Civil and Administrative Tribunal

New South Wales

Case Name:	Gelder v The Owners – Strata Plan No 38308
Medium Neutral Citation:	[2020] NSWCATAP 227
Hearing Date(s):	1 October 2020
Date of Orders:	5 November 2020
Decision Date:	5 November 2020
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President S Goodman SC, Senior Member
Decision:	(1) The appeal is allowed. (2) Paragraphs (2) and (3) of the Orders made by the Tribunal on 8 July 2020 in file numbers SC 19/48418 and 20/06550 are set aside. (3) In lieu of paragraph (3) of the Orders made by the Tribunal on 8 July 2020, order that: The Owners – Strata Plan No. 38308 is to take all steps necessary to ensure that the by-law referred to in paragraph (1) of these orders is registered and effective. (4) If any party desires to make an application for costs of the appeal: (a) that party is to so inform the other party within 14 days of the date of these reasons; (b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons; (c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for

costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;
(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;
(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

Catchwords:	LAND LAW – strata title – common property – common property rights by-law – whether unreasonable refusal to consent – errors of law
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 2015
Cases Cited:	Ainsworth v Albrecht (2016) 261 CLR 167 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223 Capcelea v The Owners-Strata Plan No. 48887 [2019] NSWCATAD 27 Collins v Urban [2014] NSWCATAP 17 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Goncalves v Bora Developments Pty Ltd; Bora Developments Pty Ltd v Goncalves [2020] NSWCATAP 9 Kimberley Developments Pty Ltd v Cicihour Pty Ltd [2020] NSWCATAP 213 Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248 Minister for Immigration & Citizenship v Li (2013) 249 CLR 332 Olive Grove Investment Holdings Pty Ltd v The Owners-Strata Plan No 5942 [2015] NSWCATAD 120 Owners Corporation Strata Plan 5164 v Givney (2013) NSWCTTT 261 Owners of Strata Plan No 74835 v Pullicin [2020] NSWCATAP 5 SZRLO v Minister for Immigration and Citizenship [2013] FCA 825

	The Owners of Strata Plan No. 3397 v Tate (2007) 70 NSWLR 344 The Owners-Strata Plan No 12289 v Donaldson [2019] NSWCATAP 213 The Owners – Strata Plan No 37762 v Pham [2006] NSWSC 1287 The Owners-Strata Plan No 69140 v Drewe [2017] NSWSC 845 Walsh v The Owners – Strata Plan No 10349 [2017] NSWCATAP 230 White v Betalli (2006) 66 NSWLR 690
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Michelle Gelder (Applicant) The Owners – Strata Plan 38308 (Respondent)
Representation:	Counsel: DD Knoll AM (Appellant) Solicitors: DEA Lawyers (Appellant) Bannermans Solicitors (Respondent)
File Number(s):	AP 20/31209
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial
Citation:	N/A
Date of Decision:	8 July 2020
Before:	C Paull, Senior Member
File Number(s):	SC 19/48418; SC 20/06550

REASONS FOR DECISION

Introduction

1 The appellant owns Lot 2 of Strata Plan 38308. Special By-Law 1 of that Strata Plan confers on the appellant rights of exclusive use over a courtyard within the common property of the Strata Plan (**Lot 2 Courtyard**).

2 On 8 July 2020, on the application of the respondent Owners Corporation, the Tribunal made orders changing Special By-Law 1 and directing that the amended by-law be registered. The changes ordered included (a) the grant of a right of access to other lot owners to the appellant's exclusive use area for the purposes of installing, maintaining and repairing air conditioning units; (b) the appellant becoming liable to indemnify the respondent against demands and liabilities arising from the exercise of those rights of access; and (c) the excision of parts of the appellant's exclusive use area.

3 On 30 July 2020, the Tribunal's orders were stayed pending the determination of this appeal.

4 The appellant appeals against the Tribunal's decision as of right with respect to the errors of law for which she contends. The appellant also seeks leave to appeal, to the extent that leave is necessary.

5 For the reasons set out below we allow the appeal.

Background

6 Strata Plan 38308 was registered in January 1991 and relates to a three storey building in Neutral Bay. Each storey contains two lots. Lot 2 is on the ground floor below lot 4 (first floor) and lot 6 (second floor). The Lot 2 Courtyard is accessible from Lot 2.

7 In April 2016, Special By-Law 1 was registered, in the following form:

> The Owner(s) for the time being of Lots 1, 2, 5 & 6 and any persons authorised by them from time to time shall be entitled to exclusive use and enjoyment of that part of the Common Property ("the Exclusive Use Area") designated on the Plan annexed hereto and forming part of this By-Law (the Exclusive Use Area number attached to the Lot number in the Strata Plan as set out in the Schedule below) subject to the following terms and conditions:
>
> > (a) The exclusive area shall be used for the purpose designated in the Schedule below.

(b) The Owner(s) is responsible for the property maintenance and shall keep the exclusive use area clean, tidy and properly maintained and otherwise in a state of good and serviceable repair.

(c) The Owner(s) shall not permit the Exclusive Use Area to be used in a manner likely to cause disturbance or annoyance to the occupant of any other Lot.

(d) An Owner(s) must not store chemicals, flammable substances, gas or alcohol, volatile compounds or substances on the Exclusive Use Area.

(e) The Owner(s) indemnifies the Owner's Corporation against, demands, and liabilities of any kind which may arise from respective damage to any property or death or injury to any person arising out of the exercise of the rights conferred by this By-Law.

(f) To the extent that this By-Law makes the Owners of the Exclusive Use Area directly responsible for the cleanliness, tidiness and proper maintenance of such Exclusive Use Areas, it discharges the Owners Corporation from its obligations under Section 62 of the *Strata Schemes Management Act 1996*.

