Supreme Court

New South Wales

Case Name:	The Owners Strata Plan No 68976 v Nicholls
Medium Neutral Citation:	[2018] NSWSC 270
Hearing Date(s):	07 April 2017
Date of Orders:	6 March 2018
Decision Date:	6 March 2018
Jurisdiction:	Common Law
Before:	Rothman J
Decision:	(1) Leave to appeal refused; (2) The plaintiff's summons is dismissed; (3) The plaintiff shall pay the defendants' costs of and incidental to the proceedings; and (4) The proceedings are dismissed.
Catchwords:	STRATA SCHEMES – proceedings before Strata Schemes Adjudicator concerning whether works were "in keeping with rest of building" – appeal to NCAT – appeal from NCAT APPEALS – STATUTORY TRIBUNALS – appeal on a ground raising "question of law" – discussion of grounds in that context and principles – no arguable question of law raised – leave refused
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil Proceedings Act 2005 (NSW) Evidence Act 1995 (NSW) Strata Schemes Management Act 1996 (NSW)

Cases Cited:	Attorney General for the State of NSW v X (2000) 49 NSWLR 653; [2000] NSWCA 199 Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126 Collector of Customs v Agfa-Gaevert (1996) 186 CLR 389; [1996] HCA 36 Collingridge v The Owners SP5374 [2009] NSW CTTT 301 Coote v Kelly [2012] NSWSC 219 Haider v JP Morgan [2007] NSWCA 158 HG v R (1989) 197 CLR 414; [1999] HCA 2 Hutchinson v RTA [2000] NSWCA 332 M v The Queen (1994) 181 CLR 487; [1994] HCA 63, Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50 Ormwave Pty Limited v Smith [2007] NSWCA 210 R v R (1989) 18 NSWLR 74 Sullivan v Department of Transport (1978) 20 ALR 323 Weintroub & Weintroub v Ellison [2002] NSW RT 32 Williams v The Queen (1986) 161 CLR 278; [1986] HCA 88
Category:	Principal judgment
Parties:	The Owners Strata Plan No 68976 (Plaintiff) Blair Milton Nicholls (First Defendant) Liesel Von Molendorff (Second Defendant)
Representation:	Counsel: J O'Connor (Plaintiff) K Rees SC (Defendants) Solicitors: Harris & Harris Solicitors (Plaintiff) Jane Crittenden Lawyer (Defendants)
File Number(s):	2016/239839
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal - Sydney
Citation:	[2016] NSWCAT

Date of Decision:	12 July 2016
Before:	M Cohen, Senior Member
File Number(s):	SP 68976

JUDGMENT

1 **HIS HONOUR:** The defendants are lot owners in a building and performed building work to which the plaintiff objects. The building work was the building of a spa and surrounding decking. By Summons filed 9 August 2016 the plaintiff, The Owners Strata Plan No 68976, seeks to appeal and/or seeks leave to appeal the Decision of the New South Wales Civil and Administrative Appeals Tribunal ("NCAT"). The orders are sought pursuant to the terms of s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the Act"). The plaintiff seeks that the orders of NCAT be set aside and the matter be remitted to NCAT to be heard and decided in accordance with law and, it seems, upon hearing further evidence.

Grounds

2 The grounds of appeal, raised by the plaintiff, are in the following terms:

(1) The Tribunal, in determining whether the construction of the spa by the defendants breached the By-law, erred in failing to give reasons as to the meaning of the By-law.

(2) The Tribunal erred as to the construction of the By-law, namely the meaning the Tribunal gave to the words "*is not in keeping with the rest of the building*", to find that the defendants' construction of the Spa did not breach the By-law.

(3) The Tribunal erred in finding that the Spa was in keeping with the rest of the building and therefore not in breach of the By-law in circumstances where there was no evidence to support that finding.

(4) The Tribunal denied the plaintiff procedural fairness in failing to permit the plaintiff an opportunity to cross-examine the first defendant in relation to matters relevant to an issue in the proceedings, namely whether the Spa could be observed from outside the defendants' Lot and outside the common property, to establish that the Spa breached the By-law

(5) The Tribunal denied the plaintiff procedural fairness in:

(a) finding that the report of Marchese Partners did not comply with the Tribunal's Expert Code of Conduct,

(b) failing to permit the plaintiff to rely on the report of Marchese Partners (the "Marchese Report") to establish that the Spa "is not in keeping with the rest of the building" and therefore in breach of the By-law.

(6) The Tribunal erred in failing to comply with s 38(5) of the *Civil and Administrative Tribunal Act 2013* (NSW) in denying the plaintiff an opportunity to cross-examine the defendant in relation to matters relevant to an issue in the proceedings, namely whether the Spa could be observed from outside the defendants' Lot and outside the common property to establish that the Spa breached the By-law.

(7) The Tribunal's finding that the construction of the Spa did not breach the By-law and that the Adjudicator's determination should not be set aside was so unreasonable as to amount to a miscarriage of justice.

(8) The Tribunal's finding was based on the first defendant having misled the Tribunal as to the height of the boundary wall at the rear of the property which led the Tribunal into error in finding that persons standing at the rear of the property would be unable to observe the Spa over the boundary wall.

(9) The Tribunal's Decision was not fair and equitable as the Decision was made against the weight of evidence.

3 Essentially, the grounds fall into a number of classes:

(1) Failure to provide adequate reasons;

(2) The alleged error in defining the term "not in keeping with rest of the building", either, it seems, as a matter of construction or, as a matter of evidence.

(3) Breach of the rules of procedural fairness in not permitting cross-examination of the first defendant as to whether the building work could be observed from the street and the refusal to admit an alleged expert report dealing with whether the spa and decking was "in keeping with the rest of the building".

(4) Allegedly misleading evidence upon which NCAT's Decision was based.

(5) The Decision of NCAT was "not fair and equitable" as it was against the weight of evidence.

