Supreme Court

New South Wales

Case Name:	Chen v The Owners – Strata Plan No 55792
Medium Neutral Citation:	[2020] NSWSC 151
Hearing Date(s):	12 December 2019
Date of Orders:	28 February 2020
Decision Date:	28 February 2020
Jurisdiction:	Common Law
Before:	Wright J
Decision:	(1) Leave to appeal is refused. (2) The plaintiff's summons filed on 28 June 2019 is dismissed. (3) The plaintiff is to pay the defendant's costs as agreed or assessed.
Catchwords:	APPEAL– civil – application for leave to appeal from decision of NCAT Appeal Panel – s 83 Civil and Administrative Tribunal Act 2013 (NSW) limited to appeal on a question of law by leave – competence and leave to appeal – whether questions of law – no questions of law raised –leave to appeal refused
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Civil Procedure Act 2005 (NSW) Conveyancing Act 1919 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Regulation 2010 Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited:	B & L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481; [2008] NSWCA 187 Council of the Municipality of Woollahra v Sved [1998] NSWCA 227 Davis v NSW Land and Housing Corporation [2016] NSWCA 325 Doppstadt Australia Pty Limited v Lovick and Son Developments Pty Limited (No 2) [2014] NSWCA 219 Doyle v Hall Chadwick [2012] NSWCA 175 PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48 Wigmans v AMP Ltd [2019] NSWCA 243; (2019) 373 ALR 323
Texts Cited:	Moses N J, Strata Titles (2nd Ed) (Thomson Reuters (Professional) Pty Ltd, Sydney)
Category:	Principal judgment
Parties:	Yan Ping Chen (Plaintiff) The Owners –Strata Plan No 55792 (Defendant)
Representation:	Counsel: Yan Ping Chen (Plaintiff –self represented) D D Knoll AM (Defendant) Solicitors: Yan Ping Chen (Plaintiff –self represented) Doyle Edwards Anderson Lawyers Pty Ltd (Defendant)
File Number(s):	2019/200861
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Appeal Panel
Citation:	[2019] NSWCATAP 135
Date of Decision:	04 June 2019
Before:	G K Burton SC, Senior MemberP H Molony, Senior Member
File Number(s):	AP 19/06671

JUDGMENT

1 By a summons filed on 28 June 2019, the plaintiff, Ms Chen, in effect sought leave to appeal from a decision of the Appeal Panel of the Civil and Administrative Tribunal of New South Wales given on 4 June 2019.

2 This summons was initially allocated to the Court of Appeal but, on 19 August 2019, the matter was transferred to the Common Law Division. A sealed copy of the summons and the supporting affidavit were served on the solicitors for the defendant, The Owners – Strata Plan No 55792 (the Owners Corporation) on 3 September 2019. It does not appear that a sealed copy of the summons or the affidavit had been served on the Owners Corporation prior to that time.

3 By a notice of motion filed on 13 September 2019, the Owners Corporation sought an order that the appeal be dismissed as incompetent, and related orders. On 10 December 2019, the Owners Corporation filed an amended notice of motion which sought an order that leave to appeal be refused, in addition to the orders in the original notice of motion.

4 The amended notice of motion came on for hearing before me on 12 December 2019.

5 For the reasons set out below, I have decided that leave to appeal should be refused and, in these circumstances, it is appropriate to dismiss the summons with costs.

Background

6 The present proceedings concern three lots owned by Ms Chen in a strata development, Strata Plan No 55792, in Pitt Street, Sydney. One of the lots is a penthouse on the 52nd floor of the building. The other two lots are each car parking spaces, in the garage area of the building.

Proceedings at first instance in the Tribunal

7 Ms Chen brought proceedings in the Civil and Administrative Tribunal of New South Wales, or NCAT, seeking various forms of relief including, without being exhaustive: repairs to prevent, and remediation of damage caused by, the entry of water into her penthouse; the provision of replacement or additional security keys for the common property and penthouse and remote access

devices for the car parking spaces; payment of the costs associated with moving out of the penthouse while any repairs and remediation were carried out; and orders requiring the windows of the penthouse to be cleaned by the Owners Corporation. It appears that the window cleaning and other claims for relief, having been the subject of earlier proceedings, were not pressed in the points of claim submitted by Ms Chen or were not supported by any evidence at the hearing at first instance.

8 The matter was initially heard by a single Member of NCAT, on 20 August 2018. According to the Appeal Panel's reasons for decision, *Chen v Owners Strata Plan No. 55792* [2019] NSWCATAP 135, on 23 January 2019, the Member made orders in effect requiring the Owners Corporation:[1]

(1) to take steps in relation to entry of water into the penthouse, including arranging for appropriately qualified engineers and consultants to prepare a scope of works, quotations and tender process based on an existing engineering report dated 20 April 2018;

(2) to issue Ms Chen with three replacement security keys to access her penthouse and two garage remote access devices to access her car spaces on condition "that [Ms Chen] must comply with, and take reasonable steps to ensure that her family members comply at all times, in relation to the use of the security keys and garage remotes with first, the by-laws of SP55792 and secondly, the restricted [sic] covenant on the common property title".[2]

9 The other relief sought was refused.

Proceedings in the NCAT Appeal Panel

10 On 11 February 2019, Ms Chen lodged an internal appeal to the Appeal Panel of NCAT against the Member's decision under s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act). Section 80(2) of that Act provides:

> "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."

[1] Chen v Owners Strata Plan No. 55792 [2019] NSWCATAP 135 at [2] – [3].

[2] The restrictive covenant on the title was set out in the Appeal Panel's decision at [9] and is quoted in full later in these reasons.

11 Since the decision appealed against was a decision of the Consumer and Commercial Division of NCAT, cl 12 of Sch 4 to the NCAT Act also applied. That clause states:

> "An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a [Consumer and Commercial] Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> > (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)."