(g) This By-Law may only be amended or repealed with the written consent of the Owner or Owners of the Lot or Lots concerned and in accordance with a special resolution.

SCHEDULE	
LOT NUMBER	**EXCLUSIVE USE OF AREA NUMBER/LOCATION DETAILS**
1	Court yard for exclusive use of Lot 1 designated Area "A" on the Plan annexed and marked "P1".
2	Court yard for exclusive use of Lot 2 designated Area "B" on the Plan annexed and marked "P1".
5	Roof space for exclusive use of Lot 5 designated Area "C" on the Plan annexed and marked "P2".
6	Roof space for exclusive use of Lot 6 designated Area "D" on the Plan annexed and marked "P2".

8 The annexed Plan P1 included as Area "B" the Lot 2 Courtyard.

9 As is evident, Special By-Law 1 provides that the owner of Lot 2 has exclusive use of the Lot 2 Courtyard and that a proposed amendment of Special By-Law 1 which concerns the Lot 2 Courtyard requires the written consent of the owner of Lot 2. The exclusive use area is unlimited as to depth or height.

10 In September 2016, the appellant became the owner of Lot 2.

11 In about February 2017, the appellant installed an air conditioning system in Lot 2. The condensers for this system are located within the Lot 2 Courtyard and at ground level. This installation occurred without the approval of the respondent.

12 In March 2018 at an Extraordinary General Meeting of the Scheme, Special By-Laws 4 and 6 were passed. Those by-laws were registered in September 2018. The salient parts of each of those by-laws (which defined the "Lot" as Lot 4 and Lot 6 respectively) include:

> 1.1 In this by-law:
>
> ...
>
> (d) **Owner** means the Owner of the Lot from time to time.
>
> ...
>
> (g) **Proposed Works** means all building works and all related services supplied to effect the following:
>
> i. installation of a new air conditioner in the living area with the external condenser unit affixed to the northern external wall of the Lot and with an appearance in keeping with the rest of the scheme; and
>
> ii. all associated penetrations, piping and electrical connections.
>
> in accordance with the diagram of the proposed and existing works attached to this by-law at "**Annexure A**" of this by-law.
>
> ...
>
> 3.4 The Owner:
>
> ...
>
> (f) must indemnify the Owners Corporation against any costs or losses arising out of the Proposed Works to the extent permitted by law.

13 On 14 October 2018, the respondent issued a notice of an Annual General Meeting. That notice proposed changes to Special By-Law 1. The motion for consideration by the Annual General Meeting was in the following form:

24. The owners corporation specially resolves to amend special-by law 1 to define the Exclusive Use Areas for Lots 1, 2, 5 and 6.

> *Explanatory notes: Attached is the proposed amendment to the By-law. Consent Form to amended special by-law 1 to be executed by Lots 1, 2, 5 and 6. Consent forms also attached with this notice.*

14 The attachment was in the following form:

Required By: the owners of Lots 1, 3, 4, 5 & 6.

Explanatory Note: This motion is to amend special-by law 1 to define the Exclusive Use Areas for Lots 1, 2, 5 and 6.

The Owners – Strata Plan No 38309 SPECIALLY RESOLVES to amend Special By-Law 1 as set out below, and that notification of this change to the by-laws be lodged for registration in accordance with section 141 of the Act at the Registrar-General's Office:

SPECIAL BY-LAW 1 – Lots 1, 2, 5 and 6 Exclusive Use

The owner(s) for the time being of lots 1, 2, 5 and 6 and any persons authorised by them from time to time shall be entitled to exclusive use and enjoyment of that part of the common property ("the exclusive use area") designated on the plan annexed hereto and forming part of this by-law (the exclusive use area number attaching to the lot number in the strata plan as set out in the schedule below) subject to the following terms and conditions:

(a) The exclusive use area shall be used for the purpose designated in the schedule below.

(b) The owner(s) is responsible for the proper maintenance and shall keep the exclusive area clean, tidy and properly maintained and otherwise in a state of good and serviceable repair.

(c) The owner(s) shall not permit the exclusive use area to be used in a manner likely to cause disturbance or annoyance to the occupant of any other lot.

(d) An owner(s) must not store chemicals, flammable substances, gas, or alcohol, volatile compounds or substances on the exclusive use area.

(e) An owner(s) must provide reasonable access to the exclusive use area by other owners and their contractors for the purposes of installing, upgrading and maintaining the air conditioning units servicing their lots within 7 days' notice.

(f) The owner(s) indemnifies the owners corporation against demands and liabilities of any kind which may arise from respective damage to any property or death or injury to any person arising out of the exercise of the rights conferred by this by-law.

(g) To the extent that this by-law makes the owners of the exclusive use area directly responsible for the cleanliness, tidiness and proper maintenance of such exclusive use areas, it discharges the owners

> corporation from its obligations under Section 106 of the *Strata Schemes Management Act 2015*.
>
> (h) This by-law may only be amended or repealed with the written consent of the owner or owners of the lot or lots concerned and in accordance with a special resolution.

> The exclusive use areas “A” and “B” extend from the upper surface of the ground (slab) associated with the Lot and are limited to the stratum height of the lower surface of the ceiling slab associated with the lot.
>
> The exclusive use areas “C” and “D” extends from the upper surface of the roof cavity floor slab to the lower surface of the roof ceiling.

15 The key proposed changes were the inclusion of a new sub-paragraph (e) and two paragraphs at the end of the by-law.

16 On 29 October 2018, the Annual General Meeting was held. The minutes of that meeting record the following resolution:

> **Specially resolved that** the owners corporation specially resolves to amend special-by law 1 to define the Exclusive Use Areas for Lots 1, 2, 5 and 6, noting that the owners of units 1, 5 and 6 have signed the consent forms whereas the owner of unit 2 has refused to sign.

