Supreme Court

New South Wales

Case Name:	Pollak v The Owners – Strata Plan No 2834
Medium Neutral Citation:	[2020] NSWSC 784
Hearing Date(s):	21 February 2020
Date of Orders:	24 June 2020
Decision Date:	24 June 2020
Jurisdiction:	Common Law
Before:	Simpson AJ
Decision:	1. Leave to appeal against the orders of the Appeal Panel of the NSW Civil and Administrative Tribunal on 16 September 2019 is refused. 2. The plaintiffs are to pay the defendant's costs of the proceedings.
Catchwords:	LAND LAW – strata title – by-laws – construction of by-law – effect of new by-law passed following the enactment of the Strata Titles Act 1973 (NSW) – exclusive use of common property – provision for amendment of, addition to or repeal of exclusive use by-law LAND LAW – strata title – common property – whether orders for remediation of common property lacked specificity such as to amount to error of law – whether failure to take into account – relevant (and necessary) consideration – substantial loss of amenity in Lot owners losing direct access to the roof of the building – direct access to roof not part of original, approved development – no evidence that subsequent approval has been given – whether denial of procedural fairness where reliance placed on the term "usual undertaking

	as to damages" as defined in interim consent orders
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 27, 32, 80, 83(1), Sch 4, cl 12 Conveyancing (Strata Titles) Act 1961 (NSW) Strata Titles Act 1973 (NSW), Sch 4, cl 15 Strata Schemes Management Act 2015 (NSW), ss 29, 149, 229, 232, 241
Cases Cited:	Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425; (2019) 19 BPR 39,255 Pollack v The Owners – Strata Plan No. 2834; The Owners – Strata Plan No 2834 v Pollack [2019] NSWCATAP 227 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379 Wingecaribee Shire Council v De Angelis [2016] NSWCA 189
Category:	Principal judgment
Parties:	Joseph Pollak (First plaintiff) Denise Solden (Second plaintiff) The Owners – Strata Plan No 2834 (Defendant)
Representation:	Counsel: D M J Bennett QC/C M Lee (Plaintiff) M Ashhurst SC/M Forgacs (Defendant) Solicitors: Sachs Gerace Lawyers (Plaintiff) J S Mueller & Co (Defendant)
File Number(s):	2019/320698
Decision under appeal:	
Court or Tribunal:	New South Wales Civil and Administrative Tribunal, Appeal Panel
Citation:	[2019] NSW CATAP 227

Date of Decision:	16 September 2019
Before:	S Westgarth M Anderson
File Number(s):	AP 19/21640

JUDGMENT

1 **HER HONOUR:** By summons filed on 14 October 2019 pursuant to s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the CAT Act") the plaintiffs (Dr Joseph Pollak and Ms Denise Solden) seek leave to appeal against a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal ("the Tribunal") given on 16 September 2019, published as *Pollack* [sic] *v The Owners – Strata Plan No. 2834; the Owners – Strata Plan No. 2834 v Pollack* [sic] [2019] NSWCATAP 227. Such leave may be granted where the proposed appeal involves a question of law. The plaintiffs have identified three issues which they contend involve questions of law.

Background

2 An account of the relevant facts necessarily involves, at times, reference to legislation governing property held under strata title. Over the course of the more than 50 years in which the relevant events have occurred, that legislation has undergone substantial change, not least with respect to the terminology used to identify the management arrangements of strata title property. While I have attempted to use the nomenclature applicable at the relevant time, I am not confident that I have always achieved accuracy in that respect. The terminology makes no difference to the conclusions I have reached.

3 The background facts are largely uncontroversial and may be stated briefly. The plaintiffs are the registered proprietors of Lot 44 in Strata Plan ("SP") 2834. The building that constitutes SP 2834 is an eight storey building of 44 residential units plus car spaces in an inner city harbourside suburb, for which development approval was given in August 1965. Strata approval was granted under the then applicable strata titles legislation (the *Conveyancing (Strata Titles) Act 1961* (NSW)) in June 1967. Lot 44 is located on the top floor (level

8) of the building. Above Lot 44 is a flat roofed area which is presently divided into two sections. On the rear section, which faces west and south, are located some services such as the lift shaft and lift motor room. The rear roof area is accessible to all residents of the building from level 8 via the fire stairs. That area is separated from the remainder of the roof area ("the front roof area") by a balustrade, fencing, and a locked gate. The front roof area is partially enclosed and contains a bedroom, kitchenette, laundry and bathroom. In total it is an area in excess of 150 square metres overlooking Sydney Harbour to the east and north, with expansive unobstructed views. It is accessible only by a stairway that leads directly from and into Lot 44. The stairway opens into the enclosed room on the front roof area through what was called "a hole" or "void" in the floor. There is presently no door or barrier that precludes or could preclude entry from the front roof area to Lot 44.

4 The developer of the Strata Plan, a Mr C Kool, was the original owner of Lot 44. Neither the hole in the floor of the roof, nor the stairway to Lot 44, appear on the original, approved, plans. There is no evidence of approval for their construction ever having been sought or given.

5 The entirety of the roof area is common property. It is, itself, a valuable piece of real estate. At all times since the construction of the building, the responsibility for the maintenance and repair of all common property, including the front roof area, has been undertaken by the Body Corporate (as it was formerly known) or Owners Corporation (as it is currently known). There has been significant expenditure on the front roof area.

6 By resolution of the Council of the Proprietors of SP 2834 on 16 July 1968 exclusive access to the front roof area was granted to the owners for the time being of Lot 44 for a period of 50 years from 1 July 1968. The resolution was, in full, (as recorded in the Minutes) in the following terms:

> "That the Council of Proprietors Strata Plan 2834 in the exercise of the power vested in it by sub-clause (f) of By-law 3 of the By-laws contained in the First Schedule to the Conveyancing (Strata Titles) Act hereby grant to the proprietor of Lot 44 in Strata Plan 2834 for a period of 50 years from 1st July, 1968, the right to the exclusive use and enjoyment of part of the Common property being those parts of the top floor or roof area outlined in red on the sketch plan produced to this meeting and resolves that in confirmation of such grant the

> Common Seal of the Body Corporate is affixed to the minutes of this meeting and also to the said sketch plan for the purpose of identification.
>
> (The Plan was exhibited to the Meeting)."