4 Further, by Motion filed 28 February 2017, the plaintiff seeks to adduce further evidence, being the Affidavit of Anthony Johnston of 28 February 2017. Mr Johnston is a lot owner in the building and the plaintiff seeks to adduce his evidence as it purports to provide evidence, including photographs, inconsistent with the evidence adduced by the defendants in the proceedings before NCAT.

History

5 It is necessary to set out some procedural history. The dispute between the parties first arose as a result of the defendants building a spa.

6 On 12 May 2015, the plaintiff filed an Application for Adjudicator's Orders, seeking orders under s 138 of the *Strata Schemes Management Act 1996* (NSW) to the effect that: the defendants remove the spa, deck and ancillary works installed on Lot 1 and common property; and the defendants repair and reinstate the common property and Lot 1 to its original condition.

7 The application was heard before an Adjudicator and, it seems, the plaintiff's proceedings were based upon the proposition that the spa (and accompanying deck) was located on common property, utilised common property services and was "not in keeping with the building".

8 On 29 September 2015, the Adjudicator (Adjudicator S Smith) dismissed the application on the basis that the Adjudicator was not satisfied there had been any significant breach of the By-laws and, further, that the spa was in keeping with the appearance of the building. The Adjudicator reviewed photographs of the spa and decking and disagreed with the opinion of Mr Marchese, a person who purported to express an expert opinion.

9 On 22 October 2015, the plaintiff sought to appeal the Decision of the Adjudicator and appealed to NCAT from the determination of the Adjudicator. The grounds of that appeal were:

(1) The Adjudicator erred in finding that there was no significant encroachment on the common property or breach of the By-laws by the plaintiffs' works.

(2) The Adjudicator erred in finding the plaintiffs' work was not connected to or used the services of the common property.

(3) Further and in the alternative, the Adjudicator having found there was some unspecified encroachment of the common property and/or breach of the By-law erred in failing to make orders for the removal of the encroachment so found.

(4) In the alternative, the Adjudicator erred in failing to provide any reasons for not ordering any unspecified encroachment of the common property and/or breach of the By-law be removed.

(5) The Adjudicator erred in finding the plaintiffs' work was in keeping with the rest of the building for the reasons provided and/or in the absence of any probative evidence supporting such a finding.

10 At the hearing before NCAT, the plaintiff abandoned Ground 2, but pressed the other grounds recited.

11 A comparison of the grounds upon which leave to appeal is sought in this Court and the grounds agitated before NCAT discloses that the factual basis for the alleged error is now confined to whether the construction of the spa and decking was "in keeping with the rest of the building". The foregoing comment is not intended to deprecate the grounds that allege issues of principle before this Court.

The appeal to the Court

12 The appeal to this Court is purportedly based upon the provisions of s 83(1) of the Act, which is in the following terms:

> "**83 APPEALS AGAINST APPEALABLE DECISIONS**
>
> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any Decision made by the Tribunal in the proceedings."

13 As a consequence of the above provisions, the plaintiff requires leave of the Court and, subject to the provision of leave, may appeal "on a question of law".

14 A denial of procedural fairness may be a question of law, assuming for present purposes that NCAT is required to provide procedural fairness. The misconstruction of a By-law may also be, depending upon the circumstances, a question of law. A question of what is "fair and equitable" or "against the weight of evidence" is plainly not a question of law.

A question of law

15 In *Williams v The Queen* (1986) 161 CLR 278; [1986] HCA 88, the High Court discussed the meaning of the expression "a question of law" within the phrase "a question of law alone" and in the context of a provision in the Tasmanian *Criminal Code 1924* which allowed the Attorney-General to seek leave to appeal an acquittal, and for which leave was granted by the Court of Criminal Appeal. The High Court said:

> "In *Reg v Jenkins*, Crisp J correctly pointed out that a 'question of law alone' does not include a question of mixed fact and law and went on to say that 'there would seem to be great difficulties in the way of entertaining an appeal by the Crown against the exercise of a judicial discretion where the question involved is not so much the existence of a discretion but the question of its exercise in relation to the facts of a particular case'." (Per Gibbs CJ at 287 with whom Wilson and Dawson JJ agreed on this point.)

16 In the same judgment, Mason and Brennan JJ said:

> "An appeal lies on 'a question of law alone'. An appeal does not lie on a ground which involves a mixed question of fact and law: that is a ground available to a person convicted of an offence (s 401(1)(b)(ii)) but not to the Attorney-General. An appeal on the ground of the wrongful rejection of evidence by a trial judge in the exercise of a discretion is not an appeal on a question of law alone. The manner in which a discretion is exercised depends upon the judge's appreciation of all the facts of the case, so that an error of law which leads the judge wrongly to hold that he has a discretion is not the only factor which contributes to his Decision to reject the evidence." (*Williams*, supra, at 301-302)

17 A "question of law", as a term, is wider than the term a "decision on a question of law" (see, for example, *Hutchinson v RTA* [2000] NSWCA 332 at [33]) and wider than the term "error of law" (see, for example, *Attorney General for the State of NSW v X* (2000) 49 NSWLR 653; [2000] NSWCA 199 at [124]) and may, therefore, allow greater scope for an appeal. However, the use of the phrase in s 83(1) of the Act confines the expression considerably and excludes questions of law made in the context of a decision of mixed law and fact that, in truth, involves an appeal on the factual basis for the legal issue or exercise of discretion.

18 In *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, the High Court said:

> "Where a Court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as 'unjust or unsafe', or 'dangerous or unsafe'. In reaching such a conclusion, the Court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the Court must decide by making its own independent assessment of the evidence …." (Per Mason CJ, Deane, Dawson and Toohey JJ at 492.)

19 In *Morris v The Queen* (1987) 163 CLR 454; [1987] HCA 50, Mason CJ referred to the function of an appellate Court in making an independent assessment of the evidence for the purpose of deciding whether a jury should

have entertained a reasonable doubt. Describing the nature of this inquiry, his Honour said at 462:

> "In performing the function which is discussed in the passage just quoted the Court of Criminal Appeal is deciding a question of fact. So much clearly appears from the judgment of the Court (Dixon CJ, Fullagar and Taylor JJ.) in *Raspor v The Queen* (1968) 99 CLR 346 at 350 and *Hocking v Bell* (1945) 71 CLR 430 at 497. When 'the Court performs this duty, it is not deciding a question of law; it is supervising or reviewing the findings of a Tribunal of fact', to use the words of Dixon J in *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 643."