17 On 16 November 2018, the appellant’s solicitors wrote to the respondent, asserting that the resolution was invalid because the appellant’s consent was required and had not been obtained.

18 On 28 October 2019, the respondent filed an application in the Tribunal in which it sought, amongst other things, an order under s 149 of the *Strata Schemes Management Act 2015* (**SSMA**) prescribing changes to Special By-Law 1, such changes being those presented to the Annual General Meeting on 29 October 2018.

19 On 10 February 2020, the appellant filed an application seeking various orders.

The proceeding below

20 On 30 March 2020, the Tribunal conducted a hearing of the applications filed by the appellant and the respondent.

21 At that hearing, an affidavit of the appellant affirmed 13 March 2020 was read. In that affidavit the appellant stated at paragraph 12 that a significant part of her decision to purchase Lot 2 was the Lot 2 Courtyard with its exclusive use rights and that she had been looking for an apartment that had outdoor space with privacy. Later in her affidavit, she described the proposed changes to

Special By-Law 1 and then set out her reasons for not consenting to those changes. Her evidence included:

> 74. There were a number of significant issues with these amendments:
>
> (a) there is no “ground slab” in my courtyard;
>
> (b) the upper surface of the ground of my courtyard is below the upper surface of the floor slab within lot 2. In order to access the courtyard I have to walk down 4 stairs to the ground of my courtyard;
>
> (c) the land slopes away and is not level;
>
> (d) the effect of the change to the lower boundary would be my exclusive use would be at the height of the upper surface of the floor slab of lot 2 which is approximately one metre or more above the ground level of my courtyard which makes a nonsense of the by-law and significantly diminishes and interferes with the existing exclusive use rights which I paid for and have enjoyed since purchasing lot 2;
>
> (e) there are trees and plants that were planted by the developer prior to the other owners and I purchasing and those would no longer be within my exclusive use courtyard;
>
> (f) I have a pergola which was installed by the developer prior to the other owners and I purchasing and that extends above the proposed new upper height of my courtyard and therefore that would no longer be within my exclusive use courtyard;
>
> (g) I would be required to provide access to my courtyard to unidentified persons for indeterminate period of time on giving of 7 days notice;
>
> (h) those unidentified persons are not required to clean any debris, rubbish or material deposited into our client exclusive use area yet the by-law requires me to keep the exclusive use area clean and tidy;
>
> (i) those unidentified persons are not required to repair any damage to the courtyard or my contents within my courtyard;
>
> (j) those unidentified persons are not required to hold insurance for death or injury or damage to property although me as occupier of the courtyard may be liable for those things.
>
> 75. Annexed to this affidavit at **page 282** are some photographs of the courtyard depicting the stairs, the slope of the land and the pergola.
>
> 76. Therefore, I did not provide written consent to the OC for the proposed amendment to special by-law 1.

22 The appellant was not cross examined.

23 The respondent relied upon a witness statement of Mr Ludecke. Mr Ludecke’s evidence included that he is an owner of Lot 6 and authorised to make his statement on behalf of the respondent. Relevantly for present purposes, Mr Ludecke responded to paragraph 74 of the appellant’s affidavit, as follows:

> 17. I refer to paragraph 74 of Ms Gelder's Affidavit and say that the proposed amendments to Special By-law 1 and proposed by-law for the unauthorised works in Lot 2 in the Scheme's Letter satisfactorily deal with the concerns raised by Ms Gelder as:
>
> > (a) The stratum height of the exclusive area is defined to extend "from a depth of two metres below the upper surface of the ground of the courtyard and limited to the stratum height of the lower surface of the ceiling slab associated with the Lot", which deals with concerns raised in paragraph 74(a)-(d) of Ms Gelder's Affidavit;
> >
> > (b) The pergola in the exclusive use area is included in the definition of "existing works" for which approval is granted in proposed new by-law for Ms Gelder's unauthorised works", which deals with concerns raised in paragraph 74(f) of Ms Gelder's Affidavit; and
> >
> > (c) Clauses e(v), e(vii), e(x) and e(ix) (sic) in the proposed amendments to Special By-Law 1 in the Scheme's Letter respectively deal with concerns raised in paragraphs 74(g)-(i) of Ms Gelder's Affidavit.

24 The "Scheme's Letter" referred to in that evidence is an open letter from the respondent's solicitors to the appellant's solicitors dated 25 March 2020.

25 In that letter the solicitors for the respondent referred, amongst other things, to the appellant's "concerns with previous amendments to Special By-Law 1 (see paragraph 74 of Ms Gelder's Affidavit) ...". It then continued "I am instructed that the Owners Corporation has considered the above issues and, in the hopes of resolving these proceedings amicably and satisfying Ms Gelder's concerns, proposes the following:

> ...
>
> 2. A further amended version of Special By-Law 1 is also enclosed and, in my client's view, deals with the concerns raised in paragraph 74 of Ms Gelder's Affidavit."

26 The enclosed further amended version of Special By-Law 1 included, as sub-paragraph (e):

> An owner(s) must provide reasonable access to the exclusive use area as follows:
>
> > (ii) To the other owners servants, agents and contractors for the purposes of installing, upgrading and maintaining the air conditioning units servicing their lots;
> >
> > ...
>
> Such access to be provided on the following conditions:
>
> ...

(v) such notice must identify the purpose for which access is required, the name, address, company details, telephone number and contractor licence number… of all persons who will access the exclusive use area;

…

(vii) access is limited to the reasonable time required to undertake the proposed works;

(ix) the owners corporation or owner as the case may be indemnifies the relevant owner entitled to exclusive use of the exclusive use area against demand and liabilities of any kind which may arise from the access to the exclusive use area for damage to property and death or injury to any person;

(x) the owners corporation or owner as the case may be must promptly make good any damage to the relevant lot or contents within the lot or exclusive use area, arising out of the access; and

...