7 On 1 July 1974 the *Strata Titles Act 1973* (NSW) (later renamed as the *Strata Titles (Freehold Development) Act*) came into effect. The *Conveyancing (Strata Titles) Act* was repealed. Clause 15(1) of Sch 4 of the *Strata Titles Act* (which contained transitional provisions) provided:

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

8 As a consequence, on 28 August 1974, on notice having been served by the owner of Lot 44 in accordance with cl 15(1), the proprietors of SP 2834 passed a new by-law, By-Law 28, in the following terms:

> "28(1) The proprietor(s) of Lot 44 in Strata Plan 2834 are granted the right to the exclusive use and enjoyment of those parts of the common property on the top floor or roof area hatched black on the annexed plan until 30 June, 2018.
>
> (2) This right of exclusive use was initially granted by and pursuant to the terms of the resolution on 16th July, 1968 by the then Council of the Proprietors of Strata Plan 2834.
>
> (3) This by-law may be amended, added to or repealed at the request of the proprietor(s) for the time being of lot 44 in Strata Plan 2834 and with the consent of the Body Corporate or subject to the consent in writing of the said proprietor(s) in all other cases."

9 The plaintiffs became the registered proprietors of Lot 44 on 7 February 2014. Prior to completion of their purchase (on 25 October 2013) solicitors for the Owners Corporation wrote to Dr Pollak, drawing his attention to By-Law 28 and advising that, on the expiration of the exclusive use term, the Owners Corporation would require possession of the front roof area to be restored to the Owners Corporation. Other requirements, including that the hole in the floor of the enclosed room on the roof area be sealed in an appropriate manner, were stated in the letter.

10 On 13 March 2018 the Owners Corporation, through its lawyer, wrote to the plaintiffs to remind them of the imminent expiration of their right of exclusive use of the front roof area, and that they would be required to yield possession and control of the area and to remediate the hole, or void, in the floor.

11 By letter dated 11 April 2018 solicitors acting on behalf of the plaintiffs responded, saying that they did not accept that the by-law "necessarily ends on 30 June 2018". They gave notice, purportedly under By-Law 28(3), to the Owners Corporation "to amend By-Law 28" by deleting "2018" in sub-cl 28(1), and substituting therefor "2068" with all other terms unchanged. That is, they claimed an extension of the grant of exclusive use for a further 50 years.

12 The notice was referred to the Strata Committee constituted under s 29 of the current legislation (the *Strata Schemes Management Act 2015* (NSW) ("the SSM Act"). At an annual general meeting on 17 May 2018 the Owners Corporation declined to make the amendment sought, and resolved to repeat the request that the plaintiffs yield possession and control of the area, surrender all keys and other devices used to access the area, and seal the hole in the floor that provided access from Lot 44 to the front roof area.

13 On 30 June 2018 Dr Pollak forwarded by email to the Secretary of the Owners Corporation a further notice purportedly under By-Law 28(3) requiring amendment to the by-law. That notice was given, not by the plaintiffs, but by JPSF Pty Ltd ("JPSF"), the registered proprietor of Lot 41. The Notice read in full:

> "JPSF Pty Ltd, being the owner of lot 41 in SP2834, requires amendments and additions to by-law 28 to:
>
> 1. AMEND the date in clause 28(1) to 30 June 2068;
>
> 2, ADD a clause requiring the owner of Lot 44 to be responsible for the repair and maintenance of the exclusive use area and to indemnify and hold harmless the owners corporation from all claims, demands, and actions in relation to the repair and maintenance and the use of the exclusive use areas; and
>
> 3. ADD a clause requiring the owner of Lot 44 to give the owners corporation and its agents reasonable access to the exclusive use area as necessary solely for the purpose of repairing and maintaining the structure of the building and other parts of the common property."

The Notice was signed by Dr Pollak as sole director of JPSF. (Dr Pollak is also the sole shareholder of JPSF). The notice bore a note signed by Dr Pollak and Ms Solden, as owners of Lot 44, consenting to the amendment. The Strata Committee declined to amend the by-law as proposed.

14 During the course of these exchanges there were some discussions between the parties concerning the possible sale or lease of the area. The discussions were inconclusive. The exclusive use granted to the owners for the time being of Lot 44 pursuant to the resolution of July 1968 and continued by By-Law 28 came to an end on 30 June 2018.

15 Both the plaintiffs and the Owners Corporation commenced proceedings in the Tribunal. In separate applications (in identical terms) filed on 2 July 2018 the plaintiffs sought interim and final orders:

- that "all lot owners and their tenants and invitees refrain from accessing the exclusive use area …" and
- that the Owners Corporation amend By-Law 28 as requested in their notice of 11 April 2018.

Sections 149 and 232 of the SSM Act were relied on as the sources of power for the orders for amendment of the by-laws. Section 241 was relied on as the source of power for the final non-access order, and s 231 as the source of power for the interim order.

16 By application filed on 26 July 2018 the Owners Corporation sought orders requiring the plaintiffs:

- to give vacant possession of the exclusive use area, to remove their property (including any fixtures or fittings belonging to them) and deliver up all keys or other devices used to provide access to the exclusive use area;
- to "seal the hole in the floor of the enclosed room" providing access from Lot 44 to the exclusive use areas; and
- to pay the Owners Corporation compensation in the form of an occupation fee or mesne profits from 30 June 2018.

Sections 229, 232 and 241 of the SSM Act were cited as the sources of power for the orders sought.

17 On 20 July 2018, by the consent of the parties, the Tribunal made interim orders which included:

"On the Applicants Joseph Pollak and Denise Susan Solden, by their solicitors, giving the usual undertaking as to damages, the Tribunal orders that:

1. The First Respondent, the Owners-Strata Plan No. 2834, be restrained from accessing the exclusive use area identified in the plan annexed to by-law 28 (except for the purpose of maintaining or repairing the common property in that exclusive use area) until the earlier of:

a) The making of orders to dispose of the Application in File No. SC18/29386; or

b) Three months from the date of these orders.

…

3. In these orders the 'usual undertaking as to damages' means an undertaking to the Tribunal to submit to such order (if any) as the Tribunal may consider to be just for the payment of compensation (to be assessed by the Tribunal or as it may direct) to any person (whether or not a party) affected by the operation of these orders or the undertaking or of any interlocutory continuation (with or without variation) of these orders or the undertaking.

…"

The proceedings in the Tribunal

18 All three applications came before the Tribunal constituted by Senior Member D G Charles and were heard together on 6 December 2018. Evidence, including expert evidence, was presented in both documentary and oral form. The Tribunal's decision, with reasons, was published on 12 April 2019. Relevantly, the Tribunal ordered:

"1. … that Joseph Pollack [sic] and Denise Solden are to pay the Owners Corporation an amount of money commensurate with $3,970.00 per month from 1 July 2018 until compliant with orders (3)(i), 3(ii), 3(iii), 3(iv) and 3(v) below …

3. …

(i) … that Joseph Pollack [sic] and Denise Solden are not to restrict access to and use of those parts of the common property in Strata Plan No. 2834 on the top floor or roof area of the building hatched black on the plan annexed to by-law 28, … and the owners and occupiers of other lots in Strata Plan 2834 and their invitees ('Roof Top Area').