12 According to the Appeal Panel, at [17] of their reasons, the "grounds for the challenge" relied upon by Ms Chen were, in summary and leaving aside costs:

> "(1) The consultants should be ordered to include the engineer who provided the expert report in April 2018, the appellant [Ms Chen] was entitled to a rectification order for the appellant's internal tiles and waterproofing based on the April 2018 report, to be completed within two years from the date of that report, being 20 April 2020.
>
> (2) The respondent by its building manager should be ordered to provide appropriate alternative accommodation for the appellant and her family during the time taken to repair the property, at the cost of the respondent.
>
> (3) The appellant was to have returned all six security keys and three remote controls to which she said she was entitled, with compensation for lost rental during the time the keys and remotes had been de-activated.
>
> (4) Annual window cleaning must include the appellant's apartment.
>
> (5) The chair and secretary of the strata committee 'must resign from the committee immediately and apologise to all the owners of [the scheme].'"

13 It can be seen that these "grounds for the challenge" are more in the nature of the relief sought on the appeal than grounds of appeal.

14 In addition, in the internal appeal to the Appeal Panel:

(1) Ms Chen challenged the decision at first instance that each party pay her or its own costs; and

(2) both parties sought their costs of the appeal.

15 The Appeal Panel heard the appeal on 2 May 2019 and delivered its decision, together with written reasons for decision, on 4 June 2019: *Chen v Owners*

Strata Plan No. 55792 [2019] NSWCATAP 135. The Panel's conclusions on issues other than costs can be summarised as follows:

(1) there was no error of law by the Member at first instance in relation to the water penetration issue: Appeal Panel reasons at [34];

(2) there was no error of law by the Member at first instance in relation to garage access remote devices issue: Appeal Panel reasons at [35]-[36];

(3) there was an error of law by the Member at first instance in relation to the security keys because the reasons only dealt with garage remote access devices and yet the orders covered security keys, which give access to the common property and thus the penthouse as well: Appeal Panel reasons at [42];

(4) "[t]he other three matters - alternative accommodation, annual window cleaning, resignation of officers of the strata committee - were properly not dealt with by the primary member, because they were not before him at all or (in the case of window cleaning) in that generalised form, or (in the case of the allegation about window clearing in a narrower form) was the subject of an earlier application": Appeal Panel reasons at [43];

(5) there was no basis for a grant of leave to appeal on other issues: Appeal Panel reasons at [46].

16 In relation to the water penetration issue, although the Appeal Panel did not find any relevant error, because Ms Chen sought an end date for completion of the remediation work of 20 April 2020 (as recorded in [17(1)] of the Appeal Panel's reasons) and the Owners Corporation was prepared to consent, without admission, to an amendment to the orders made by the Member at first instance which required the remediation works to be completed by 31 December 2020 (as recorded in [19] of the reasons), the Appeal Panel was prepared to amend the orders at first instance to insert a requirement that the remediation work be completed by the latter date.

17 In relation to costs, after referring to s 60 of the NCAT Act and rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) (the NCAT Rules), the Appeal Panel found that there was no error in relation to the decision of the Member at first instance that each party pay her or its own costs: Appeal Panel reasons at [61]. This was on the basis that, at first instance, Ms Chen had not been successful on many issues but had obtained some relief on the water penetration issue and the garage remote access device issue and there were no offers which might constitute "special circumstances" (as referred to in s 60 of the NCAT Act) such as to justify a costs order: Appeal Panel reasons at [61].

18 The Appeal Panel also concluded that each party should pay her or its own costs of the appeal before the Panel: Appeal Panel reasons at [62]. It was held that certain aspects of the appeal were hopeless but Ms Chen had succeeded on others and, in the circumstances, there were no special circumstances justifying a departure from making no costs order: Appeal Panel reasons at [62].

19 The Appeal Panel made orders on 4 June 2019 as follows:

> "(1) Leave to Appeal is refused to the extent that leave is required.
>
> (2) Appeal is allowed for an error of law.
>
> (3) On a reconsideration of the matter by the Appeal Panel:
>
> (a) vary order 3 made by the Tribunal on 23 January 2019 to delete "three new security keys for access to the Applicant's lot 597 and" before "two garage remotes", and to delete "the security keys and" before "garage remotes";
>
> (b) add a new order "(3A) On or before 12 June 2019, the Applicant will be issued with sufficient activated security keys such that there is on issue to the Applicant a total of six activated security keys for access to the Applicant's lot 597.".
>
> (4) Pursuant to s 63 of the Civil and Administrative Tribunal Act 2013 (NSW), in order 3 change "restricted" to "restrictive".
>
> (5) By consent of the respondent, and without admission by the respondent, vary order 1 made by the Tribunal on 23 January 2019 to add at the end ", such works to be completed by 31 December 2020".
>
> (6) Make no variation to the order concerning costs made at the primary hearing.
>
> (7) Order that each party is to pay her or its own costs of the appeal."

20 Ms Chen decided to appeal from those orders to this Court.

Ms Chen's Supreme Court appeal

21 Ms Chen filed a summons on 28 June 2019 which indicated that she was seeking to appeal against orders 3(b), 4, 5 and 7 made by the Appeal Panel.

22 As she was a party to the internal appeal in the Appeal Panel of NCAT, Ms Chen could appeal from the Appeal Panel's decision to this Court by virtue of ss 82 and 83 of the NCAT Act. Section 82(1)(a) of the NCAT Act establishes that "any decision made by an Appeal Panel in an internal appeal" is an appealable decision of the Tribunal for the purposes of s 83. Section 83 relevantly provides:

> "(1) A party to an … 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.
>
> …
>
> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:
>
> > (a) an order affirming, varying or setting aside the decision of the Tribunal,
> >
> > (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.
>
> ..."

23 It was not in dispute in the present case that the Appeal Panel's decision was made "in an internal appeal" for the purposes of s 82(1)(a) of the NCAT Act or that Ms Chen was a party to an internal appeal. Nonetheless, because of the operation of s 83(1), Ms Chen can only appeal to this Court with the leave of the Court and only "on a question of law".

24 Ms Chen's summons stated that the orders she sought were as follows:

> "Order 3(b): Replace an active third remote with no cost.
>
> Order 4: Must be withdrawn.
>
> Order 5: Relocation of my family during the recertification process within my home.at OC's [Owners Corporation's] cost.
>
> Order 7: OC pay all most costs and losses.
>
> Add: OC is to provide annual windows clean must include Level 52."