27 On 8 July 2020, the Tribunal published its Reasons for Decision (**Reasons**) and Orders. The Tribunal (correctly) interpreted s149 as requiring a two-step process, namely (a) a determination as to whether the appellant's refusal of consent to the amendment of a common property rights by-law was unreasonable under s 149(1) and if so, then (b) a decision whether to order that the by-law be amended (Reasons at [47], [69] and [90]).

28 The Tribunal held (at [90]) that the appellant had unreasonably refused to consent to the proposed changes to Special By-Law 1 at the Annual General Meeting. In reaching that conclusion the Tribunal:

(1) indicated (at [77]) a *prima facie* view that the appellant "was unreasonable in not allowing an amendment to the courtyard by-law that would facilitate other lot owners installing air conditioning" because:

(a) it was common ground that the appellant's exclusive use rights of the air space above the Lot 2 Courtyard were unlimited (at [73]) and that what was proposed would place a height limit on the air space rights of the appellant and the other lot owners who benefit under Special By-Law 1 (at [74]);

(b) the installation of the appellant's air conditioner was unapproved (at [76]);

(c) the owners of the lots above Lot 2 (i.e. Lots 4 and 6) sought to install their air conditioners directly above the appellant's air conditioner (at [76]);

(d) the other lot owners had approval for the installation of their air conditioners (at [76]);

(e) the proposed changes would allow the other lot owners the right to enter the Lot 2 Courtyard for the purpose of installing air conditioners, and for repairs and emergency matters (at [75]);

(2) then turned to the reasons given by the appellant for her refusal to consent to the changes and held:

> 78. What Ms Gelder says, however, is that such an amendment by restricting the height of her open space rights, will take away valuable property rights; benefit only lot owners 4 and 6 and are inconsistent with her current rights under the courtyard by-law.
>
> 79. Ms Gelder complains of the fact that she will be required to give access to persons on 7 days notice for work related matters; that such persons are not required to take responsibility for their actions e.g. by taking out appropriate insurance, cleaning and repairing after their work is done.
>
> 80. These matters are more fully set out at paragraph 74 of Ms Gelder's affidavit. How, exactly Ms Gelder comes to put forward some of these matters is not explained and the particularisation of her complaints often remain open ended (eg para 74(b)(c)(d)).
>
> 81. In other instances it is hard to assess what in fact is the degree of the adverse impact alleged (eg para 74 (e) and (f)) and matters such as photographic evidence do not assist.
>
> 82. In other instances the matters complained of do not seem to impose unreasonable problems (eg para74 (g)); and those concerns that may eventuate down the track are matters for which Ms Gelder would clearly have recourse were they to arise (eg Para 74 (h) (l) (n) (j)).

(3) held (at [83]) that the proposed changes to Special By-Law 1 represented "a reasonable effort to address the matters that are to be of the most likely concern"; and

(4) dismissed (at [84] to [89]) the appellant's argument that the proposed changes would diminish the value of Lot 2 because it was not supported by evidence and noted that any compensation claim failed for the same reason.

29 We note that paragraph 74 of the appellant's affidavit included sub-paragraphs (a) to (j) (inclusive). We thus treat the reference in paragraph [82] of the Reasons to "74(h) (l) (n) (j)" as a typographical error for "74(h) (i) and (j)".

30 As noted above, the Tribunal also made Orders disposing of the applications filed by the applicant and the respondent. Of those Orders, only the following are relevant:

> (1) Pursuant to s 149(1) Strata Schemes Management Act 2015 the Tribunal makes the by-law presented at the 18 January 2018 Extraordinary General Meeting in relation to the air conditioners installed by the owner of Lot 2 SP383083 (sic)

> (2) Pursuant to s 149(1)(b) of the Strata Schemes Management Act 2015 the Tribunal makes the by-law presented at the 29 October 2018 Annual General Meeting as motion 24 to amend Special By-Law 1 other than that the word "slab" is to be omitted from that document where it appears in relation to Lot 2 SP383083 (sic)
>
> (3) The Owners Corporation SP 383083 (sic) is to take all steps required under Strata Schemes Management Act 2015 to ensure that the by-laws referred to in 1 and 2 above are registered and effective

31 Order (1) authorised the installation of air conditioning in Lot 2 and was made by consent. There is no appeal from Order (1). Orders (2) and (3) gave effect to the proposed amendment to Special By-Law 1, but with the deletion of the word "slab" where it appeared in relation to Lot 2.

Provisions and principles relevant to the appeal and leave to appeal

32 Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (**NCAT 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.

33 As the decision was made in the Consumer and Commercial Division, cl 12 of Sch 4 to the NCAT Act is also relevant. It provides:

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

34 The principles regarding whether leave to appeal should be granted under cl 12 of Sch 4 of the NCAT Act were summarised by an Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17 at [65]-[84].

Section 149 of the SSMA

35 Section 149 of the SSMA provides in so far as is presently relevant:

149 Order with respect to common property rights by-laws

(1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—

> ...
>
> (b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or
>
> ...

(2) In considering whether to make an order, the Tribunal must have regard to—

> (a) the interests of all owners in the use and enjoyment of their lots and common property, and
>
> (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.
>
> ...

(4) The Tribunal may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.

(5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).

(6) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

36 It is common ground that Special By-Law 1 is a common property rights by-law, within the definition of that term in s 142 of the SSMA.

37 Section 149(1)(b) provides the Tribunal with a discretion to make an order prescribing a change to a common property rights by-law if the Tribunal first makes a particular finding. In the present case, the requisite finding is a finding that the appellant, as an owner of a lot, has unreasonably refused to consent to the terms of a proposed amendment of a common property rights by-law.

