*:
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> 'In order to fall within this paragraph the appellant must be able to point to evidence which:
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> (1) is significant; and
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> (2) has arisen and is new in the sense that it was not reasonably available at the time the proceedings below were being heard.'
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> 38 In *Leisure Brothers Pty Ltd v Smith* [2017] NSWCATAP 11 the Appeal Panel stated at [40]:
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> > 'The meaning of this clause was considered by the Appeal Panel in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111. At [23] – [24] the Appeal Panel said:
> >
> > '23 Unlike the WIM Act, the expression "reasonably available" is not qualified by the words "to the party". This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence by summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014] NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave under cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the appellant at the time of the hearing and could not reasonably be known due to fraud.
> >
> > 24 Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).'
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> 39 As stated at [27] in Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown:
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> 'the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.'

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

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

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

31 In dealing with errors of law and errors of fact, the Panel must be cognisant that the two can intermingle. The Panel must also be alert that, under Australian law, there is a different approach to matters between two situations.

32 The first of these is where the particular decision has involved evaluation from findings of primary facts and the drawing of inferences therefrom on which reasonable minds may differ but which must be accepted as legally correct unless overturned or varied on appeal.

33 The second situation arises where there has been an exercise by the primary decision-maker of a discretion or choice embodied in the statute or law being applied, including as to whether relief is to be granted or refused and the form of relief: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [18], [20], [26], [30]-[32], [43]-[45], [48]-[49], [55]-[56], [85]-[87], [127]-[128], [153]-[155].

Error of law

34 We consider that the primary member correctly found that the appellants had no standing because of the appointment of a compulsory strata management with the powers of the EC and OC. We agree with the reasons given by the primary member, which we have summarised earlier, for his conclusion.

Grant of leave to appeal on questions of fact

35 We consider there is no basis for a grant of leave on the foregoing authority concerning alleged errors of fact. We enter into this topic only because the primary member did so, which gave the opportunity to the appellants to raise it on appeal. We think that prudence may advise, in most circumstances, not

entering into the merits if one finds an absence of jurisdiction. It may embarrass findings if there is another forum that does have jurisdiction.

36 There was no alternative expert opinion given to the primary member. The cross-examination did not effectively cast doubt upon that opinion. The primary member's decision had a clear basis in the material before him that we have described at the start of these reasons. The decision on that material was not against the weight of evidence or inequitable and unfair so as to be a substantial miscarriage of justice of the serious type required to justify grant of leave to appeal.

37 We do not consider that the explanation given by the appellants concerning the absence of a competing expert report at the primary hearing met the test for admitting further evidence in the form of the expert report now obtained. The appellants were provided with a copy of the expert report obtained by the strata manager at the time it became available in November 2018. They did not seek to pursue specific questions about its findings until 4 February 2019, which was close to the hearing.

38 The explanation in the notice of appeal was that the appellants expected in cross-examination to obtain "clarification" that would meet "some reservations" they had about the expert report. That meant they took the risk of not receiving the answers they hoped for, without other evidence to support what they hoped for.

39 During the appeal hearing the female appellant said, when asked about her questioning of the expert evidence, "I was convinced I am right". We consider that tends to summarise why an earlier expert report was not obtained.

40 It also appeared from the appellants' submissions that they were seeking to address what they perceived to be a potential breach of noise amenity requirements from the cumulative effect of air conditioners in what they said was a confined space between two buildings in the strata scheme, where there was no actual complaint of breach.

41 In those circumstances we would not allow the appeal on the basis of further evidence not reasonably available.

Costs

42 The appellants challenged the adverse costs order they suffered at the primary hearing. The female appellant said to the effect "I did my best". We are sure that she did and that she courageously put what she believed despite opinion of an expert that she had formerly trusted. But her lack of trust when the opinion was not to her liking combined with the lack of standing caused by the presence of a compulsory strata manager with broad powers appointed on her application, made the application hopeless from the outset. For the same reasons as given by the primary member for making his costs orders that we have set out earlier in these reasons, we consider that the primary members' costs orders were correct.

43 For the same reasons, when the position did not improve on appeal, we consider that the appellants should pay the costs of the appeal on the ordinary basis as agreed or assessed.

44 In addition to the material before the primary member, we were shown a letter written on behalf of the OC by the strata manager to the appellants, then applicants, dated 30 November 2018. That letter comprehensively set out the reasons that the appellants should not pursue the claim with a focus on the costs to the OC of the claim being pursued (including attendance by the expert at hearing and the need for legal representation) and the weakness of the position on standing. The letter then explicitly warned that a costs application would be made.

45 This only reinforces our conclusion on costs. The letter did not purport to be an offer and we do not in any event consider that an award of costs on the indemnity basis would be appropriate in the circumstances.

Orders

46 The orders we accordingly make are as follows:

(1) Leave to Appeal out of time is refused.

(2) Leave to appeal on alleged error of fact is refused.

(3) Appeal dismissed.

(4) Order that the appellants pay the respondent's costs of the appeal on the ordinary basis as agreed or assessed.

****

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

Registrar

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