25 Under the heading "APPEAL GROUNDS" in the summons, it said "See attachment". This directed attention to a form of affidavit of Ms Chen the substantive part of which was a section described as "Appeal for the decisions from NCAT Internal appeal penal". In addition there were 24 attachments. In the first section, Ms Chen provided detailed background information relating to her claims in 46 numbered paragraphs and then set out in paragraphs numbered 1 to 5 what I understood to be, in substance, her grounds of appeal, together with some submissions. Those paragraphs stated:

> "**I appealing to the decisions**
>
> 1. NCAT Internal Appeal did not make any decision for when OC [Owners Corporation] to provide annual inaccessible and unsafe window cleaning service in the building must include level 52. This is restricted by the Strata

Schemes Management Regulation 2010 schedule 2, 11(2): "The Owners Corporation is responsible for cleaning regularly all exterior surfaces of glass in windows and door that cannot be accessed by the owner or occupier of the lot safely or at all." It is common sense everyone should know and must know if the Act is not written in our by-laws, it still needs to be complied. Especially excluding level 52 when the service is provided to the whole building. The Court has to make a written order. This will resolve any future disputes.

2. Decision 3 did not mention the third remote control. This is a breach of our by-law 13.1. The third remote was obtained legally with a charge of $200 not refundable. SC [Strata Committee] has no right not to replace it when they updated the security system. SC must respect the Court any future actions taken by the SC must have Tribunal order.

3. Decision 4, "in order 3 change 'restricted' to 'restrictive'" is an error of the law. This is restricted by Strata Living Act. Must be withdrawn.

a) The reasons for the decisions point 3, 9,10,12,18,19, 33, 35, 36, 44, 46 and 53: The restricted [sic| covenant is not a law and this restricted by Strata Living Act: "Be aware that Strata Schemes are empowered to make decision about the rules and governance of their scheme. Generally, government and courts cannot intervene or overrule properly exercised decisions". (Page 40) Especially, this document is used for the easements of redevelopment only. Cannot be used on the strata scheme at all.

b) SC rather spend excess amount of time and money at the owner's cost to find documents not even laws that does not apply to this case. SC has tried very hard to delay the process of attending to the serious leaking problem on the roof. All the unnecessary legal cost accumulated is all due to SC's misconduct and breached the Strata Living Act.

c) According to the NSW Strata Living Act:

Common Property: is all the areas of the land and building not included any 'lot'.

Lot: includes a unit, townhouse, parcel, garage that you have a right of ownership over.

Lot owner: a person(s) or company that buys a lot and whose name is shown on the register at the LPMA.

d) The reasons of decision point 10,12, 36 and 38 is against the Strata Living Act 2016:

i. By-Law cannot be harsh, unconscionable or oppressive, restrict children from the scheme, or restrict dealing in a lot, such as the owner renting out their lot. No one have the legal rights to add any conditions,

ii. Strata Living Act revised July 2011: "Tenants are as much a part of their strata community as are owners, they have the same right and responsibility under the scheme's by-laws." (Page 14) It is illegal for SC to treat the owners and tenants in different ways.

iii. The SC is abusing their power and breached the Security Act. Without a security license monitoring my family is illegal.

iv. Those are errors of the law and above Strata Living Act and our by-laws are enough to proof that the decision was a big mistake and errors of the law. This Order must be withdrawn.

4. Order 5: "all works completed by 31 December 2020". Given the deadline without mentioning any details of the conditions.

a) The reason for the decision point 8: are excuses to delay the recertification process. On 17-08-2018, just 3 days before the final NCAT hearing on 20-08-2018, SC offered my lawyer: recertification jobs will be completed within my apartment before 31-01-2019 with unlawful conditions to permanently take away 3 security keys and one remote control from me. This is breach of our special by-law 8 (a) and by-law 13.1. Attachment (14) …

b) This is totally under SC's control. If SC wanted to do the job then it can be completed in a few months.

c) Major works needed to be done within my unit. The whole unit needs new waterproofing, all wall and floor tiles in the bathroom, kitchen and entrance hallway need to be replaced, walls and ceiling in the unit need to be recertified. After Eric issued report on 20-4-2018, it has been over a year now, the more delays causes more defects. Court Order must include the complete recertification of defects in Eric and Majcon engineer reports with all old and new defects. This will resolve any future disputes. Attachment (20) …

d) The amount of works that needed to be done, it is impossible for my family to live in during the recertification process there will be a lot of workers, equipment's and materials accessing my unit. The process will affect my family's lifestyle including health, safety, privacy and valuables will not be secure.

e) The order must add details to relocate my family with similar to the current accommodation at OC's cost.

f) Without court order SC will never comply with the strata laws and our registered by-laws and special by-laws.

5. Decision 7. The reasons for the decisions point 25 and 26 for: "no evidence". There are two different standards. NCAT never request any cost evidence from OC and requested for me to pay all costs to them. Now NCAT has removed those orders. All my cost details are provided with this appeal.

a) The case was very simple, SC only needed to provide the common property maintenance. SC had personal financial interests. They breached the Strata Living Act, our by-laws and special by-laws, Tort and Statue Laws.

b) SC abused their power, illegally restricted 3 sets of my security keys without any Tribunal orders. As I am the owner, I pay levies for Lot 597, Lot 149 and Lot 153, but I have no rights to use Lot 149, Lot 153 and half of Lot 597, denied my rights to rent out my Lots and the SC used my private Lots for their use without my permission. This is trespassing on private property (lots).