38 If such a finding were to be made, the Tribunal’s discretion to make an order would be enlivened. In exercising that discretion, the Tribunal must have regard to the matters set out in s 149(2), namely (a) the interests of all owners in the use and enjoyment of their lots and common property and (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

39 It is common ground that the respondent bore the onus of proving that the appellant's refusal of consent was unreasonable.

40 It is also common ground that "unreasonable" should be regarded as meaning "not endowed with reason, not guided by reasonable good sense, not based on or in accordance with reason or sound judgment, immodest, capricious or exorbitant": see *Olive Grove Investment Holdings Pty Ltd v The Owners-Strata Plan No 5942* [2015] NSWCATAD 120 at [67]; *Capcelea v The Owners-Strata Plan No 48887* [2019] NSWCATAD 27 at [31]. In *The Owners-Strata Plan No 69140 v Drewe* [2017] NSWSC 845, Latham J said at [43]: *"The onus lay upon the first defendant to establish that these grounds had no rational basis in that they were not guided by sound judgment or good sense"*.

41 The determination of whether there has been unreasonableness is to be made by reference to the circumstances at the time of the refusal to give consent: *The Owners – Strata Plan No 69140 v Drewe* [2017] NSWSC 845 at [27],[41]; *The Owners-Strata Plan No. 12289 v Donaldson* [2019] NSWCATAP 213 at [88],[101].

42 We turn now to address the grounds of appeal in the order in which they were addressed by the parties.

Failure to actively and genuinely engage with critical evidence and failure to take into account relevant considerations

Submissions

43 The competing submissions may be summarised as follows.

44 The appellant submitted that the Tribunal was obliged to actively engage with whether the appellant's refusal to consent to the proposed changes was unreasonable. In this regard, cursory consideration is insufficient (*Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at 270 [59]) and the Tribunal must engage in "an active intellectual process" (*SZRLO v Minister for Immigration and Citizenship* [2013] FCA 825 at [48]-[49]). The respondent did not cavil with this submission.

45 The appellant then submitted that in the present case this required the Tribunal to genuinely consider each of the reasons given by the appellant for

not consenting to the proposed amendments and described in paragraph 74 of the appellant's affidavit, but the Tribunal did not do so and in particular the Tribunal's treatment of the appellant's evidence in paragraph 74 of her affidavit was cursory and dismissive. The appellant also submitted that the Tribunal also failed to engage with, and make a finding concerning, the evidence of Mr Ludecke as set out above, which the appellant submitted contained an implied concession that the proposed removal of the lower part of the appellant's exclusive use area provided a valid and rational reason for the appellant to oppose the proposed amendments.

46 The respondent submitted that the Tribunal actively and genuinely engaged with the appellant's reasons for refusing consent and in particular that the Tribunal found that the appellant's response to the respondent's claim with respect to Special By-Law 1 was not clearly articulated. The respondent also submitted that although the Tribunal's reasons are brief, they properly point to the unreasonableness of the appellant's reasons for refusing consent and that, when viewed objectively, the appellant's reasons do not have a logical or rational basis, including because they lack adequate detail. The respondent submitted that Mr Ludecke's evidence was not a concession, rather it was evidence of an attempt to resolve the dispute between the appellant and the respondent.

47 In reply, the appellant reiterated her submissions in chief and added that it does not follow from the fact that the Tribunal found that the refusal of consent was unreasonable that there was the necessary degree of engagement by the Tribunal. The appellant also submitted that the respondent's submissions do not rise above the level of assertion.

Consideration

48 Section 149(1)(b) required the Tribunal to consider whether the appellant's failure to consent was unreasonable. This required the Tribunal to consider the reasons given by the appellant for refusing to consent.

49 In our view, the Tribunal did not consider the appellant's reasons for refusing consent beyond a cursory and dismissive reference to those reasons.

50 The appellant's evidence as to her reasons for refusing to consent, which was unchallenged, is principally found in paragraph 74 of her affidavit. The Tribunal's engagement with that evidence is found at paragraphs [80] – [82] of the Reasons. Those paragraphs are set out above.

51 The appellant's reasons for her refusal to consent included that if the proposed amendments were made:

(1) she would lose the exclusive use of that part of her exclusive use area below the level of the upper surface of the floor slab for Lot 2 (**Lower Excision**);

(2) she would lose the exclusive use of that part of her exclusive use area above the level of the lower surface of the ceiling slab for lot 2 (**Upper Excision**); and

(3) the creation of rights of access to her exclusive use area would have had certain effects, which included that (a) she would be required to provide access to the Lot 2 Courtyard to unidentified persons for indeterminate periods and those persons would be under no obligation to keep the exclusive use area clean, with such obligation remaining on her and (b) she may be liable for losses caused by death or injury or damage to property occurring during the access being exercised by those persons (**Effects of Access**).

52 We consider each of these in turn.

Lower Excision

53 The proposed amendment to Special By-Law 1 includes:

> The exclusive use areas "A" and "B" extend from the upper surface of the ground (slab) associated with the Lot and are limited to the stratum height of the lower surface of the ceiling slab associated with the lot.

54 As noted above, prior to the amendment, the appellant's exclusive use area is unrestricted as to height or depth. If Special By-Law 1 were to be amended in the manner proposed, the inclusion of this paragraph would have the effect of restricting the appellant's exclusive use area to that space which fell between two levels, namely:

(1) at the lower level, the upper surface of the ground (slab) associated with Lot 2; and

(2) at the upper level, the lower surface of the ceiling slab for Lot 2.

55 The areas below and above these levels would be excised (i.e. the Lower Exclusion and Upper Exclusion respectively).

56 At paragraphs 74(b) – (f) of her affidavit, the appellant dealt with the Lower Excision. In paragraphs 74 (b) to (d), the appellant indicated that the upper surface of the floor slab within Lot 2 is approximately one metre above the upper surface of the ground in the Lot 2 Courtyard and that the difference in height between those levels is evident from (a) the fact that access to the Lot 2 Courtyard was via a staircase down to the land within the Lot 2 Courtyard which land then sloped away and was not level and (b) the photographs referred to at paragraph 75 of the appellant's affidavit. The appellant's evidence was also that this change significantly diminished and interfered with the existing exclusive use rights for which she had paid and had enjoyed since purchasing Lot 2.