(ii) …that Joseph Pollack [sic] and Denise Solden remove from the Roof Top Area all of their chattels and goods, including any furniture and equipment, and any fixtures or fittings belonging to them, and make good any damage caused by such removal.

(iii) …that Joseph Pollack [sic] and Denise Solden deliver to the Owners Corporation all keys and other devices in their possession, custody or control that are used to access the Roof Top Area ('Roof Top Keys') and be restrained from retaining any Roof Top Keys.

(iv) …that Joseph Pollack [sic] and Denise Solden seal the hole in the floor of the enclosed room on the Roof Top Area which provides a means of access to

> Lot 44 via a staircase using appropriately licensed and qualified contractors, in a proper and competent manner, and in accordance with all applicable laws.
>
> (v) Consistent with their statutory obligation to co-operate with the Tribunal in giving effect to the Tribunal's guiding principle of the just, quick and cheap resolution of the real issues in the proceedings, including compliance with the Tribunal's orders, direct the parties to liaise co-operatively to give effect to orders 3(i), 3(ii), 3(iii) and 3(iv) above within two (2) months of the date of these orders, or within such further time as may be agreed between the parties:
>
> *Pollack* [sic] *v The Owners Strata Plan 2834; The Owners Strata Plan 2834 v Pollack* [sic] [2019] NSWCAT (no number is given).

The Reasons of the Tribunal

19 The Tribunal identified the "central issues" as:

> "20 … the proper meaning of By-Law 28 and the extent of the benefit to the lot owners, and if that benefit is no longer available to the lot owners what are the consequences for them including whether orders in the Owners Corporation's application should be made against the lot owners."

20 Later, the Tribunal identified more specifically the questions for determination as:

> "55 …
>
> (1) What is the proper interpretation of By-Law 28?
>
> (2) If the [plaintiffs'] interpretation of By-Law 28 is correct, in the events which have occurred, are there any discretionary reasons why the Tribunal ought not to amend By-Law 28 in the manner proposed by the [plaintiffs]?
>
> (3) On the other hand, if the [plaintiffs'] interpretation of By-Law 28 is not correct, should the Tribunal make orders in the Owners Corporation's application against the [plaintiffs]?
>
> (4) If so, what orders should be made for the Owners Corporation against the [plaintiffs]"

The Tribunal answered those questions as follows.

Question 1: the construction of By-Law 28

21 It was only cl (3) of By-Law 28 that was in issue. The plaintiffs contended before the Tribunal (and have consistently maintained) that cl (3) of By-Law 28 envisages two alternative circumstances in which the by-law may be amended:

- on request by the owners of Lot 44, which requires the consent of the Owners Corporation; and
- on request by any other person, which requires the consent of the owners of Lot 44, but does not require the consent of the Owners Corporation.

That is, on the construction propounded on behalf of the plaintiffs, there are two separate and independent "limbs" of the by-law, one of which permits a request by the owners of Lot 44 and requires the consent of the Owners Corporation, the other of which permits a request by any other person and requires the consent of the owners of Lot 44, but does not require the consent of the Owners Corporation. The argument of the plaintiffs depended significantly on the words "in all other cases" that conclude cl (3). It appears to have been assumed that, on a request being made, the Body Corporate was obliged to make the amendment, addition or repeal sought.

22 The Tribunal rejected this construction. It held:

(1) (i) the purpose of By-Law 28 "viewed objectively" was to confirm the grant originally made in 1968; an objective interpretation of the by-law would convey to a reasonable person that its purpose was to grant to the owners for the time being of Lot 44 a right to the exclusive use of the relevant area until 30 June 2018 and not beyond that date;

(2) (ii) within the language of By-Law 28 there is a grant of a right to exclusive use of the front roof area until 30 June 2018 and not beyond that date: the grant is not able to be amended to extend its duration. There is a distinction between amendment of the by-law, and amendment of (or addition to) the grant of exclusive use. At the time the by-law was made (following the enactment of the *Strata Titles Act 1973* (NSW)) the Owners Corporation (then known as the Council of the Proprietors of the Strata Plan) had no power "to give the owners of Lot 44 the unilateral right to grant an extension of the grant of exclusive use"; the transitional provisions of the *Strata Titles Act* made it clear that the amendments made by the 1973 Act did not vary initial grants of exclusive use made under the previous Act;

(3) (iii) the construction of By-Law 28 proposed by the plaintiffs would enable it to be amended or added to, without the consent of the Owners Corporation, in a manner which would extend the duration of the grant for another 50 years; such a construction would give the by-law an "absurd, capricious and irrational operation" which could not have been intended and ought to be avoided. That construction, if correct, would mean, for example, that any third party (such as another lot owner or occupier or even an outsider in a neighbouring building or the local council) would be entitled to insist on the amendment of By-Law 28 in any manner, without the consent of the Owners Corporation (provided that the owners of Lot 44 consented);

(4) (iv) on the proper construction of By-Law 28, any amendment thereof requires the consent of the Owners Corporation.

23 The Tribunal considered that the words "in all other cases" were a reference to a request for amendment of, addition to or repeal of By-Law 28 made by the Owners Corporation, which would require the consent of the owners of Lot 44.

24 The Tribunal also considered that, as JPSF was a company owned and controlled by Dr Pollak, the request for amendment of the by-law made by JPSF was, in reality, a request made by or on behalf of the plaintiffs, and, therefore, even on the construction of the by-law proposed by the plaintiffs, required the consent of the Owners Corporation: that is, the request was within the first, and not the second "limb" of the by-law as construed by the plaintiffs. No third party that would engage "the second limb" of the by-law (on the plaintiffs' construction) was involved.

25 The Tribunal held that:

> "84 …the Lot 44 owners are not entitled to unilaterally insist on By-Law 28 being amended or added to without the written consent of the Owners Corporation …"

Question 2: discretionary considerations

26 The Tribunal went on to consider whether, had it reached a different conclusion on the construction question, any discretionary factors would have operated against it making the orders sought and concluded:

> "88 …there are powerful discretionary reasons for withholding the relief sought by the lot owners …"

Although the Tribunal made passing reference to discretionary factors identified in the submissions of the Owners Corporation, it did not spell out which of those factors it accepted.

27 Those conclusions answered, adversely to the plaintiffs, the first two questions stated in paragraph 55. The consequence was that each of the plaintiffs' applications was dismissed.