c) Now, two engineer reports have clarified SC lied to the Owners in the past. Telling owners that I wanted for OC to pay the cost to renovate my kitchen and bathrooms, which gained approval from the

owners to seek legal representation against me. SC rather use our sinking fund on legal fees instead of attending to common property maintenance. The amount of time and costs that have incurred is a result of SC breaching Strata Living Act and our by-laws 10. Attachment (21) …

d) In these proceedings, I have followed our registered by-law 10. Notification of defects: "An owner or an occupier of a lot must promptly notify the Building Manager of any damage to or defect in the common property or any personal vested in the Owners Corporation". Strata Schemes Management Regulation 2010 schedule 2, 11(2): "The Owners Corporation is responsible for cleaning regularly all exterior surfaces of glass in windows and door that cannot be accessed by the owner or occupier of the lot safely or at all." And followed the Strata Living Act:

i. If common property needs repair or maintenance the OC should undertake out work, not an individual owner,

ii. Responsibility for repairs is straightforward - the OC must repair common property,

iii. If it is in a boundary wall, the OC is responsible,

iv The OC is responsible for water penetration problems coming in through external walls or the floor,

v. Plumbing under the floor is the responsibility of OC,

vi. If no action is being taken, you can put a motion requesting repairs,

vii. If the repairs are being delayed you can lodge an application for mediation with Fair Trading to try to settle the matter,

viii. All buildings need to be maintained regularly to retain their value and stop minor damage and deterioration becoming major problems,

ix. By-Law cannot be harsh, unconscionable or oppressive, restrict children from the scheme, or restrict dealing in a lot, such as the owner renting out their lot,

x. Tenants are as much a part of their strata community as are owners, they have the same right and responsibility under the scheme's by-laws,

xi. If no settlement is reached or an agreement breaks down, one side can apply for an order by an Adjudicator or the Consumer, Trade and Tenancy Tribunal, The CTTT provides a quick and low cost dispute resolution service for strata schemes.

The SC abused their power and breached number of our by-laws and special by-laws, also breached a lot of NSW Strata Living Act. Illegally, stole my registered parcel, taking action without Tribunal Order, SC did not do their duty of care refused to simply resolve the defects. Instead took revenge on me when I reported and asked for the defects to be attended to. The SC denied my freedom to use my own Lots when they trespassed onto my property Lot

153 and Lot 149 for their own convenience. Step by step SC forced me to make continues complaints to various departments. Now it has incurred a large amount of unnecessary costs and losses for me. OC is responsible to compensate for all these costs and losses totaling $115785. Attachment (22a, 22b) …

NCAT Internal Appeal File No. Ap 19/06671 Reply to Respondent Grounds of Appeal dated 25-03-2019. Attachment (23)

NCAT Internal Appeal File No. Ap 19/06671 Reply to Respondent written submissions dated 16-04-2019. Attachment (24)

Supreme Court requested Affidavit to witnessed a fee of AUD$72/RMB¥335 was charged at the Australian Embassy in Shanghai. Attachment (25) page 140."

26 Having regard to the orders sought on appeal and paragraphs 1 to 5 quoted above, I am satisfied that the substance of the issues or grounds which Ms Chen seeks to raise in her appeal can be summarised as follows:

(1) The Appeal Panel should have ordered the Owners Corporation to clean the exterior windows of Ms Chen's penthouse: **the window cleaning issue**;

(2) In relation to order 3(b), the Appeal Panel should have ordered that the Owners Corporation provide Ms Chen with a third remote access device for the garage area: **the garage remote access issue**;

(3) In relation to order 4, the Appeal Panel erred in law by amending order 3 made at first instance to refer to the "restrictive covenant", thus, in effect, requiring Ms Chen to comply with the requirements of that covenant as a condition of being given operative garage remote access devices: **the restrictive covenant issue**;

(4) In relation to order 5, the Appeal Panel should have:

(a) specified the rectification work that was to be carried out by 31 December 2020;

(b) ordered the Owners Corporation to pay the costs of relocating Ms Chen and her family while the rectification and remediation work was carried out:

the rectification work issue;

(5) in relation to order 7, the Appeal Panel erred in ordering each party to pay her or its own costs on the basis that there was no evidence as to costs, because no such evidence was requested and the Appeal Panel should have ordered the Owners Corporation to pay Ms Chen's costs at first instance and on appeal as well as the amount of other losses: **the costs issue**.

27 The summons was headed "#Summons Commencing Appeal (Part 50) / #Summons Seeking Leave to Appeal (Part 50)". Notwithstanding this, neither

the summons nor the attached document included an application for leave to appeal or a statement of the reasons why leave should be granted, as required by r 50.12(4)(a) and (b) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

28 Furthermore, neither the summons nor the attached document identified any specific questions of law in relation to which Ms Chen sought to appeal.

29 As noted above, on 13 September 2019, the Owners Corporation filed a notice of motion seeking orders that Ms Chen's appeal should be dismissed as incompetent. This was done within the time prescribed by r 50.16A of the UCPR. Later, this motion was amended to include an application for an order that leave to appeal be refused.

30 These applications made by the Owners Corporation were the subject of the hearing on 12 December 2019.

Competence

31 In relation to the competence of the appeal, the Owners Corporation relied upon the decision of the Court of Appeal in *Council of the Municipality of Woollahra v Sved* (Court of Appeal (NSW), 24 July 1998, unrep) Mason P, Sheller JA agreeing. What was relevantly said in that case is recorded and explained in *Doyle v Hall Chadwick* [2012] NSWCA 175 at [19] by Basten JA as follows:

> "*Sved* is not authority for an obligation of the kind asserted. Rather, the Court (Mason P, Sheller JA agreeing), having held that the attempt by the Council to add a ground of appeal raising an issue which had been abandoned below was an abuse of process, found that the amount in dispute was below the threshold and the appeal was therefore incompetent. Upon the Council requesting an opportunity to file papers to seek leave to appeal, which, despite directions from the Registrar, it had not done prior to the listing of the objection to competency, Mason P stated (at 7(45)):
>
> > 'A party faced with a formal objection to the competency of its appeal should, if it wishes to fall back on an application for leave to appeal, ensure that such an application is duly made prior to any contested competency application. The reason is simple. The case for leave may be strong, indeed overwhelming. In such a situation there may be no point in debating a difficult issue of competency. Here the putative appellant failed to follow this practice. What is worse it failed to comply with the Registrar's direction designed to ensure such compliance.'"

32 *Sved* related to an appeal in the Court of Appeal and not in a Division, as in the present case. Nonetheless, in my view the principles are equally applicable in this matter.