57 The Tribunal dealt with this evidence at paragraph [80] of the Reasons, where the Tribunal stated:

> 80. These matters are more fully set out at paragraph 74 of Ms Gelder's affidavit. How, exactly Ms Gelder comes to put forward some of these matters is not explained and the particularisation of her complaints often remain open ended (eg para 74(b)(c)(d)).

58 Neither the Tribunal's questioning as to how the appellant came to put forward this evidence (which is quite irrelevant particularly as the evidence was unchallenged), nor the description of the appellant's complaints as open ended, amounts to an engagement with the issue of the rationality or otherwise of the reasons given, as part of a consideration of whether the appellant's refusal of consent was unreasonable. The Tribunal failed to address in any meaningful way the appellant's unchallenged evidence that the proposed change would excise from her existing rights the exclusive use of the space the subject of the Lower Excision.

59 The appellant's evidence concerning the Lower Excision also described, at paragraph 74(e) of her affidavit, how the Lot 2 Courtyard contained trees and plants that were planted before she purchased Lot 2 that would no longer be wholly within her exclusive use area. By deduction, the parts of those trees and plants which were more than approximately one metre above the ground would remain within the exclusive use area but the roots and any part of the trees and plants below approximately one metre would not. The Tribunal dealt with this evidence at paragraph [81] of the Reasons, where the Tribunal stated:

> 81. In other instances it is hard to assess what in fact is the degree of the adverse impact alleged (eg para 74 (e) and (f)) and matters such as photographic evidence do not assist.

60 Again, the Tribunal did not engage meaningfully with the appellant's evidence. The adverse impact included at least that she would no longer have exclusive access to the trees and plants in her exclusive use area to the extent that those trees and plants were below approximately 1 metre in height (including the roots of such trees and plants). At a practical level, other lot owners would be entitled to place garden furniture of less than one metre in height and to garden in a space over which the appellant previously had exclusive use rights.

61 The appellant expressed concern that her enjoyment of the proprietary rights that she held over the exclusive use area would be adversely affected.

62 The rights she holds are proprietary in nature: see *White v Betalli* (2006) 66 NSWLR 690 at 702-703 [59]-[64]; *The Owners of Strata Plan No. 3397 v Tate* (2007) 70 NSWLR 344 at 363 [76]. Where there is a reasonable apprehension that such rights would be adversely affected by a proposed amendment, it is difficult to conclude that the owner of such rights would act unreasonably in refusing to consent to that proposed amendment: see *Ainsworth v Albrecht* (2016) 261 CLR 167 at 186-187 [60]-[64].

63 In our view, engagement with the question whether the appellant had unreasonably refused to consent to the proposed amendments required a meaningful analysis of the fact that the proposed amendments, if made, would remove proprietary rights of the appellant. The Tribunal did not do so.

64 For completeness, we note that we do not consider that Mr Ludecke's evidence was a concession of the validity or rationality of the appellant's concerns about the Lower Excision. That evidence is equally consistent with the respondent maintaining its view that those concerns were unreasonable, whilst being prepared to suggest changes in an attempt to resolve the dispute.

Upper Excision

65 Paragraph 74(f) of the appellant's affidavit dealt with the Upper Excision. The appellant's evidence was that the Lot 2 Courtyard contains a pergola which was installed prior to the appellant's purchase of Lot 2, and which extended above the proposed new upper boundary and therefore part of the pergola

would no longer be within the appellant's exclusive use area if the proposed amendments were to be made. It is also apparent that the part of the pergola within the Lower Excision would also fall outside the appellant's exclusive use area.

66 The Tribunal dealt with this evidence at paragraph [81] of the Tribunal's Reasons. Again, the Tribunal did not engage meaningfully with the appellant's evidence. The adverse impact included that the appellant did not have exclusive use of the space above the level of the lower surface of the ceiling slab of Lot 2 in circumstances where the pergola was higher than that level.

67 The comments made above concerning the failure of the Tribunal to engage critically with the fact that the effect of the proposed amendments would be to remove proprietary rights from the appellant are again apposite.

Effects of Access

68 Paragraphs 74(g) – (j) of the appellant's affidavit dealt with the Effects of Access. The Tribunal dealt with this evidence at paragraph [82] of the Reasons, where the Tribunal stated:

> 82. In other instances the matters complained of do not seem to impose unreasonable problems (eg para 74(g); and those concerns that may eventuate down the track are matters for which Ms Gelder would clearly have recourse were they to arise (eg Para 74 (h) (l) (n) (j)).

69 The appellant's principal submission as to the Effects of Access was that the proposed amendments would expose the appellant to potential liabilities to which she was not otherwise exposed.

70 The parties were at issue as to whether the proposed amendments would in fact create such an exposure for the appellant. The appellant submitted that the effect of the inclusion of sub-clause (e), when read together with sub-clause (f), would be to expose the appellant to a requirement to indemnify the respondent against demands and liabilities which may arise in the course of repairs and maintenance by the owners of Lots 4 and 6 of their air conditioning equipment.

71 The respondent submitted that Special By-Law 1, if the proposed amendments were to be made, would confer rights and obligations only on the owners of Lots 1, 2, 5 and 6 and that the correct construction of sub-clauses (e) and (f) is

that the indemnity only arises if the respondent suffers loss as a result of one of the owners of Lots 1, 2, 5 and 6 exercising that owner's rights, in which case only that owner would be required to indemnify the respondent. The appellant submitted in reply that subclauses (e) and (f) have a wider operation than as submitted by the appellant.