28 The Tribunal then turned its attention to the application by the Owners Corporation for, in effect, vacant possession of the front roof area, its claim for compensation, and for the sealing of the hole, or void, in the enclosed area and consequential orders.

Questions 3 and 4: orders consequential upon the Tribunal's conclusions

29 Against the possibility of an adverse conclusion on the construction question, the plaintiffs nevertheless sought dismissal of the Owners Corporation's application in order to explore further options for resolution. The Tribunal declined to take that course, finding "no proper basis" for withholding the relief sought. It was necessary then for the Tribunal to consider the nature of the relief to be afforded to the Owners Corporation. An order for vacant possession was to be expected, and was inevitable, having regard to the conclusions already expressed. There remained the Owners Corporation's application for orders:

- for removal of the plaintiffs' possessions, including fittings and fixtures;
- for sealing the "hole" providing access from Lot 44 to the exclusive use area;
- for compensation for the exclusive use of the area from the expiration of the period of exclusive use granted by the by-law (1 July 2018) and continuing.

Rectification/Remediation

30 The Tribunal held that the internal staircase and the void that created access from Lot 44 to the roof top were constructed unlawfully (they were not shown on the Council approved plans, and there was no evidence of any subsequent approval). The Tribunal therefore concluded that the plaintiffs should not be allowed to continue to use those structures. It rejected a submission on behalf of the plaintiffs that an order requiring remediation of the kind sought should not be made because the work would require Council approval. In doing so, it took into account evidence of a Town Planner called by the plaintiffs that the Council had already (in its initial approval to the development) approved a floor covering the whole of the roof area.

31 The Tribunal further considered that the plaintiffs ought not have preferential access to the common property front roof area via the internal staircase, and that, while they remained entitled (like all lot owners) to use the area, their access should be gained in the same way as that of other occupants of the building – via the common property stairway that leads to the back part of the roof. It therefore made an order (order 3(iv)) to the effect that the plaintiffs seal the hole in the roof, using appropriately qualified contractors, and in a proper and competent manner.

Compensation

32 Finally, the Tribunal considered the issue of compensation. The Tribunal rejected a claim made on behalf of the Owners Corporation for compensation arising from "breach of statutory duty" or for "mesne profits". It referred, however, to the interim orders made by consent on 20 July 2018, in which the plaintiffs gave the "usual undertaking as to damages", and in which (unusually) "the usual undertaking as to damages" was defined as:

> "… an undertaking to the Tribunal to submit to such order (if any) as the Tribunal may consider to be just for the payment of compensation (to be assessed by the Tribunal or as it may direct) …"

33 The Tribunal accepted evidence of a valuer (Mr Darren Keen) that the front roof area had a monthly rental value of $3,970.00. It ordered (order 1) that the plaintiffs pay compensation to the Owners Corporation calculated on that basis from 1 July 2018 until they complied with the substantive orders. The Tribunal made no order as to costs to the intent that each party bear his, her and its own costs.

The appeal to the Appeal Panel

34 By s 32 of the CAT Act the decision of the Tribunal was an "internally appealable decision".

35 Pursuant to s 80(1) and (2) of the CAT Act an appeal lies from an internally appealable decision to an Appeal Panel constituted under s 27 as of right on any question of law, or, with the leave of the Appeal Panel, on any other grounds. Exercising that right, both parties appealed. The appeals were heard on 31 July 2019. The appeal by the Owners Corporation does not call for further consideration. It resulted in no orders adverse to the plaintiffs, and nothing arising therefrom is involved in the present proceedings.

36 In support of their appeal the plaintiffs maintained the arguments they had put to the Tribunal.

37 The plaintiffs identified 13 separate grounds of appeal, many of which contained "sub grounds". Relevantly to the present proceedings, the plaintiffs asserted legal or factual errors on the part of the Tribunal in:

(i) the rejection of their proposed construction of By-Law 28(3) (ground 1);

(ii) the opinion expressed by the Tribunal that the application made by JPSF was, in reality, an application made by them or on their behalf (ground 2);

(iii) the failure to hold that the plaintiffs had "accrued property rights" (ground 3);

(iv) the finding that the internal stairway and the hole in the roof were constructed unlawfully (ground 6);

(v) ordering that the plaintiffs undertake the remediation work of the stairway and the hole in the floor (grounds 7, 9, 10, 11);

(vi) in making orders 3(i)-(iii) [which were consequential upon the rejection of the plaintiffs' construction of By-Law 28(3)] (ground 12).

(vii) the order that the plaintiffs pay compensation to the Owners Corporation (ground 13).

The remaining grounds raised issues that are no longer pursued.

38 Some of these grounds raised questions of law as to which the plaintiffs had an appeal as of right. Others involved questions of fact or questions of mixed fact and law, which required leave of the Appeal Panel. Clause 12 of Sch 4 of the CAT Act prescribes the circumstances in which leave may be given on an internal appeal. It provides:

> "(1) An Appeal Panel may grant leave under s 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because–
>
> (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)
>
> …".

39 On 16 September 2019 the Appeal Panel gave its decision, with reasons. It generally upheld the decision of the Tribunal, with the exception that it set aside the order that required the plaintiffs to seal the hole in the floor, and ordered, instead, that the Owners Corporation undertake that work. *Pollack*

[sic] *v The Owners – Strata Plan No. 2834; The Owners – Strata Plan No. 2834 v Pollack* [sic] [2019] NSWCATAP 227.

The reasons of the Appeal Panel

The construction of By-Law 28: grounds 1, 2, 3 and 12:

40 After extensive review of the submissions of the parties the Appeal Panel stated its agreement with the Tribunal's construction of By-Law 28(3) that any amendment of the by-law required the consent of the Owners Corporation. It may be taken that, except as otherwise stated, the Appeal Panel accepted the reasoning of the Tribunal.

41 The Appeal Panel considered that a "request" as contemplated by cl (3) of By-Law 28 is to be made to the Owners Corporation (which has responsibility for making by-laws). Hence, nothing would be added by requiring the consent of the Owners Corporation to any amendment, addition or repeal proposed. The concluding words of cl (3) "in all other cases" refer to potential requests for amendment, addition or repeal by other Lot owners (or strangers); such a request, before consideration by the Owners Corporation, would require the consent of the owners of Lot 44. In this respect the Appeal Panel departed from the reasons of the Tribunal.

42 Having regard to those conclusions the Appeal Panel did not find it necessary to state whether it agreed or disagreed with the Tribunal's conclusion that, even if it had accepted the plaintiffs' construction of cl (3), there were powerful discretionary reasons for withholding the relief sought by the plaintiffs. It expressly declined to adopt or endorse the Tribunal's conclusion that the by-law did not permit the amendment, addition to or repeal of the grant of exclusive use (as distinct from amendment, addition to or repeal of the by-law itself). The Appeal Panel said:

> "67 …the essential point is that the Decision was correct in concluding that the consent of the Owners Corporation is required to amend, add to or repeal By-Law 28."