33 In addition, as has been noted above, Ms Chen's right of appeal under s 83(1) of the NCAT Act is limited to "an appeal on a question of law". The Owners Corporation contended that no question of law had been identified in the present appeal.

34 The consequences of an appeal being limited to a question of law have been identified by the Court of Appeal in *Davis v NSW Land and Housing Corporation* [2016] NSWCA 325 at [77] – [79] (McColl JA):

> "77. First, on such appeal, the existence of a question of law is not merely a qualifying condition to the right of appeal, but the question of law alone is the subject matter of the appeal. The Supreme Court cannot engage in a "review of the merits" of the decision.
>
> 78. Secondly, such an appeal is in the nature of a judicial review in which it is necessary to examine for legal error what has been done in the Appeal Panel. That will almost inevitably require consideration of the Tribunal's findings to determine whether the Appeal Panel's conclusion on the question of law identified in respect of the Tribunal's reasons was open.
>
> 79. Thirdly, on such an appeal, in certain circumstances, a new issue, not raised before the Tribunal, may be raised. In considering whether to permit that course in the exercise of the court's discretion, the court will take into account *Coulton v Holcombe* considerations. It will also take into account considerations specific to the limited nature of an appeal from the Tribunal on a question of law, for example that referred to by Gummow J in *Federal Commissioner of Taxation v Raptis*, 'that there is difficulty in finding an 'error of law' in the failure in the Tribunal to make a finding first urged in this Court.'" (footnotes omitted)

35 By letter dated 27 November 2019, the solicitors for the Owners Corporation reiterated the observation that Ms Chen had not identified grounds for leave to appeal and urged her to obtain legal advice and legal representation before the hearing on 12 December 2019. At this hearing, Ms Chen was self-represented.

36 Given the terms of s 83(1) of the NCAT Act, Ms Chen's proceedings in this Court must be by way of an application for leave to appeal limited to questions of law. But, as noted above, her summons does not include an application for leave to appeal nor does it comply with UCPR r 50.12(4)(a) and (b) nor does it identify any relevant questions of law. These might be bases for dismissing the application contained in the summons as incompetent. If, however, there is

some substance to the grounds sought to be raised in the appeal, and leave to appeal should be granted, a more appropriate course would be to grant leave to amend the summons to address the formal deficiency and then deal with the application for leave to appeal.

Leave to appeal

37 The principles concerning whether leave to appeal should be granted are well established and apply in relation to applications for leave to appeal to the Court sitting in a Division as well as to applications for leave to appeal to the Court of Appeal. The principles were recently stated by the Court of Appeal in *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 at [6], and endorsed in *Wigmans v AMP Ltd* [2019] NSWCA 243 at [36]; 373 ALR 323, in the following terms:

> "Leave applications in this Court attract a general obligation on the applicant for leave to establish that there is an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable: *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *BE Financial Pty Ltd v Das* [2012] NSWCA 164 at [32]- [38]; *Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]; *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28]."

Competence and leave to appeal both dealt with on 12 December 2019

38 In light of the fact that Ms Chen is a self-represented litigant, I thought it preferable to consider the question of competence at the same time as the question of whether leave to appeal should be granted, so that a decision could be made as to whether the appeal should be allowed to continue in respect of the substance of the appeal not just the form. Ms Chen and the Owners Corporation were both prepared to proceed at the hearing on 12 December 2019 in relation both to the question of competence and to the question of leave to appeal.

39 Having regard to the principles referred to above, I now turn to consider each issue or ground of appeal identified above, in order.

The window cleaning issue

40 The complaint is that the Appeal Panel did not make an order that the Owners Corporation should clean the windows of Ms Chen's penthouse annually. Her contentions are that she cannot access her windows safely and that the model

by-laws in the Strata Schemes Management Regulation 2010 Sch 2, cl 11(2)[3] establish that the Owners Corporation is responsible for cleaning regularly all exterior surfaces of glass in windows and doors that cannot be accessed by the owner or occupier of the lot safely or at all. Ms Chen apparently accepted that this clause in the model by-laws was not included in the by-laws for Strata Plan No 55792 but contended that:

> "[i]t is common sense everyone should know and must know if the Act is not written in our by-laws, it still needs to be complied."

41 The Appeal Panel's decision on the window cleaning issue was that the annual window cleaning issue, among others, was "properly not dealt with by the primary member" because it was "not before him … (in the case of window cleaning) in that generalised form, or (in the case of the allegation about window clearing in a narrower form) was the subject of an earlier application".[4]

42 Ms Chen did not seek to raise any question of law in relation to the bases for the Appeal Panel's decision. She did not identify what the relevant application before the Member at first instance was, what evidence she relied upon or what the Member's decision was. She has not demonstrated that a prior application had not dealt with the issue she now sought to raise or that the Appeal Panel erred on some question of law in this regard.

43 Furthermore, her own material included a letter from the solicitors for the Owners Corporation dated 17 February 2016 to the Secretary of Strata Plan No 55792 which stated, among other things:

(1) "The configuration of the apartments on level 52 [which includes Ms Chen's] means that the exterior of the windows of those apartments do not require access by abseilers. Therefore, they are not cleaned by the owners corporation and are the responsibility of the lot owners"; and

(2) "The model by-laws have not been used in your strata scheme".

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[3] See numbered par 1 in the attachment to Ms Chen's affidavit which is quoted in full above. The clause of the model by-laws in the Strata Schemes Management Regulation 2010 Sch 2 that relates to window cleaning is in the same terms as cl 10 of the Strata Schemes Management Regulation 2010 Sch 2 and cl 13 of the Strata Schemes Management Regulation 2005 Sch 3 which all state: "(1) Except in the circumstances referred to in clause (2), an owner or occupier of a lot is responsible for cleaning all interior and exterior surfaces of glass in windows and doors on the boundary of the lot, including so much as is common property. (2) The owners corporation is responsible for cleaning regularly all exterior surfaces of glass in windows and doors that cannot be accessed by the owner or occupier of the lot safely or at all."

[4] Appeal Panel reasons at [43].