20 The Court of Criminal Appeal has held similarly, albeit in a different context. In *R v R* (1989) 18 NSWLR 74, the Court was required to answer a question on a stated case relating to the capacity of a trial judge to direct an acquittal where the judge considered it would be "unsafe and unsatisfactory" for the jury to convict. Relying on *Morris*, supra, and other authorities, the Court said:

> "… [O]ne major difference between the task of a Court of Criminal Appeal in considering whether a jury's verdict is unsafe or unsatisfactory and that of the same court, or a trial judge, in considering in point of law whether there is sufficient evidence to sustain a conviction, is that in the former case regard is to be had to the totality of the evidence." (Per Gleeson CJ, Maxwell and Wood JJ agreeing.)

21 While there are many judgments that delineate between questions of fact and questions of law, the analysis usually commences with the taxonomy of Sir Frederick Jordan CJ in *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126. At page 82, Jordan CJ said:

> "Before proceeding to the questions which have been submitted, it is necessary to keep in mind that this Court has jurisdiction to determine only questions of law and only such questions of law as are submitted to it. In cases in which an appellate Tribunal has jurisdiction to determine only questions of law, the following rules appear to be established by the authorities:
>
> (1) The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law. This question is to be resolved by the relevant Tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence; although evidence is receivable as to the meaning of technical terms; and the meaning of a technical legal term is a question of law.
>
> (2) The question whether a particular set of facts comes within the description of such a word or phrase [ie, an ordinary English word or phrase] is one of fact.
>
> (3) A finding of fact by a Tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of

> supporting its finding, and there is evidence capable of supporting its inferences.
>
> (4) Such a finding can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences, or (c) if it has misdirected itself in law. Thus, if the facts inferred by the Tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a Tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law." (Citations omitted.)

22 The above quote discloses that even on the older and longer standing view of the distinction between fact and law, an appeal on the ground of the "reasonableness" of a judgment or that it is against the weight of evidence would not be an appeal on "a question of law". Other judgments make that clearer: see *Ormwave Pty Limited v Smith* [2007] NSWCA 210 at [12] and following and the cases cited therein; *Haider v JP Morgan* [2007] NSWCA 158; and see *Collector of Customs v Agfa-Gaevert* (1996) 186 CLR 389; [1996] HCA 36 at 395 et seq.

23 The difficulty for practitioners and the Court is that where it is alleged that there is no evidence for a finding, then that is a question of law and can be the basis of leave to appeal. Where, however, there is some evidence of the conclusion, but the evidence is unbelievable, improbable, against the weight of the totality of evidence, or so slender as not to satisfy even the lower civil onus, the question is of fact. Different considerations may arise where it is said the conclusion of fact was not open or it was irrational or discloses manifest error of law.

24 As it was stated in *R v R*, supra:

> "The distinction between the existence of evidence and the sufficiency or reliability of that evidence provides convenient categories for most purposes of analysis, but in truth that distinction is not absolutely rigorous. This does not invalidate the distinction. It simply means that it is to be applied with due regard to its limitations; what is involved is a matter of judgment rather than calculation. That, I consider, is what the Court of Appeal in England had in mind in *R v Galbraith* when reference was made to 'borderline cases' which can 'safely be left to the discretion of the judge'. The word 'discretion' was not being used in its widest sense." (Per Gleeson CJ at 84, Maxwell and Wood JJ agreeing.)

25 It is necessary to determine whether the questions identified as grounds of appeal by the plaintiff are, or raise, questions of law and whether they display errors of law.

Evidence before the Court

26 As earlier stated, the plaintiff seeks leave to file, read and rely upon an Affidavit of Mr Johnston of 28 February 2017, which seeks to deal with questions of fact before NCAT, presumably for the purpose of disclosing that the evidence before NCAT was "misleading".

27 The evidence is not fresh. It concerns the height of a wall and the capacity to observe the area of the spa and decking from outside Lot 1. There is no reason why it could not have been adduced, or sought to be adduced, before NCAT or, indeed, before the Adjudicator.

28 Before NCAT (and the Adjudicator) photographic evidence was adduced of the spa and decking, which included some parts of the wall.

29 It is relevant to recite the By-laws that are said to apply to the dispute between the parties:

> "5 Damage to common property
>
> (i) an owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the Owners Corporation.
>
> …
>
> 17 Appearance of Lot
>
> (i) the owner or occupier of a lot must not, without the prior written approval of the Owners Corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building."

30 On or about 15 August 2013, a special By-law was passed conferring on Lot 1 the privilege of attaching particular common property, and affixing works to it, to the exclusive use of the owners of Lot 1. There were currently irrelevant conditions placed upon it, going to engineering issues.

31 After some correspondence amongst the unit holders of the plaintiff, one of those unit holders, Parridale Pty Ltd issued a Summons in the New South Wales Land and Environment Court to restrain the defendants from carrying

out further works. The Summons was supported by an Affidavit that included photographs.

32 An undertaking was given by the defendants to the New South Wales Land and Environment Court on an interlocutory basis which was to expire on 12 September 2014.

33 On 27 August 2014, the Owners Corporation wrote to the defendants alleging a breach of By-law 17 (recited above).

34 On 11 September 2014, Parridale Pty Ltd discontinued the proceedings before the New South Wales Land and Environment Court and agreed to pay the defendants' costs of those proceedings. As a consequence, either by the withdrawal of the proceedings or the effluxion of time, after 12 September 2014, the undertaking to the New South Wales Land and Environment Court expired.

35 Warringah Council had confirmed that the construction to which the plaintiff takes objection was an exempt development and did not require Council approval or action. Thereafter, the dispute proceeded to mediation and then to the current proceedings, as already outlined, namely the Application to the Adjudicator, appeal to NCAT and appeal to this Court.