That conclusion disposed of grounds 1, 2, 3 and 12 of the appeal.

43 The Appeal Panel then turned to the ground of appeal (ground 6) that challenged the finding that the stairway and void were constructed unlawfully; it

considered that the ground did not "assert any question of law" but, rather, asserted that the Tribunal's finding was not available on the evidence. That meant that leave was required for the ground to be argued. The Appeal Panel was not satisfied that the plaintiffs had demonstrated that they had suffered a substantial miscarriage of justice in any of the respects set out in cl 12 of Sch 4 of the CAT Act. It refused leave to appeal on that ground.

Compensation: ground 13

44 The plaintiffs' complaints with respect to the order for compensation were three-fold. First, they asserted that they had been denied procedural fairness, because (they claimed) they had not been advised that the Owners Corporation would rely on the terms of the undertaking given on 20 July 2018. Second, they asserted that the Tribunal does not have power to order damages "in the circumstances of this case". Third, they complained of the methodology by which the compensation ordered had been quantified. Specifically, they argued that the Owners Corporation had not established any loss referable to its continued exclusion from the front roof top area, and that having regard to the manner in which the appeal had been conducted, it was a denial of procedural fairness from the Tribunal to accept the evidence that it did.

45 The Appeal Panel rejected all arguments. It held that the terms of the undertaking, given in the consent orders "as a condition for the interim orders restraining the Owners Corporation" and other occupants of the building from accessing the front roof area put the plaintiffs on notice that the Owners Corporation might make an order for the payment of compensation. It held that, pursuant to s 232 of the SSM Act, the Tribunal had power to make an order for compensation, citing *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15. And it held that, on the basis of the undertaking given by the plaintiffs, the Owners Corporation was entitled to seek compensation for "the value of the benefit denied to" it, which had been quantified in evidence by reference to the rental value of the space.

The order that the plaintiffs seal the hole (order 3(iv): (grounds 7, 8, 9, 10 and 11)

46 There was no ground of appeal that clearly raised the question whether the hole should be sealed. The grounds as pleaded were directed to whether there was error in the identification of the plaintiffs as bearing responsibility for undertaking the works.

47 The Appeal Panel upheld ground 7, by which the plaintiffs challenged the order that they undertake the remediation work. It held that the Tribunal erred in failing to identify the basis for assigning that responsibility to the plaintiffs. It accepted that, for safety reasons, it was necessary that the hole be sealed. It also took into account that, once the front roof area was open to users other than the owners of Lot 44, the owners of Lot 44 were entitled to have the hole sealed to preserve their privacy and amenity. However, it took the view that responsibility for the remediation lay with the Owners Corporation. It varied order 3(iv) accordingly. That disposed of ground 7.

48 In the light of that conclusion the Appeal Panel considered it unnecessary to deal with grounds 9, 10, 11 and 12. (it may be that ground 12 is misplaced: by ground 12 the plaintiffs complained of orders 3(i)-(iii), which fell away with the construction question).

The appeal to this Court

49 As indicated above, pursuant to s 83(1) of the CAT Act, the plaintiffs appealed to this Court. Such an appeal is limited to grounds that involve questions of law. In oral argument three questions of law which the plaintiffs assert arise were identified. The questions of law concern:

(i) the true construction of cl (3) of By-Law 28;

(ii) the principles on which, pursuant to their undertaking to the Tribunal, an order for “damages” may be made;

(iii) the basis for the order that the hole in the floor be sealed.

50 Four grounds of appeal were pleaded. They concern:

(i) the construction of By-Law 28(3); (ground 1)

(ii) the order made by the Tribunal that the Owners Corporation seal the hole in the floor (thereby blocking direct access from Lot 44 to the roof); (grounds 2 and 3)

(iii) the order for compensation (ground 4)

The plaintiffs' argument

51 The written argument of the plaintiffs was almost exclusively directed to the reasons of the Tribunal. Little reference was made to the reasons of the Appeal Panel. To the extent that the Appeal Panel adopted or endorsed the reasons of the Tribunal that is understandable. It is, nevertheless, the reasons of the Appeal Panel that must be scrutinised. In all respects the plaintiffs maintained the arguments that had twice been firmly rejected.

Determination

Ground 1: the construction of By-Law 28(3)

52 The plaintiffs have never deviated from their original stated position that cl (3) of By-Law 28 is bifurcated, providing two separate routes to amendment, addition to or repeal of the by-law. The first is a request by the owner(s) of Lot 44, which, the plaintiffs accept, requires the consent of the Owners Corporation. The second, by which a request may be made by any other Lot owner (or, on the original proposal of the plaintiffs, anybody), requires only the consent of the owners of Lot 44, and does not require the consent of the Owners Corporation. "In all other cases", on the plaintiffs' argument, refers to requests made by persons other than the owners of Lot 44. Such a request requires only the consent of the owners of Lot 44, and not the consent of the Owners Corporation. This is notwithstanding the undoubted fact that (as in this case) the request may be for, in effect, the alienation for a period of years (at the option of the requestor) of a valuable piece of real estate that is the common property of the Owners Corporation (that is, the Lot owners as a whole), and has, to date, been maintained at the expense of the Owners Corporation, notwithstanding its exclusion from it.

53 In two ways the extreme and unreasonable implications of the proposition as originally made were recognised: first, in the notice given by JPSF when, for the first time, an amendment (or addition) to the by-law was proposed that

would move the financial responsibility for maintenance of the front roof area to the owners of Lot 44. (There was, however, no proposal that the By-Law be further amended by requiring the payment of an occupation fee). The second recognition was in the belated acceptance, made in written submissions in this Court, that the words "in all other cases" had to be given "a sensible construction" so as to exclude strangers to the Strata Plan and limit the entitlement to request amendment of, addition to, or repeal of the by-law to Lot owners or the Owners Corporation. That concession was made, so far as I can see, for the first time in submissions made to this Court and in response to the observation of the Tribunal that the plaintiffs' construction would allow a stranger to the Strata Plan to insist on the conferral of exclusive rights to common property on the plaintiffs (or their successors in title).

54 The corollary of the proposition that "a sensible construction" would be one that disentitled strangers to the Strata Plan to require amendment of, addition to, or repeal of the by-law must be that the construction proposed by the plaintiffs - that is, one that would permit any owner of any lot other than Lot 44 to require the conferral of exclusive use rights of valuable common property on the owners of Lot 44, provided only that those owners consented – is a "sensible" one.