44 While this Court cannot make any findings of fact based upon that material with a view to ruling on whether the windows are inaccessible and should be cleaned by the Owners Corporation, the material does indicate that it is unlikely that Ms Chen has suffered some relevant, reasonably clear injustice which would support the granting of leave to appeal in respect of window cleaning. Further, there does not appear to me to be any issue of principle or question of public importance in relation to the window cleaning issue which would be a proper basis for granting leave.

45 For these reasons, I would not grant leave to appeal in respect of the window cleaning issue, even if the formal defects in the summons were rectified.

The garage remote access issue

46 It appears that Ms Chen had sought an order that she be provided with a third garage remote access device in addition to the two she already had. She contended that previously she had paid for and obtained three devices but, after the security system was updated and new remote access devices were issued, she was only permitted to have two devices. Ms Chen contended that her car space lots "can comfortably park three large size vehicles".

47 The Member at first instance declined to make such an order and the Appeal Panel held that there was no error of law in this regard. The Appeal Panel said at [35]-[36]:

> "35 There is equally no error of law in the primary member's dealing with the garaged access remotes. Reasons were given that were grounded in a comprehensive consideration of the relevant evidence. The covenant clearly could not be fulfilled in the category of visitors if the people parking did not access the apartment to visit. There was no clear evidence to identify the car parkers with the persons named as tenants on the alleged tenancy agreements, or with the unnamed family members who are said to be occasional occupants. The appellant did not say the cars parking were owned by her.
>
> 36 At that point, breach of the covenant was established. One did not need to make findings on the genuineness the leases as documents intended to have legal effect, such as whether rent was paid under them, whether they reflected the appellant's evidence of occasional occupation without exclusive possession of the bedroom, and whether they were held over with the expiry of the fixed term in each of them."

48 The Appeal Panel found that the covenant referred to by the Member at first instance in respect of the parking spaces was in the following terms:

> "No car space forming a lot or part of any lot may be used by persons who are not a registered proprietor, occupant or tenant of a lot, not being a utility lot, or a visitor of a registered proprietor, occupant or tenant of a lot, not being a utility lot, or who are not involved on a regular basis in the operation of one or more of the shops or other facilities within the strata scheme.
>
> The registered proprietor or tenant of a lot must not grant or permit to be granted any lease, licence or sublease or otherwise part with possession of any car space forming a lot or part of a lot other than to a registered proprietor, tenant or occupier of a lot not being a utility lot except in conjunction with the lease, licence or transfer of a lot, not being a utility lot."[5]

49 At the hearing before me, it appeared that this was a restriction on the use of the car space lots in the strata scheme, created under s 88B of the *Conveyancing Act 1919* (NSW) on registration of the strata plan. It operated as a restrictive covenant in respect of the car parking lots, including Ms Chen's.

50 The Appeal Panel did find that there was an error of law in relation to the security passes, but it was held that these were distinct from the garage remote access devices.

51 In substance, Ms Chen was asserting a right to a third garage remote access device, because she had paid for a third device before the security system was upgraded. Ms Chen in effect submitted that three cars could fit into her two car parking spaces and she should be allowed to permit whomever she wanted to park in those spaces, because she was the owner of the lots. In her oral submissions and in her challenge to order 4, Ms Chen contended that the restrictive covenant attaching to the car space lots "is not a law" and "[could] not be used on the strata scheme at all".

52 For the reasons given in relation to the restrictive covenant issue below, Ms Chen's contentions as to the law are without substantial foundation. Further, in an appeal under s 83 of the NCAT Act, it is not open for her to challenge the findings of fact or findings of mixed fact and law. She has not established any error of law by the Appeal Panel in relation to the garage remote access devices nor has she raised a question of law as a basis for her ground of appeal in relation to the garage remote access issue.

53 Even if Ms Chen could identify an arguable question of law in relation to the garage remote access issue, any such question would not appear to raise, in

[5] Appeal Panel's reasons for decision at [9].

all the circumstances, an issue of principle or question of public importance. Nor is there a reasonably clear injustice that is more than arguable. For these reasons, I would not be minded to grant leave to appeal in respect of the garage remote access issue, even if the formal defects were cured.

The restrictive covenant issue

54 The restrictive covenant issue relates to the decision of the Appeal Panel to correct what was perceived to be an error in order 3 made by the Member at first instance when he referred to a "restricted covenant" rather than "restrictive covenant". The terms of the restriction on use have been quoted in full above when dealing with the garage remote access issue.

55 As has been already observed, Ms Chen contended that:

(1) the change to order 3 involved an error of law because "[t]he restricted [sic] covenant is not a law"

(2) the covenant or the change to refer to the covenant as a "restrictive covenant" was inconsistent with what she described as the "Strata Living Act" and could not be used on the strata scheme at all.

56 In addition, Ms Chen submitted that by-laws cannot be harsh, unconscionable or oppressive, restrict children from the scheme, or restrict dealing in a lot, such as the owner renting out their lot. It was also said that no one has the legal rights to add any conditions and the Strata Living Act stated that tenants "have the same right and responsibility [as owners] under the scheme's by-laws".

57 At the hearing, it appeared that, when Ms Chen referred to the "Strata Living Act", she was referring to a booklet called "Strata Living" published by NSW Fair Trading with a view to providing a plain language guide to New South Wales strata management laws and the rights and responsibilities of persons involved with strata schemes. For the sake of clarity, I note that this booklet is not the *Strata Schemes Management Act 2015* (NSW) or any related legislation or delegated legislation made under that Act. While "Strata Living" is clearly an attempt to provide information about the law applicable to strata schemes in New South Wales, it cannot be relied upon as a statement of the applicable law.

58 Ms Chen's specific submissions included that "[b]y-Law cannot be harsh, unconscionable or oppressive, restrict children from the scheme, or restrict dealing in a lot, such as the owner renting out their lot. No one have the legal rights to add any conditions" and that the following statements in Strata Living excluded the possibility of there being a restriction of the type contained in the covenant or restriction on use set out above:

> "Be aware that Strata Schemes are empowered to make decision about the rules and governance of their scheme. Generally, government and courts cannot intervene or overrule properly exercised decisions"

and

> "Tenants are as much a part of their strata community as are owners, they have the same right and responsibility under the scheme's by-laws."