36 The Court should note the Adjudicator's Decision (Exhibit AJ-005). It is appropriate to recite paragraphs [22] – [28] of that determination.

> "22 From all of the material on file and the considerations mentioned above, I am not persuaded that there is any significant breach of the By-laws in the installation of the spa and its associated deck.
>
> 23 The only other issue is whether as now installed it is '*in keeping with the appearance of the rest of the building*'. From the photos supplied by the respondent, spa and deck are small, the spa being only 2m square. The colour seems to be a close match to that of the building and it has an unobtrusive cover when not in use.
>
> 24 Although a Mr Marchese, architect, has opined that the spa is 'totally out of character with the minimalist design of the building' I am unable to agree with him. The photos available to me suggest a small item which does not detract from the building at all.
>
> 25 Mr Johnston of lot 2 asserts that his amenity will be diminished because the spa is visible from his lot and there might be noise. If the use of the spa does cause him nuisance or annoyance he has a remedy under the By-laws.

> 26 I observe that all of the evidence from lot owners proffered by the Owners Corporation has a similarity about it which detracts from its persuasive power.
>
> 27 The narrative account submitted on behalf of the respondent indicates that very strong, perhaps irrational, feelings have been generated by quite a small item. It is said that Mr Johnston turned a hose on the respondents' workmen and that Mr Probert engaged in a scuffle with Mr Nicholls. These do not go directly to the merits of the case for either party but might show that perspective has been lost.
>
> CONCLUSION
>
> 28 Although the case for the Owners Corporation is well presented and argued as convincingly as circumstances permit, I cannot be satisfied that there is a serious enough breach of any by law nor provision of the Act to warrant an order that the spa and deck be removed."

37 One other aspect should be recited. First, a directions hearing before this Court occurred on 7 September 2016 in which the Court made orders for evidence and submissions. The hearing was first listed for 5 December 2016.

38 On 30 November 2016, the Court vacated the hearing listed for 5 December 2016 on account of the late service of evidence and submissions by the plaintiff and ordered that the plaintiff pay the defendants' costs thrown away as a result of the vacation of the hearing.

39 On 30 January 2017, a further directions hearing in the proceedings occurred for which the plaintiff's solicitor arrived late and, at the Court, sought leave to file further evidence. Leave was refused and the plaintiff was ordered to pay the defendants' costs of the day.

40 The evidence sought to be adduced, being the evidence of Mr Johnston in the Affidavit of 28 February 2017, is, in effect, the evidence that was rejected by the Court on 30 January 2017 and which was directed to be served but was not, as a result of which the original hearing date was vacated.

41 First, the evidence that is sought to be adduced could have been adduced before the Adjudicator, before NCAT, and could have been sought to be adduced before the Court in accordance with the directions given by the Court on 7 September 2016. Apart from the attempt to adduce the evidence in a manner that is inconsistent with the duties imposed upon litigants and legal practitioners (and the Court) by s 56 of the *Civil Proceedings Act 2005* (NSW), and the following provisions, there are more fundamental problems with the plaintiff's attempt to produce the evidence.

42 Subject to the grant of leave, an appeal to this Court may be taken "on a question of law" against an NCAT Decision. A fundamental issue arises as to the relevance of any further evidence relating to the structure or appearance of the wall on any question that is or may be raised.

43 Manifestly, the further evidence that is sought to be adduced goes to a question of fact. Some questions of fact arising as a result of a mixed question of fact and law or that are necessary in the determination of a question of law may be raised in the Court on an appeal. The material sought to be adduced in the evidence of Mr Johnston is not in that category.

44 It may be that the evidence goes to the issue of whether evidence before NCAT was "misleading" or whether there was a "breach of the rules of procedural fairness". The material may be directly or indirectly relevant to such an issue.

45 The circumstances of the manner in which the evidence was adduced are such that the Court is minded not to grant leave to adduce the evidence. Further, it is only marginally relevant, and of little or no probative value to any question of law raised in the proceedings. Nevertheless, the Court is minded to allow the further evidence to be adduced for a purpose confined to that for which it is, or may be, marginally relevant, namely, whether the evidence before NCAT and or the Adjudicator was misleading or whether there was a breach of the rules of procedural fairness.

Submissions of the plaintiff

46 The plaintiff submits that leave to appeal should be granted because: the appeal is based on more than that the NCAT Decision is arguably wrong, but that it was such as to give rise to an injustice because it was based on errors that are "plain and readily apparent" and "central to the Tribunal's Decision". Further, the plaintiff submits that the appeal involves an issue of principle, namely that the Decision was based on misleading evidence and an issue of public importance, being the proper interpretation of By-law 17.

47 The written submissions of the plaintiff seek to itemise, for the first time, what are said to be errors of law or questions of law, being: the failure to provide proper reasons; NCAT identifying the wrong issue or asking itself the wrong

question; NCAT applying the wrong principle of law; denial of procedural fairness; failure to take into account relevant considerations mandated by the Act or its jurisdiction; NCAT took into account an irrelevant consideration; a finding of fact on which there was no evidence; and irrationality, being a decision so unreasonable that no reasonable decision-maker could reach it.

Ground 1: Failure to give reasons or sufficient reasons is the meaning of By-law 17

48 The plaintiff submits that a central issue in the proceedings before NCAT was the meaning of By-law 17. Further, the plaintiff pointed to submissions before NCAT in which it alleged that the Adjudicator did not have regard to the terms of By-law 17. The plaintiff relies upon a broad interpretation of the words in By-law 17, which is the By-law requiring work to be "in keeping with the rest of the building". The plaintiff relies on the Decisions of NCAT (or its predecessors) in *Collingridge v The Owners SP5374* [2009] NSW CTTT 301 and *Weintroub & Weintroub v Ellison* [2002] NSW RT 32, the latter of which, in particular, refers to the By-law requiring a broad interpretation and referring to that which is "not in harmony with the particular features of the rest of the building, whether they be architectural, structural or landscaping."