55 In written submissions filed in support of the appeal (which were not signed by either counsel who appeared at the oral hearing) the rhetorical question was posed: (if their construction of cl (3) is not accepted) what work is done by the concluding words "in all other cases"? This was central to the plaintiffs' argument. That rhetorical question was answered by the Appeal Panel by acknowledging that requests for amendment of, addition to or repeal of the by-law may be made by Lot owners other than the owners of Lot 44. "All other cases" included such requests – that is, requests other than requests made by the owners of Lot 44. The consent of the Owners Corporation was not required because such requests were made to the Owners Corporation.

56 In support of the plaintiffs' argument, orthodox principles of statutory construction were invoked. Reference was made to *Project Blue Sky Inc v*

Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 at [71], where the majority said:

> "71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision."

57 One difficulty with reliance on those principles is that a by-law made by an Owners Corporation (or a Body Corporate) is not a statute and, it may be taken, is generally not drafted by a person with the skill and expertise of Parliamentary draftspersons. Whether by-laws made under strata titles legislation are to be seen as delegated legislation or as contractual terms (see the discussion by McColl JA, with whom Mason P agreed, in *The Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344; [2007] NSWCA 207) the rigours of statutory interpretation that attend the construction of statutes may (to the extent that it is necessary to do so in fairness and in order to give effect to the intention of the draftsperson) be somewhat relaxed: see *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [54]-[56]; *Wingecaribee Shire Council v De Angelis* [2016] NSWCA 189 at [20].

58 In *Tate*, after an exhaustive discussion, McColl JA (at [71]) stated nine propositions with respect to the approach to be taken to the construction of by-laws in Strata Plans. The fifth of those propositions was:

> "Whichever be the appropriate characterisation [of by-laws - that is, as delegated legislation or contractual terms], exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person."

59 If there were any ambiguity in By-Law 28 (and there is not) the focus of the construction exercise must be on determining the intention of those who adopted it at the meeting of 28 August 1974 and, in accordance with the fifth of McColl JA's proposition, what would be conveyed to a reasonable person. It is inconceivable that any of those who adopted By-Law 28 envisaged that it would permit perpetuation of exclusive use, by the owners of one Lot, of the valuable real estate that is constituted by the front roof area, without cost to the Lot owners (including cost of maintenance, the proposal by JPSF that the Lot 44 owners accept financial responsibility for maintenance being an addition that does not bear on the construction question). In this respect it is not to be overlooked that there was no evidence that any occupation fee had ever been paid or sought for the 50 year exclusive use; the clear inference is that none

was ever paid (or sought). It is equally inconceivable that any reasonable observer would consider that By-Law 28 had the effect for which the plaintiffs contend.

60 In the written submissions a number of specific arguments with respect to the proposed construction were advanced. I will deal with them in turn.

61 First, it was submitted that, contrary to the findings of the Tribunal (not disowned by the Appeal Panel), "there is nothing absurd, capricious or irrational" about the plaintiffs' proposed construction of the by-law. It was pointed out that:

> "Rights are often given that are capable of extension or expiry at the option of the beneficiary of those rights, either alone or, as in this case, when supported by another lot owner."

That may be so, but it overlooks that, in those cases, the option is ordinarily expressly spelled out in the contractual document.

62 Added to that submission was the proposition that:

> "The by-law was given a primary sunset date because the owner of Lot 44 may not wish to maintain responsibility that goes with exclusive access to a rooftop, or may simply be inactive so that the by-law comes to an end."

63 The second part of this is incomprehensible. There is nothing to suggest that inactivity on the part of the Lot owners would bring the by-law to an end. Neither the original resolution nor By-Law 28 imposed any responsibility for maintenance or upkeep of the front roof area on the owners of Lot 44. It may be that what was contemplated in this submission was the ordinary household maintenance and cleaning that goes with occupation, but there is nothing in the evidence to suggest that that responsibility would be seen as potentially burdensome in the way now suggested. This proposition is untenable.

64 Second, the plaintiffs took issue with the Tribunal's view that the purpose of By-Law 28 was to confirm the grant originally made in July 1968 (for the existing period of 50 years from that date). Whether that was the "sole purpose", they argued, was "speculation"; the purpose may have been to confirm the original grant together with an amendment power capable of extending its term.

65 That proposition is itself mere speculation, and improbable speculation. Given the timing (cl 15 came into effect on 1 July 1974, the by-law was made on 28

August 1974) and the terms of cll (1) and (2) of By-Law 28, together with cl (3), providing, as required by cl 15(1) of Sch 4 of the *Strata Titles Act*, a method of amendment, addition or repeal) – the irresistible inference is that the purpose was, in accordance with cl 15(1), to confirm the existing right of exclusive use. There is not the slightest reason to think that there was any additional purpose, and certainly not the slightest reason to think that the purpose was to confer an additional benefit on the owners of Lot 44.

66 Schedule 4 of the *Strata Titles Act* (in which cl 15 appeared) contained transitional and saving provisions. The clear purpose of cl 15(1) was to require Bodies Corporate to preserve existing rights by formalising them in by-laws that complied with the 1973 legislation.

67 The original grant of exclusive use did not contain any provision for amendment, addition or repeal. It merely fixed 50 years as the period of exclusive use. The provision for amendment, addition or repeal made its entry only when By-Law 28 was made, in compliance with cl 15(1) of Sch 4 of the *Strata Titles Act*, which expressly required that a by-law made thereunder:

> "…indicat[e] the method by which the by-law may be amended added to or repealed."

Clause (3) provided for that method – it is to be by request by the owner(s) of Lot 44 (which requires the consent of the Body Corporate) or, in all other cases, with the consent of the owners of Lot 44. That the purpose of those who adopted the by-law might have had in mind extending the grant of exclusive occupancy is nothing short of fanciful. Equally fanciful is the idea that a reasonable observer might perceive the by-law as having that effect.

68 Overlooked in the plaintiffs' submissions is that cl (3) provides for a method by which the by-law "*may be* amended, added to or repealed" at the *request* (not demand) of the owner of Lot 44 or some other person. While cl 15(1) of Sch 4 of the *Strata Titles Act* entitled a Lot owner with exclusive use rights to *require* the Body Corporate to make a by-law confirming those rights, it did not entitle that Lot owner to *require* amendment, addition or repeal in any particular respect. All the Body Corporate had to do was indicate a method of proposing amendment, addition or repeal. It is the Body Corporate (or, now, the Owners

Corporation) that must, in the end, agree to the amendment, addition or repeal. This point was made by the Appeal Panel.