59 Contrary to Ms Chen's submissions, a restriction on use, or a restrictive covenant, can be imposed in respect of lots in a strata scheme, on registration of the strata plan by operation of s 88B of the *Conveyancing Act 1919* (NSW) and in circumstances such as those referred to in ss 34 and 63 of the *Strata Schemes Development Act 2015* (NSW).[6] Restrictions on the letting of utility lots, including lots relating to parking spaces, are a common feature of strata schemes.

60 Further, and in any event, the Appeal Panel's decision to change the description from "restricted covenant" to "restrictive covenant" in the order of the Member at first instance does not change the nature of the obligation, with which Ms Chen was required to comply, in relation to her car parking spaces. It was not contended that any alteration of significance occurred because of the Appeal Panel's decision or that the Tribunal lacked power to impose compliance with that obligation as a condition of obtaining the two garage remote access devices.

61 In the circumstances, there does not appear to me to be any question of substance raised in relation to the restrictive covenant issue. To the extent that a question of law does arise in this context, as to whether a restriction on the use of lots can be imposed as part of a strata scheme, it does not appear to be

[6] See generally the commentary on ss 34 and 63 of the Strata Schemes Development Act 2015 (NSW) in Moses N J, Strata Titles (2nd Ed) (Thomson Reuters (Professional) Pty Ltd, Sydney) at 1-3200 to 1-3202 and 1-3342 to 1-3343.

in doubt that such restrictions can be imposed in a case such as the present, having regard to the provisions of the *Conveyancing Act* and the *Strata Schemes Development Act* referred to above. Further, there arises in the present case no reasonably clear injustice that is more than arguable. Nor do I accept that Ms Chen is seeking in this regard to raise an issue of principle or question of public importance such as to justify a grant of leave.

62 Accordingly, leave to appeal in respect of the restrictive covenant issue should not be granted.

The rectification work issue

63 The rectification work issue arose of the water penetration in Ms Chen's penthouse and the length of time it has taken to have repairs and remediation carried out.

64 Ms Chen's proposed challenges in relation to the rectification work issue are as set out above in par 4 quoted from her grounds of appeal and submissions in relation to order 5 of the Appeal Panel. There it was said that there was "the deadline without mentioning any details of the conditions". The matters mentioned by the Appeal Panel at [8] of their reasons were said to be "excuses to delay". It was submitted that "Court Order must include the complete recertification of defects in Eric and Majcon engineer reports with all old and new defects". In addition, Ms Chen sought to recover the costs of relocating her family and property while the works were carried out.

65 Ms Chen did not, however, identify in her submissions any error of law on the part of the Appeal Panel or identify any specific question of law which she said arose out of the Panel's decision in these regards.

66 The Appeal Panel recorded, at [2] of their reasons, that the relevant order of the Tribunal at first instance was to the effect that, on provision of access by Ms Chen within parameters specified in the order, the Owners Corporation was to arrange for appropriately qualified engineers and consultants to prepare a scope of works, quotations and tender process based on an existing engineering report dated 20 April 2018, for the purpose of addressing remediation of water entry into Ms Chen's penthouse.

67 Although the Appeal Panel did not find any relevant error in relation to this order, since the Owners Corporation was prepared to consent, without admission, to the remediation works being completed by 31 December 2020, the Appeal Panel amended the orders at first instance to insert a requirement that the remediation work be completed by that date.

68 In relation to Ms Chen's submission that the "Court Order must include the complete recertification of defects in Eric and Majcon engineer reports with all old and new defects", it should be noted that the express terms of the order make clear that the work to be done must include the works identified by the building expert, Mr Eric Byrne, in his report of 20 April 2018. This report, therefore, establishes the nature of the works to be carried out under the order. From the material Ms Chen supplied, it appears that Majcon is the trading name of MAJ Consulting Pty Ltd who are the consulting engineers and project managers retained by the Owners Corporation, in accordance with the orders of the Tribunal at first instance, to prepare the scope of works, obtain tenders and to manage the project.[7] In addition, because of the amendment made by the Appeal Panel, Ms Chen now has the benefit of a specific date for completion of the work. Ms Chen has not identified any question of law, or error of law, arising out of these aspects of the order or the Appeal Panel's decision that could be the subject of an appeal to this Court.

69 In so far as there is further work that now needs to be done because of water entry and other problems which have occurred since the time of the orders of the Tribunal at first instance, that may be able to be addressed by relisting the matter in the Tribunal or by way of a fresh application. Where the further work is required because of events after the hearing at first instance, this cannot give rise to a question of law, or error of law, that can be dealt with as part of an appeal against the decision of the Appeal Panel in this case.

70 As to the question of recovering the cost of alternative accommodation while rectification work is undertaken, the Appeal Panel said, at [43], that this matter was "properly not dealt with by the primary member, because they were not before him". Ms Chen has not demonstrated that this conclusion was wrong or

[7] See the letter of Majcon dated 30 April 2019 concerning Strata Plan 55792, p 117 of Ex AA1.

that a challenge to this finding involved a question of law in the present case. If an application for the cost of alternative accommodation has not already been made to NCAT, such an application can now be made, if it is otherwise appropriate and justified in the circumstances.

71 For these reasons, I do not accept that Ms Chen is seeking to appeal on a question of law in relation to the rectification works issue. Nor can I discern any reason to be satisfied that there is an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable which would justify granting leave to appeal on this issue.

The costs issue

72 In essence, Ms Chen seeks that the Appeal Panel's costs orders be set aside and the Owners Corporation should be ordered "to pay all most costs and losses". Her written submissions in paragraph numbered 5, which have been quoted above, identify in substance two bases for the relief sought:

(1) the Appeal Panel erred in relying on the fact that there was "no evidence" because no evidence as to costs had been asked for;

(2) allegations of misconduct by the Strata Committee.

73 The "no evidence" basis appears to me to be misconceived. The Appeal Panel did not decide the questions relating to costs on the basis that Ms Chen had not led any evidence as to her costs.