49 The plaintiff refers to the fact that NCAT, in its reasons for Decision, did not identify the meaning of By-law 17 and, purportedly did not give any consideration to or address the meaning of the words in that By-law. Further, the plaintiff refers to the NCAT Decision at [103] which refers to "the dominant concern of the lot owners" being "the conduct of the [defendants] and not the question of whether the external spa bath and timber decking was not in keeping with the building".

Consideration of Ground 1

50 The Adjudicator, in relation to the breach of By-law 17, after referring to the complaint about the use of services of the common property without permission, says that the Owners Corporation maintained that the spa and decking was "contrary to the By-laws; is visible from outside the lot; and is not in keeping with the appearance of the structure": Adjudicator Decision at [18]. At [23] and [24], as quoted above, the Adjudicator, after referring to whether the spa and decking was in keeping with the appearance of the building said:

> "From the photos supplied by the respondent, spa and deck are small, the spa being only 2m². The colour seems to be a close match to that of the building and it has an unobtrusive cover when not in use. Although a Mr Marchese, Architect, has opined that the spa is 'totally out of character with the minimalist design of the building' I am unable to agree with him. The photos available to me suggest a small item which does not detract from the building at all."

51 In its Decision, NCAT summarises the evidence of both the applicant and respondent in relation to the alleged breach of By-law 17 at [92]-[96]. The Tribunal then deals with the evidence and the submission.

52 At [97], NCAT notes that perspective has been lost by the parties and confirms the Adjudicator's observation in that regard. NCAT then makes clear that the issue of a breach of By-law 17 is not a "subjective" test and does not allow for an assumption that something that is not to the taste of other occupants is, for that reason, a breach of By-law 17. At [101], NCAT refers to the somewhat trite proposition that it is for the plaintiff to prove that the defendants maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is "not in keeping with the rest of the building".

53 NCAT found that the Adjudicator did not err in being unpersuaded by the lay evidence advanced on this issue: at [102] of the NCAT Decision. NCAT then refers to the dominant concern, on which comments of NCAT the plaintiff relies, and the fact that the only document seeking to remedy a breach was a Notice to Comply, which was, thereafter, not taken to its logical conclusion. NCAT also confirmed the finding that the lay evidence, because of the similarity in it, had less persuasive force than it might otherwise have had.

54 NCAT in then dealing with the "expert opinion" of Marchese Partners (the comments in which are characterised as "adamantine"), referred and cited the Expert Code of Conduct applicable to NCAT and determined that the Marchese Partners report fails to abide by clauses 11, 12, and 13 of that Code: see [110]-[118].

55 In particular, NCAT took the view that the Marchese Report was the type of "oracular pronouncement" described as impermissible in expert testimony in the comments of the Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305; *HG v R* (1989) 197 CLR 414;

[1999] HCA 2 at [44]. NCAT, in its Decision, deals with the application of By-law 17 at [119]-[163].

56 At [132] of its Decision, NCAT concludes, on the basis of the evidence before it and on the balance of probabilities:

> "(1) The external spa bath and timber decking is not easily viewed from within the strata scheme whether the observer is standing on common property adjacent to the location in which it is installed or upon one of the balconies in other lots overlooking the Respondents' lot.
>
> (2) The external spa bath and timber decking is not easily viewed from outside the strata scheme, whether from the viewpoint of neighbouring properties, or from the path which leads along its boundary line abutting the foreshore and leading to the beach below.
>
> (3) The location of the external spa bath and timber decking within the Respondents' lot obscures it partially from view by observers likely to be on common property.
>
> (4) The location of the external spa bath and timber decking within the Respondents' lot obscures it wholly from view by observers likely to be outside the common property from any vantage point available to them.
>
> (5) Other occupants of the strata scheme do not make use the common property directly in front of the Respondents' lot, and any direct view of the external spa bath and timber decking by an observer standing on common property is unlikely to occur when regard is had to the use of the common property made by lot owners in the scheme.
>
> (6) The form and colour of the external spa bath and timber decking exhibited by the photographic material before the Tribunal is consistent with the form and colour scheme exhibited by the building which constitutes the common property of the strata scheme, and the form and structure of the external spa bath and timber decking may fairly be characterised as 'minimalist' design.
>
> (7) The external spa bath and timber decking being intended for use in a beachside setting is not, contrary to the contentions of the applicant, totally out of character with the minimalist design of the building and thus the rest of the character of that building or the public nature of the common area adjacent at the ground level directly in front of the building.
>
> (8) No evidence is available to demonstrate that the presence of the external spa bath and timber decking has had, or will have, any effect upon the market value of the lots in the strata scheme."

57 It is not immediately apparent how it is said that the criteria utilised by the Adjudicator and by NCAT, which confirmed the Adjudicator's Decision and finding, were criteria that were irrelevant on any interpretation of By-law 17, or failed to take into account a relevant consideration on the issue of whether the works were in keeping with the rest of the building. More importantly, it is not clear or immediately apparent how the plaintiff suggests that the allegedly

unidentified interpretation of By-law 17 would impact upon the considerations regarded as relevant and which the Adjudicator or NCAT was required to determine.

58 It is unnecessary for a tribunal to express a considered view on the interpretation of By-law 17 if the construction of By-law 17 is uncontroversial. It is necessary for the plaintiff to demonstrate that the test applied by NCAT in determining whether the works were in keeping with the rest of the building was an error of law or the wrong test. The test utilised by both the Adjudicator and NCAT was a broad test that compared works with the rest of the building and the likelihood that persons would observe the works from outside Lot 1.

59 The phrase "in keeping with the rest of the building" is ordinary English, which bears neither a technical or legal meaning. It requires the Adjudicator and NCAT to undertake an evaluative exercise to reach a conclusion as to the works (being the spa and decking) that have been undertaken.

60 The approach of the Adjudicator, confirmed by NCAT, and the subsequent approach of NCAT, does not disclose an error in approach to the evaluation that was required. While, in a hypothetical or general sense, a failure to provide sufficient reasons would be an error of law, the plaintiff has not disclosed an insufficiency of reasons in this regard. Both the Adjudicator and NCAT, in their decisions, disclose the process by which the conclusion was reached. If the wrong test were applied, it is not apparent from the grounds of appeal or submissions of the plaintiff.