69 Third, the plaintiffs took issue with the finding of the Tribunal that the power to amend the by-law did not include a power to amend the grant of exclusive use. A distinction was drawn by the Tribunal between the power to amend the by-law and a power to amend the grant of exclusive use. The difficulty with this proposition for the plaintiffs is that it was one of the conclusions of the Tribunal that the Appeal Panel did not adopt or endorse. The appeal is against the orders of the Appeal Panel, not those of the Tribunal, and it is the reasons of the Appeal Panel that must be examined.

70 Fourth, issue was taken with the conclusion of the Tribunal that, in serving its notice on the Owners Corporation, JPSF was acting at the behest of (or, as the plaintiffs characterised it, as the agent for) the plaintiffs.

71 This argument ignores the context in which the finding was made. It was not given as a reason for the Tribunal's finding against the plaintiffs' construction of the by-law. The Tribunal reached that conclusion independently of the relationship between Dr Pollak, or the plaintiffs, and JPSF. Rather, the Tribunal relied on the concept of "agency" as a reason that, even had it accepted the plaintiffs' construction of cl (3), it would have found that the notice fell within the first "limb" of cl (3) and was subject to the requirement of the consent of the Owners Corporation. Given the Tribunal's earlier conclusions, the finding was no more than a contingent finding in the event that the Tribunal was wrong on the construction of cl (3). Moreover, the finding did not make its way into the reasons of the Appeal Panel.

72 Fifth, it was asserted that the Tribunal's view that there were "powerful discretionary reasons" for withholding relief even if the plaintiffs' construction were accepted was an error, and the Appeal Panel should have so held. No further argument was addressed to that proposition.

73 No ground of appeal to this effect appears in the Notice of Appeal to the Appeal Panel. Nor does any argument to that effect appear in the written submissions presented to the Appeal Panel. Accordingly, the Appeal Panel did

not deal with any such argument. There is no error on the part of the Appeal Panel in failing to address a ground of appeal that was not pleaded.

74 Sixth, and finally on the construction point, the plaintiffs claimed that (on their construction of cl (3)) they have "an accrued legal right to exclusive use of the front rooftop area" and that the Owners Corporation had pleaded or established no basis on which they may have lost that right. The argument here proceeded to a somewhat obscure discussion of estoppel.

75 Precisely what was meant by "an accrued legal right to exclusive use" was not explained, nor was the means by which the "accrued legal right" is said to have been brought about.

76 The underlying premise of the argument is the correctness of the plaintiffs' construction of cl (3). If the plaintiffs were correct in their construction, this argument is superfluous. But it is worth noting the implications of the proposition. The proposition is not limited in time. That is, there is no limit on the plaintiffs' asserted "accrued legal right to exclusive use". If the plaintiffs now have "an accrued legal right to exclusive use of the front rooftop area" then they need not stop at extending their rights (as they perceive them) under the by-law by claiming an extension of 50 years; they may claim an extension for whatever period their audacity allows. And, when that term expires, the owners of Lot 44 would have "an accrued legal right" for another 50 (or 100) years, and another, and another.

77 This final argument exposes with conspicuous clarity the poverty of the plaintiffs' proposed construction. The argument has been untenable from start to finish. The Tribunal was correct to characterise the plaintiffs' construction of cl (3) as "absurd, capricious and irrational". The construction of By-Law 28 proposed on behalf of the plaintiffs is little – if anything – short of farcical. It has been maintained through three levels of the adjudicative process. It has nothing to recommend it. Yet the Owners Corporation has been forced, on three separate occasions, to the expense of mounting a defence of the unassailable.

78 There is not the slightest basis for a grant of leave to appeal with respect to ground 1. Leave to appeal on that ground is refused.

79 It is only fair to add the following. Neither senior nor junior counsel who appeared on the appeal was responsible for the written submissions. On the hearing of the appeal, senior counsel initially avoided reference to ground 1, preferring to concentrate his attention on ground 4, which challenges the order for compensation. When forced to address ground 1 he skated lightly, in as few words as possible, with little apparent enthusiasm. I take that lack of enthusiasm as recognition of the patent unsustainability of the argument advanced in the written submissions.

Grounds 2 and 3: order 3(iv)

80 Grounds 2 and 3 concern order 3(iv), by which, after variation, the Appeal Panel made an order that the Owners Corporation seal the hole in the floor "in a proper and competent manner, in accordance with all applicable laws and within a reasonable time frame". Having made that variation the Appeal Panel did not deal with other aspects of the order that were the subject of challenge.

81 There are two parts to order 3(iv). The first is that the hole in the floor be sealed. The second part concerns which of the plaintiffs and the Owners Corporation is to be responsible for the remediation. The Tribunal ordered that the hole be sealed. It gave as one reason for that order that the hole and the access stairway from Lot 44 were unlawfully constructed. It ordered that the plaintiffs be responsible for the remediation.

82 The plaintiffs sought to appeal against the finding that the construction was unlawful. The Appeal Panel refused leave, being not satisfied that the plaintiffs may have thereby suffered a substantial miscarriage of justice (see Sch 4, cl 12 of the CAT Act, [38] above). It upheld the order that the hole be sealed, but ordered that that be done by Owners Corporation.

83 The plaintiffs now assert (ground 2) that the "replacement" order made by the Appeal Panel "has no proper statutory foundation because it does not disclose what needs to be done with sufficient specificity". They also complain of the Appeal Panel's refusal of leave to appeal against the finding that the construction was unlawful.

84 The connection between the asserted absence of statutory foundation, and the lack of specificity is unclear to me. As I understand the plaintiffs' submissions,

their point is that any work to seal the hole would require development consent, which in turn would require their consent (the clear implication being that that consent would not be forthcoming).

85 It is not at all clear to me that the proposed work would require the consent of the plaintiffs. The whole of the work proposed would be on common property. As was pointed out by the Owners Corporation, and accepted by the Tribunal in argument, a method of sealing the void (without major construction work) is "a matter of common sense". No reasons were advanced as to why remediation of an unauthorised "hole" on the common property rooftop area would require the consent of any individual Lot owner.

86 The Tribunal did not make an express finding that development consent was not required. Rather, it concluded that the potential that the plaintiffs might withhold consent was not a reason for declining relief. In doing so, it took into account evidence of the plaintiffs' own expert that approval for a covering of the whole floor had been given in the original planning approval.

87 The argument of the plaintiffs in support of these grounds is in two parts. First, they relied on what they contended to be a lack of specificity in the orders. In this respect they relied on a decision of Parker J in *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425; (2019) 19 BPR 39,255. In that case, orders in very general terms had been made for repairs to common property of a strata building. Of those orders Parker J said:

> "113. Furthermore, the orders are in the nature of mandatory injunctions. Such orders can be enforced (indirectly, under NCAT: *Civil and Administrative Tribunal Act*, s 73) by way of contempt. It is unacceptable that the recipient of the order should be in any doubt as to what is required. In my view, for the Tribunal to make an order giving rise to such a doubt is itself an error of law."