72 The respondent also submitted that clause 3.4 of Special By-Laws 4 and 6 requires the owners of Lots 4 and 6 to be liable for damage and to indemnify the respondent and that in respect of damage caused to Lot 2, the appellant would have recourse against the owners of Lots 4 and 6. The appellant submitted that Special By-Laws 4 and 6 would not operate so as to remove the indemnity created by sub clause (f) and that whilst Special By-Laws 4 and 6 allow the respondent to recover against the owners of Lots 4 and 6, the result would be that the respondent may have multiple potential defendants against which it might proceed, including the appellant.

73 In our view, the effect of clauses (e) and (f) of Special By-Law 1 if amended as proposed would be to expose the appellant to an obligation to indemnify the respondent against liabilities arising from damage to any property or death or injury of any person arising out of the exercise by other owners of the rights conferred by that by-law. Sub-clause (f) requires that the owner(s) – including the appellant - indemnify the respondent "against demands and liabilities of any kind which may arise from respective damage to any property or death or injury to any person arising out of the exercise of the rights conferred by this by-law". Sub-clause (e) creates rights of access to the exclusive use area (relevantly the Lot 2 Courtyard) in favour of the "other owners and their contractors for the purposes of installing, upgrading and maintaining the air conditioning units servicing their lots". As those rights may be exercised by owners other than the appellant and by contractors engaged by those other owners, it follows that the appellant may be required to indemnify the respondent against demands and liabilities arising out of the exercise of those rights by the other lot owners.

74 For example, if a contractor engaged by the owner of Lot 6 were to enter into the Lot 2 Courtyard for the purpose of repairing the air conditioning unit affixed to the exterior of Lot 6 and to fall from a ladder while in the process of

conducting such a repair, such access would amount to the “exercise of rights conferred by this by-law” within sub clause (f), such right having been conferred by sub-clause (e). Sub-clause (f) would then oblige the appellant to indemnify the respondent against demands and liabilities which may arise from the contractor’s death or injury.

75 The Tribunal did not meaningfully engage with the applicant’s evidence as to the Effects of Access and in particular the appellant’s potential exposure to indemnify the respondent. There was no analysis of how the relevant clauses of Special By-Law 1 would operate following the proposed amendment and thus whether the appellant’s refusal to consent was unreasonable. To say, as the Tribunal did, that the appellant would have recourse were these matters to arise is insufficient.

76 For the reasons set out above, in or view the Tribunal erred in failing to actively engage with the appellant’s evidence as to her reasons for her refusal of consent and thus as to whether her refusal to consent to the proposed amendments was unreasonable.

Whether the decision to make order (2) was legally unreasonable

Submissions

77 The competing submissions may be summarised as follows.

78 The applicant submitted that a conclusion of legal unreasonableness is available if the Panel comes to the view that no reasonable Tribunal could have reached the primary decision on the material before it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223 at 230; *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at 364 [68]; and that a failure to properly exercise a statutory discretion may be legally unreasonable if, upon the facts, the result is unreasonable or plainly unjust: *Li* at 367 [76] (*Goncalves v Bora Developments Pty Ltd; Bora Developments Pty Ltd v Goncalves* [2020] NSWCATAP 9 at [29]).

79 The respondent did not cavil with this submission. The appellant then submitted that it was not legally reasonable to decide that the appellant’s refusal to consent was unreasonable within the meaning of that word in sub-section 149 (1)(b) when:

(1) access to install, maintain and repair air conditioning units could be achieved by an amendment to Special By-Law 1 without the Excisions being part of that amendment;

(2) the Excisions removed existing proprietary rights of the appellant; and

(3) the other lot owners had no interest in the Excisions being made.

80 The respondent submitted that the Tribunal's decision was not legally unreasonable when account was taken of the history of the dispute between the appellant and the respondent and in particular that the appellant had refused access to the Lot 2 Courtyard and had refused to sign a Deed of Access which would have allowed the owners of Lots 4 and 6 access to the Lot 2 Courtyard to install, repair and maintain air conditioning. In view of that history, the respondent submitted, the proposed changes were necessary and reasonable, and it was entirely reasonable for the Tribunal to make a by-law containing those changes. In reply, the appellant submitted that the appellant's refusal to sign the Deed of Access cannot be taken as a demonstration that the appellant behaved unreasonably in view of the Tribunal's findings at paragraphs [61]-[64] of the Reasons. In those paragraphs, the Tribunal found that it was unreasonable for the respondent to make the signing of the proposed Deed of Access a condition of approval of the installation of the appellant's air conditioner.

81 The appellant also submits there is an analogy with easements, which are granted without any extinguishment of the servient entitlement's property rights. The respondent says that an exclusive use area is not analogous to ownership of land. In reply, the appellant referred to *White v Betalli* (2006) 66 NSWLR 690 in which the Court indicated that special rights within a strata scheme could be created by way of by-laws or easements.

82 The respondent also submitted that in view of the history of the dispute, the Excisions were necessary and reasonable to ensure harmony within the Scheme, and that this was correctly identified by the Tribunal at paragraph [98] of the Reasons. The appellant in reply submitted that there was no evidentiary basis for this finding and there is no rational basis for an amendment to be made which includes the Excisions.

Consideration

83 In *Kimberley Developments Pty Ltd v Cicihour Pty Ltd* [2020] NSWCATAP 213, an Appeal Panel held at [48]:

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

84 In our view, the Tribunal's decision to order the amendment of Special By-Law 1 was legally unreasonable, for the following reasons.

85 *First*, the appellant's unchallenged evidence, as discussed above, was that the proposed changes would produce the Excisions, with the result that the appellant would no longer have exclusive use of the spaces removed by the Excisions.

86 *Secondly*, this would involve the extinguishment of part of the proprietary rights held by the appellant.