Ground 2: The Tribunal erred as to the construction of the meaning of By-law 17

61 In some respects, this is a repeat of some aspects of that which is relied upon by the plaintiff under Ground 1. It is not apparent that the Adjudicator or NCAT applied an interpretation that was anything other than "broad".

62 Fundamentally, the ground is somewhat misstated. More accurately, the ground depends upon a submission that the Adjudicator and NCAT were bound by the "uncontested evidence" of Mr Marchese.

63 Each of the Adjudicator and NCAT referred to the Marchese Report and his expression of opinion. Neither the Adjudicator nor NCAT were impressed with the Marchese Report or the opinion expressed by him.

64 Neither the Adjudicator nor NCAT is bound by the opinion expressed by Mr Marchese, whether other "expert evidence" was or was not adduced. In its submissions under Ground 2, the plaintiff refers to a passage at [124] of NCAT's reasons for Decision in which NCAT considered "the dominant architectural features of residential buildings and structures within the neighbourhood". The overwhelming basis upon which NCAT determines the appeal was to confirm the view expressed by the Adjudicator and summarised in the NCAT Decision at [120] – [123]. The quoted passage from [124] of NCAT's reasons for Decision is taken out of context, particularly when considered with that opinion in the Marchese Report concerning other buildings in the area: see NCAT Decision at [93(3)], where NCAT summarise that aspect of the Report.

65 NCAT, in its reasons for Decision, summarised the approach of the Adjudicator ([119]-[123]). The passage at [124] is an example of the kind of basis in fact upon which Mr Marchese could have relied in determining whether the character of the building was "minimalist", by comparison to other residential buildings in the neighbourhood. The context refers to the reliance by Mr Marchese on other buildings in the area.

66 Further, it is a preview to NCAT's consideration that the suggestion of the plaintiff that the installation of the spa works had a substantial impact on the value of the property: see [126]-[131]. The factual considerations that NCAT took into account in determining whether the spa and decking was "in keeping with the rest of the building" are those that are recited above and found in the subparagraphs to [132] of NCAT's reasons for Decision. Those findings were made on the balance of probabilities and do not refer to other buildings in the neighbourhood.

67 The passage at [124] of NCAT's reasons, on which the plaintiff relies, is a reference to that which, in its view, should have been in the Marchese Report,

not a consideration that NCAT, itself, took into account in determining the question posed in By-law 17: see above reference to [93(3)] at Ex X2, p 736.

68 As a consequence of the foregoing, this ground of appeal is not made out. Further, the ground does not, in the context in which it is raised, raise a question of law.

Ground 3: No evidence to support finding that works were in keeping with the rest of the building

69 The plaintiff submits that it relied, before the Adjudicator and NCAT, on the Marchese Report which opined that the spa and decking were not in keeping with the rest of the building. Further, the plaintiff asserts that the defendants did not rely on any evidence that went to any factor (e.g. form and colour of the works) upon which either the Adjudicator or NCAT could rely to establish that the works were consistent or in keeping with the rest of the building.

70 First, the defendant's did not have to establish that the works were consistent with the rest of the building. The plaintiff was required to establish, on the balance of probabilities, that, when viewed from outside the Lot, the works were not in keeping with the rest of the building. Secondly, the defendants relied upon significant evidence.

71 The defendants adduced evidence by the reading of an Affidavit of the plaintiff (that was not otherwise read) and the adducing of evidence including evidence of photographs of the works from outside the building and outside Lot 1.

72 The Adjudicator and NCAT are, in this area, akin to specialist Tribunals, the opinions of which are to be given appropriate weight. It is for the Adjudicator, at first instance, and NCAT on the first appeal, to determine, each for itself, whether the works are in keeping with the rest the building.

73 As earlier stated, the determination of whether the works are or are not in keeping with the rest of the building is an evaluative judgement, based on the totality of the evidence. Once there is evidence upon which either the Adjudicator or NCAT could rely in order to reach that evaluation, the ground does not raise a question of law: see *Australian Gas Light Company v Valuer-General*, supra at [20], in sub-paragraph [4].

74 Once there is evidence that is rationally probative and may be considered in the evaluation, the determination by NCAT that it was not satisfied that the works were "not in keeping with the rest of the building" is a question of fact and does not involve a question of law.

Ground 4: NCAT's alleged denial of the plaintiff's opportunity to cross-examine as a breach of the rules of procedural fairness

75 The failure of a tribunal that is required to act judicially to allow cross-examination may, but will not always, constitute a denial of procedural fairness. A party to proceedings is entitled to a reasonable opportunity to prepare and to present its case, including an opportunity to test the case presented against it.

76 To deny a party such a reasonable opportunity is to deny such party procedural fairness: *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 (per Deane J, as a member of the Full Court of the Federal Court). As Deane J makes clear, while the denial of a reasonable opportunity is a denial of procedural fairness, it is never the obligation of a tribunal to ensure that the party makes best use of the opportunity provided.

77 The transcript of the proceedings before the Adjudicator discloses that the vast majority of the time taken in the proceedings was taken up with the cross-examination by the plaintiff's representative of Mr Nicholls, the first defendant. As a matter of fact, it cannot be said that the plaintiff was denied the opportunity, or a reasonable opportunity, to cross-examine the defendant. The cross-examination included lengthy questioning on the height of the wall.

78 NCAT did deny to the plaintiff the opportunity to cross-examine on certain photographs that were otherwise not permitted to be adduced into evidence, because of the failure by the plaintiff to adhere to the directions of the Tribunal.

79 The plaintiff refers to evidence of the first defendant that is said to be internally inconsistent. The evidence needs to be seen in context. The cross-examination occurs at p 75 of Ex X2 (Volume 2 of the Court Book) and relates to the height of the wall at the front of the building.