88 The plaintiffs' concerns can be allayed. Order 3(iv) as made by the Appeal Panel is directed to the Owners Corporation. No concerns about uncertainty or lack of specificity have been raised by the Owners Corporation. The plaintiffs are not at risk for any orders for contempt in failing to comply with the order. (It may be different if they were to obstruct the Owners Corporation in its attempt to comply with order 3(iv)). The second point made by the plaintiffs is that the order, if carried out, would have the effect of interfering with their amenity. This was a consideration of the Appeal Panel in making the order. It gave two

reasons for making the order: safety, when other lot owners were given access to the front roof area, and preservation of the privacy and amenity of the lot owners when that eventuated.

89 By ground 3(c) the plaintiffs assert that, in upholding the Tribunal's order for remediation, the Appeal Panel failed to take into account a relevant (and necessary) consideration in that, by the loss of their direct access to the roof area, they suffered "substantial loss of amenity".

90 In their written submissions they criticised the Tribunal's decision that they should not be allowed to continue to use the unlawful structures providing direct access as "a very serious conclusion to reach". They submitted:

> "54. …It involves depriving the Lot owners of a very substantial element of the amenity of Lot 44, being direct access to the rooftop. This access was facilitated or arranged by the Owners Corporation in the late 1960s and had continued for over 50 years without the Owners Corporation suggesting that it might be unlawful. The Owners Corporation knew that the Lot owners purchased Lot 44 in the belief that this access was available."

A submission to similar effect was made to the Appeal Panel in the context of the plaintiffs' challenge to order 3(iv).

91 The Appeal Panel was plainly correct in concluding that safety was an important consideration. Retention of the hole in the floor, unfenced, would pose a hazard to users of the rooftop area. It would, it may be assumed, be possible to install some kind of fencing that would both maintain the plaintiffs' direct access and provide protection against the hazard. But such a proposition was never put either to the Tribunal or to the Appeal Panel and, indeed, it is not now put. The plaintiffs' contention is merely that there should be no impediment to their direct access to the roof area; they have made no submission concerning the safety aspects.

92 It was pointed out that it is not uncommon in strata title buildings for one or more lot owners to have superior access to common property. The example given was of a ground floor lot opening onto common property gardens. This, perhaps, was advanced as a discretionary reason for retaining the direct access.

93 One difficulty with that proposition is that such access is either included in the original specifications and strata approval, or is granted subsequently by resolution of the Owners Corporation. That is not this case. The direct access was not part of the original, approved, development and there is no evidence that subsequent approval has been given for the construction.

94 The shorter answer to the plaintiffs' contentions is that no question of law is involved in their challenge to the determination of the Appeal Panel.

95 Leave to appeal on grounds 2 and 3 is refused.

Ground 4: compensation

96 It is necessary to set out ground 4 as pleaded:

> "The Appeal Panel erred in failing to set aside order 1 at first instance in circumstances where:
>
> a. The Appeal Panel cannot make an order pursuant to an undertaking where the Appeal Panel does not have the jurisdictional power to award damages to compensate an owners corporation because other lot owners are excluded from a part of the common property;
>
> b. The order made at first instance was premised on the plaintiffs being obliged to seal the hole, being a conclusion which the Appeal Panel overturned;
>
> c. It was manifestly unjust to require the plaintiffs to pay damages in circumstances where the Appeal Panel found it was the defendant's [Owners Corporation] obligation to seal the hole between Lot 44 and the enclosed room on the front roof top area;
>
> d. It was a denial of procedural fairness to rely on evidence that the monthly rental value of the plaintiffs' access right was $3,970; and
>
> e. Monthly rental value was not an available measure to adopt to reflect the defendant's loss to the purposes of the plaintiffs' undertaking as to damages."

97 In the plaintiffs' written submissions reliance on ground 4(a) as "an independent ground of appeal" was abandoned, in acknowledgement of the undertaking given by the plaintiffs on 20 July 2018, and the definition, to which they agreed, of the term "usual undertaking as to damages".

98 It was, however, contended that the order was made in denial of procedural fairness because the plaintiffs were not told that reliance would be placed on the undertaking as a basis for the order.

99 A similar argument was put to the Appeal Panel, which rejected it saying:

> "84. …The terms of the undertaking put the Lot 44 owners on notice that the Tribunal may make an order for the payment of compensation.
>
> … Although the Tribunal did not make an order for compensation based upon an assertion of breach of statutory duty or an obligation to pay mesne profits [as claimed by the Owners Corporation] and, instead, made the order based upon the undertaking given by the lot 44 owners to pay damages, no procedural unfairness has arisen. The substance of the claim put forward by the Owners Corporation was for compensation. That was foreshadowed and the fact that the Tribunal based its decision upon the undertaking has not given rise to any unfairness suffered by the lot 44 owners. The lot 44 owners have not put to us any submission that they would have made (but did not make) had they been aware that the Tribunal would determine compensation on the basis of the undertaking."

100 There is no error of law in that reasoning. Indeed, it may be wondered what the plaintiffs thought was the purpose of the definition given to the undertaking for damages if it were not to provide a basis for quantification.

101 The plaintiffs also argued that the order that they pay compensation was unfair because – and it is necessary to set out the written submission:

> "66. …Until the hole was sealed, the interim orders that were made in return for the undertaking were necessary to protect the privacy, security and amenity of the lot owners."

102 It is difficult to reconcile that proposition with the position adopted by the plaintiffs in relation to grounds 2 and 3, in which, on the grounds of their amenity, they now oppose the making of any order for sealing the hole.

103 Finally, the plaintiffs argued that the Owners Corporation had failed to establish any loss and the basis for quantification could not be sustained.

104 Absent the terms of the undertaking giving definition to what was meant by "usual undertaking as to damages" this argument might have some semblance of validity. In the light of that definition it cannot and does not.

105 Ground 4 is, like the other grounds, unsustainable. Leave to appeal on ground 4 is refused.

106 The consequence of these conclusions is that leave to appeal against the orders of the Appeal Panel of 16 September 2019 is refused. The plaintiffs are to pay the Owners Corporation's costs of the proceedings. It is unnecessary to deal with the Owners Corporation's notice of contention.

107 The orders I make are:

1. Leave to appeal against the orders of the Appeal Panel of the NSW Civil and Administrative Tribunal on 16 September 2019 is refused;

2. The plaintiffs are to pay the defendant's costs of the proceedings.

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