74 After discussing the general principle in s 60 of the NCAT Act that, in the absence of "special circumstances" parties in the Tribunal bear their own costs and concluding that the exceptions to this general principle in rr 38 and 38A of the NCAT Rules did not apply in the present case, the Panel's reasons in relation to costs were as set out in [60]-[62] as follows:

> "60 Both parties sought the costs of the appeal and the appellant challenged the primary member's decision that each party paid her or its costs of and incidental to the primary application. The appellant had been legally represented by leave until the day before the primary hearing and has since been self-represented. The respondent was legally represented by leave throughout the proceedings, including the appeal proceedings.
>
> 61 We discern no error in the primary member's decision on costs, namely, that each party bear her or its own costs of and incidental to the application. Against the lack of success on many issues, and the delay in prosecuting her case, the primary member pointed to the fact that the appellant's determined pursuit of the matter had brought her relief on water penetration in terms of

> constructive way forward. The appellant also regained conditional return of garage remotes. There appears to have been no provision to the primary member of offers that might constitute special circumstances.
>
> 62 Largely the same position arises on this appeal. As the respondent rightly said, certain aspects of the appeal were hopeless either from the outset or at least from the time of the respondent's reply lodged and served 13 March 2019. However, the appellant has succeeded in recovering unrestricted access to her unconditional entitlement to six, not three, security access keys (not garage remotes), and the respondent has made a concession (without admission) which is something that the appellant sought on appeal. In those circumstances, we discern no special circumstances to depart from making no costs order."

75 It was not submitted that the Appeal Panel erred in its understanding or application of s 60 of the NCAT Act or rr 38 and 38A of the NCAT Rules, which relate to the awarding of costs of proceedings in the Tribunal. Accordingly, it is not necessary to consider in detail the operation of those provisions. It is sufficient to note that, where rr 38 and 38A are not applicable to proceedings under the *Strata Schemes Management Act 2015* in the Consumer and Commercial Division of NCAT or in an internal appeal to the Appeal Panel, s 60(1) and (2) establish that each party is to pay the party's own costs except if the Tribunal is satisfied that there are "special circumstances" warranting an award of costs. Under s 60(3), in determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following matters:

> "(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),
>
> (g) any other matter that the Tribunal considers relevant."

76 The Appeal Panel's findings that there were no "special circumstances" at first instance or on appeal warranting a departure from the general rule in s 60(1)

that each party to proceedings in the Tribunal pay the party's own costs are findings of fact or, at most, findings of mixed fact and law.

77 In the present case, there was no question of law identified as arising in relation to the findings that there were no special circumstances which could form the foundation for an appeal against the costs orders. Nor was any other error on a question of law identified in relation to the costs decisions by the Appeal Panel.

78 Furthermore, the factual matters relied upon by Ms Chen, especially the allegations of misconduct by the Strata Committee, have not been the subject of express consideration and findings by the Appeal Panel. Under s 83(3) of the NCAT Act, this Court is limited in what it can do if the appeal is upheld. Subs (3) provides:

> "The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:
>
> (a) an order affirming, varying or setting aside the decision of the Tribunal,
>
> (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court."

79 As the appeal to this Court is limited to one on a question of law, and given the terms of s 83(3) of the NCAT Act, this Court cannot make findings of fact for itself, even if it finds that an error on a question of law has been made: *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2009) 74 NSWLR 481; [2008] NSWCA 187 at [59]-[70] (Allsop P, Giles JA and Basten JA agreeing); *Rose v Tunstall* [2018] NSWCA 241 at [26]-[31] (Payne JA, Basten JA and Simpson AJA agreeing).

80 Accordingly, there does not appear to me to be any question of law which could found an appeal under s 83 of the NCAT Act against the Appeal Panel's orders in relation to costs. In addition, I am not persuaded that Ms Chen is seeking to raise any issue of principle or question of public importance in relation to the costs orders. I do not accept that she has shown that there is a reasonably clear injustice in relation to costs going beyond something that is

merely arguable. I would not grant leave to appeal, even if a question of law in relation to the costs orders could be said to have been identified.

Conclusion and order

81 In summary, Ms Chen has not established that any of her issues or grounds of appeal involve a question of law and, as a result, she is not seeking to "appeal on a question of law" within s 83(1) of the NCAT Act. Further, even if I am wrong in reaching that view, I would not grant leave to appeal under s 83(1) in respect of any of the issues or grounds which Ms Chen seeks to raise, in light of the applicable principles and for the reasons given above.

82 As I attempted to explain during the hearing, the qualified nature of the appeal right conferred by s 83 of the NCAT Act means that this Court cannot conduct a new hearing of the original proceedings and decide for itself what orders should be made.

83 Ms Chen appeared to be submitting, in effect, that the Court should embark upon a hearing on the merits of many of the issues and make findings of fact and then make the orders she sought, thus obviating the need for her to make any further application in NCAT. On an appeal limited to questions of law from the Appeal Panel of NCAT and for which leave to appeal is required, such a course is not open to the Court.

84 In these circumstances, as leave to appeal should be refused, regardless of whether or not the appeal is formally incompetent, it is appropriate to dismiss the summons.

85 Unlike proceedings in NCAT where generally each party pays its own costs unless there are "special circumstances" warranting the making of a costs order, in proceedings in this Court, the Court has full power to determine by whom, to whom and to what extent costs are to be paid, by virtue of s 98 of the *Civil Procedure Act 2005* (NSW). The discretion conferred on the Court by that provision is subject to the rules of court. Rule 42.1 of the UCPR provides that generally costs are to "follow the event". The event is to be taken as referring to the practical result of a particular claim: *Doppstadt Australia Pty Limited v Lovick and Son Developments Pty Limited (No 2)* [2014] NSWCA 219 at [15] (Ward, Emmett and Gleeson JJA). The practical result in the present

proceedings is that the Owners Corporation has been entirely successful. There do not appear to me to be any circumstances which would render it inappropriate for costs to follow the event.

86 Accordingly, the orders of the Court are:

(1) Leave to appeal is refused.

(2) The plaintiff's summons filed on 28 June 2019 is dismissed.

(3) The plaintiff is to pay the defendant's costs as agreed or assessed.

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