80 First, the plaintiff, in these proceedings, suggests that NCAT issued a warning to the first defendant under s 128 of the *Evidence Act 1995* (NSW). The

warning was given by the NCAT member in an unusual manner and the transcript is, in many respects, indistinct, which makes the task more difficult.

81 Nevertheless, the "warning" was not a reflection of the view of the NCAT member but a warning based upon the proposition, put in questioning from the plaintiff, that the first defendant was being untruthful. As a consequence, the NCAT member considered he was under an obligation to warn the first defendant and, it seems, suggested that he could object to answering the questions and a s 128 Certificate would be granted. It is not absolutely clear how that could occur, given that s 128 excludes the use of the Certificate in a prosecution for perjury, which, on the allegation in cross-examination as I have understood it, had already occurred.

82 Nevertheless, it is clear that the evidence of the first defendant was not emphatic and was an estimate based upon the first defendant's observations. The first defendant estimated the height of the walls and at Ex X2, p 785, line 25, in answer to a question as to whether someone standing on the parallel path, in front of the building, could see the spa, the first defendant said:

> "So what I was relying on is we obviously see out there from our apartment when people walk along past that wall on the outside to come into our local flats. Generally, you can see people's tops and heads, so based on that I was making an estimate based on the average height of the person. That -that - I don't obviously have a calculation with me or a measurement with me, so I'm basing it [on] some judgement now."

83 The same question and answer was given on a number of occasions and the same question was sought to be put on further occasions, which repetition was disallowed. At p 787 of Ex X2 the first defendant agrees that the wall, at least at one point, is the height of two sandstone blocks and that the wall, at that point, "was probably 3 foot tall".

84 On a number of occasions the first defendant makes clear that he is estimating heights and does not have measurements with him. On the other end of the wall, according to the evidence of the first defendant, the wall is at least four other sandstone blocks taller: Ex X2, p 788, line 917. Later on that page, the first defendant makes clear that he is estimating and he doesn't know the number precisely.

85 Further, the first defendant accepts that a lot owner or resident or a guest of such a person can walk on the grassed area adjacent to Lot 1 as it is common property and, if walking there, could easily see the spa: Ex X2, p 800, line 23 and following.

86 The reliability and veracity of a witness is a matter of fact and, generally, not a matter on which an appeal court will interfere. Such an estimate of the reliability or credibility of a witness is not, without more, a question of law.

87 The plaintiff's submission, to the extent that it relies upon critical reliability findings, is not an appeal on a question of law. Further, it is clear that NCAT provided the plaintiff with an opportunity to cross-examine the first defendant on the height of the wall. In other words, the plaintiff received a reasonable opportunity to test the evidence of the first defendant and there is no denial of procedural fairness.

88 It should be recalled that the spa and decking is installed at the rear courtyard of Lot 1 which, in turn, is at the rear of the building. The rear of the building backs onto the beach. The height of the spa from the beach is much taller than the height from the graded or sloping pathway that leads to the rear entry of the building itself.

89 There are photographs of the rear of the building; the rear common area of the building; and the wall between the pathway and the common area above the pathway. As earlier stated, the pathway inclines and the top of the wall is straight, so the height of the wall from the pathway reduces as the pathway rises. Nevertheless, from the beach the height of the wall will be relatively constant.

90 The difficulty with the plaintiff's complaint on this ground is that it concerns the degree to which the spa and decking can be seen from outside Lot 1. That was, it seems, never the central issue before either the Adjudicator or NCAT.

91 The provisions of By-law 17 render the evaluation of whether the works are "not in keeping with the rest of the building" a relevant question only on the assumption that the works are capable of being viewed from outside Lot 1. As a consequence, if the works could not be seen from outside Lot 1, the question

of whether the works were not in keeping with the rest of the building would never arise.

92 The Adjudicator and NCAT each came to the view that the works cannot be **easily** seen from outside the premises. In that view, they were entitled to rely upon the proposition that a member of the general public would not usually walk along the rising path unless they were seeking to enter the building and the view from the common area is, to some extent, either a view available on straining or a view that is camouflaged to a considerable amount by the plantings. Each of those factors can be seen from the photographs that were in evidence.

93 Whether or not one could see the works easily is a question of fact. On the other hand, as relevant to this ground of appeal, the plaintiff was not denied an opportunity to cross-examine and to test the first defendant. To the extent the plaintiff complains that the photos were disallowed, it is a complaint that has no merit. The plaintiff had the opportunity to file and serve evidence of which opportunity the plaintiff did not take adequate advantage.

Ground 5: The rejection of the Marchese Report

94 The plaintiff concedes that the Decision of NCAT came to the conclusion that the Marchese Report was not independent and that Mr Marchese adopted the role of an advocate. Further, NCAT came to the view that the report failed to demonstrate a proper factual basis for assumptions expressed in the report and utilised for arriving at the ultimate conclusion, which was an opinion, albeit from an architect, that the design of the spa was out of character with the minimalist design of the building.

95 Notwithstanding that Mr Marchese was not required for cross-examination by the defendants and that no other “expert evidence” was adduced, there was significant evidence, by photographic means and, by Affidavit on the colour of the spa and the building; the visual impact of the spa on the building; and the design of the building at the rear, where the spa had been installed.

96 Notwithstanding the existence of the report of Mr Marchese, each of the Adjudicator and NCAT were entitled to come to their own evaluation of the

central question in the proceedings, namely, whether the works (the spa and decking) was in keeping with the rest of the building.

97 This ground of appeal confuses a failure to consider the evidence contained in the Marchese Report and the consideration of the Marchese Report, and the rejection of the opinion expressed and the formation of an opinion that is different from that of Mr Marchese. In this task, both the Adjudicator and NCAT were involved in an evaluation of facts.

98 There was no denial of procedural fairness associated with the manner in which either the Adjudicator or NCAT considered the report of Mr Marchese.

99 The plaintiff relies upon the comments of Schmidt J in *Coote v Kelly* [2012] NSWSC 219 at [91]. The plaintiff's purpose in referring to those comments is not clear and the relevance to the case put by the plaintiff is even less clear.

100 The comments upon which the plaintiff relies are comments relating to the need for an expert to state the reasoning by which the expert conclusion flows from the facts proved or assumed by the expert in order to reveal that the opinion is based on appropriate expertise. In the absence of such reasoning, the expert opinion is inadmissible. NCAT (and the Adjudicator) admitted the Marchese Report, but, having read it, came to an evaluation of the work and whether it was in keeping with the rest of the building different from Mr Marchese.

101 The Marchese Report was admitted and considered. The report was summarised by NCAT in its Decision. The report of Marchese Partners dated 9 October 2014 was admitted before the Adjudicator and, as a consequence, was material that was in evidence before NCAT.

102 The factual premise, upon which the allegation of a denial of procedural fairness depends, has not been established. As a consequence, the ground does not arise. This ground, in light of that failure of underlying factual material, does not raise a question of law that is arguable or otherwise than untenable.

Ground 6: Failure to comply with s 38(5) of the Civil and Administrative Tribunal Act denying the plaintiff an opportunity to cross-examine the first defendant

103 This ground is a repeat of Ground 4 except in a statutory context. The provisions of s 38(5)(c) of the *Civil and Administrative Tribunal Act* codify or promulgate in statutory form the principles summarised by Deane J in *Sullivan*, supra. For the same reasons that Ground 4 must fail, so too Ground 6 must fail.

Ground 7: The Tribunal was led into error in relying on the first defendant's misleading evidence as to the height of the boundary wall at the rear of the property

104 This is, in different wording, almost precisely the same ground as that upon which the plaintiff relied in relation to earlier grounds, suggesting that the evidence of the first defendant was misleading. That allegation has been dealt with by the Court. To the extent necessary, those comments are repeated.

105 As is clear from the summary of the first defendant's evidence on the height of the wall in the Decision of NCAT: Ex X2, p 738, line 967, the defendants' evidence was that the height of the wall varied from 4 to 9 foot. Even so, as earlier explained in these reasons for judgment, the oral evidence of the first defendant was an estimate of the height of the wall.

106 The plaintiff has not established that the Tribunal was misled. The plaintiff has not established that the boundary wall height is different from between 4 and 9 foot, depending upon where on the adjacent graded walkway one is standing.

107 Nevertheless, it is clear from the photographs that are in evidence that the highest part of the wall, relative to the walkway, is directly behind Lot 1 and the spa and decking. The lowest height, relative to the walkway is at that part of the boundary wall that is farthest away from Lot 1. The spa and decking has, as earlier stated, plantings surrounding it that obstruct the view, at least partially, from the lower parts of the wall. The foregoing is clear from the photographs that were before NCAT and before the Adjudicator.

108 Further, to the extent that the allegation is made in the submissions of the plaintiff that the evidence of the first defendant was "false", that allegation is not established. On the contrary, the evidence of the first defendant was, in this

respect and as earlier stated, largely an estimate. At no stage does the evidence before the Court establish that the evidence of the first defendant before either the Adjudicator or NCAT was "false".

109 Further NCAT does not find that the spa cannot be viewed from outside the defendants' Lot. On the contrary, if it were to have so found, it would have been unnecessary for NCAT to have considered whether the spa and decking was in keeping with the rest of the building.

110 Assuming without deciding that the spa and deck can "easily be observed by a person standing on the path outside the defendants' lot", the evaluation of NCAT and the Adjudicator was that the spa and decking was in keeping with the rest of the building and that, therefore, no breach of By-law 17 was established. More accurately, the determination of NCAT was that the plaintiff had not established that the spa and decking was not in keeping with the rest of the building.

Ground 8: NCAT's decision not fair and equitable

111 Leaving aside for present purposes an allegation that an administrative decision is irrational, capricious or arbitrary or unreasonable in the *Wednesbury* sense, whether NCAT's Decision was or was not "fair and equitable" is not an issue of law and the ground does not raise a question of law.

112 The mere recitation of the ground manifestly discloses that it is not raising an appeal on a question of law or involving a question of law.

113 This ground must also be rejected as a basis for orders of the Court on appeal.

Conclusion

114 As can be seen from the foregoing, each of the grounds raised by the plaintiff in this appeal has been rejected either on the basis that it is unarguable, or on the basis that it does not raise "a question of law" in accordance with that which is the jurisdictional gateway to s 83(1) of the *Civil and Administrative Tribunal Act*.

115 Although some of the grounds may, in a hypothetical or theoretical sense, raise on appeal "a question of law", such a question depends upon a conclusion of fact that has not been established by the plaintiff in the proceedings before the

Court. The Court refers, particularly, to issues associated with procedural fairness or the rejection of evidence.

116 Further, on the issue of the rejection of evidence, NCAT is not bound by the rules of evidence and no legal error is committed by the rejection of evidence on a basis that is rational and that is not unreasonable, capricious or arbitrary. The plaintiff has not disclosed that the rejection of evidence, to the extent evidence was rejected, was in the latter category.

117 Further, the plaintiff has not disclosed or established that NCAT's Decision, was affected by applying a wrong test or considering irrelevant material or not considering relevant material. To the extent that the plaintiff relies upon the proposition that neither the Adjudicator nor NCAT expressly expounded or adumbrated a construction of By-law 17, such an allegation has no effect, unless it can be said that the test applied by either the Adjudicator (at first instance) or, NCAT (on appeal) was wrong and involved, necessarily, an incorrect application of By-law 17. The Court is not satisfied that the plaintiff has established such a proposition or, in any way, arguably sought to establish such a proposition.

118 The conclusion of the Court is that no issue of principle is involved in any ground raised by the plaintiff. Further, no issue of public importance or any matter that discloses an injustice, reasonably clear or otherwise, has been established. The conclusion of the Court is that the plaintiff has raised no arguable question of law that merits the grant of leave.

119 The Court makes the following orders:

(1) Leave to appeal refused;

(2) The plaintiff's summons is dismissed;

(3) The plaintiff shall pay the defendants' costs of and incidental to the proceedings; and

(4) The proceedings are dismissed.

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