87 *Thirdly*, the removal of that part of the appellant's proprietary rights was not necessary. The aim of allowing access to allow installation, maintenance and repair of air conditioning units was achievable without the Excisions.

88 *Fourthly*, no interest of the other lot owners required the Excisions as a step to be taken in addition to a right of access.

89 *Fifthly*, the respondent's submission that the Tribunal's finding was legally reasonable in the context of the history of the dispute between the parties is rejected. That history did not make the appellant's refusal to consent to the Excisions unreasonable. Further, the refusal of the appellant to sign a Deed of Access is not a justification for the removal of her proprietary rights and in any

event as the Tribunal found, the appellant was justified in refusing to sign that Deed in the circumstances in which it was presented to her.

90 *Sixthly*, the respondent's submission that the removal of the appellant's proprietary rights was necessary and reasonable to ensure harmony within the scheme is also rejected. It has no evidentiary basis. The Tribunal at paragraph [98] of the Reasons suggested that the possibility of friction arising from Special By- Law 1 could be addressed by "imposing what is not an unduly large height restriction" and allowing all of the lot owners to have air conditioning. However, there is no evidentiary basis for a conclusion that the removal of any friction required any steps over and above the establishment of a right of access.

91 In summary, the Tribunal's decision was legally unreasonable because it went beyond the imposition of rights of access and removed proprietary rights from the appellant when there was no need to do so or other justification for such a course. In our view, the result reached by the Tribunal is plainly unreasonable and unjust.

Absence of power

Submissions

92 The competing submissions may be summarised as follows.

93 The appellant submitted that the by-law made by the Tribunal (which omitted the word "slab" from the proposed amended by-law which had been put to the Annual General Meeting) had not been to a general meeting. The respondent did not cavil with that submission.

94 The appellant then submitted that without the particular proposed amended by-law having been put to a general meeting, it cannot be said that the appellant unreasonably refused to consent to that amendment (relying upon *Owners Corporation Strata Plan 5164 v Givney* (2013) NSWCTTT 261). The respondent submitted that the passage in *Givney* relied upon by the appellant (paragraph [44]) is not relevant because the Tribunal in the present case used its power under s 232 of the SSMA to make the order.

95 In reply, the appellant referred to paragraph [20] of *Givney* as supporting the proposition that the Tribunal had no power to re-word the proposed by-law. The appellant also submitted that s 232 is not a source of power to draft a new by-law in terms that have not been considered by a general meeting, and in particular it is not a plenary power exercisable despite the specific terms of s 149 (relying upon *Owners of Strata Plan No 74835 v Pullicin* [2020] NSWCATAP 5 at [8], *Walsh v The Owners – Strata Plan No 10349* [2017] NSWCATAP 230 at [58] and *The Owners – Strata Plan No 37762 v Pham* [2006] NSWSC 1287 at [70]).

96 The respondent also submitted that the appellant raised concerns about the inclusion of the word "slab" in circumstances where there is no slab in the Lot 2 Courtyard and those concerns were met by the removal of that word, such that she cannot now be heard to complain about that deletion. The appellant submits that it was the respondent who sought the removal of that word.

97 The respondent also submitted that if we uphold this ground of appeal, then we should exercise the power under s 81(1) of the NCAT Act to resolve this matter by amending Special By-Law 1 as we see fit. The appellant submitted that s 81 does not empower the Tribunal or an Appeal Panel to amend a by-law absent the requirements of s 149 having been satisfied.

98 The respondent also submitted that the approach suggested in the appellant's submissions is unreasonable in circumstances where:

(1) the Tribunal cannot order the respondent to call a general meeting to vote on a resolution without the word "slab", or to determine that the Owners Corporation has failed to call such a general meeting without that by-law being put forward in a formal and concrete way by the appellant for the respondent's consideration (relying upon *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 at [109]-[111];

(2) the Tribunal has power to make orders under ss 149(1) and 232 (1) of the SSMA and the exercise of the power under s 232 to settle a complaint or dispute would be consistent with the guiding principle set out in s 36(1) of the NCAT Act;

(3) there is no suggestion that the appellant would consent to a resolution with the word "slab" removed and the appellant's submissions suggest she would not, with the result that the dispute would never be resolved;

(4) the respondent would be required to commence new proceedings on substantially the same issues to deal with incorporating a stratum height into Special By-Law 1;

(5) the current situation will remain until orders are made by the Tribunal in circumstances where the appellant has air conditioning (installed in February 2017, without consent) and the owners of Lots 4 and 6 will not have air conditioning because the appellant refuses to provide access to the Lot 2 Courtyard.

Consideration

99 The starting point is to identify which provision the Tribunal used to make Order (2). Contrary to the respondent's submission, the Tribunal did not make the order pursuant to s 232. It is plain from the terms of Order (2) that the Tribunal was invoking its power under s 149 and no reference is made to s 232. Whilst the Tribunal did refer to s 232 at paragraphs [93] and [95] of the Reasons, those paragraphs refer to s 232 only as part of a description of submissions made by the respondent.

100 The next question is whether the Tribunal acted beyond the power provided in s 149 in making a by-law which had not been put in that form to a general meeting.

101 Section 149(1)(b) provides, that "the Tribunal may make an order prescribing a change to a by-law if the Tribunal finds …that an owner… has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law".

102 It is clear from the text of s 149(1)(b) that there must be, *first*, a particular by-law or a particular amendment to a by-law, and *secondly*, that the owner has unreasonably refused consent to the terms of, to the proposed amendment of, or to the repeal of that by-law. Where there is a proposed amendment, the unreasonable consent must relate to *that* proposed amendment.

103 It follows that, subject perhaps to *de minimis* exceptions, the power in s 149(1)(b) is limited to making an order in the terms of the by-law or proposed amendment to by-law in respect of which the Tribunal has made a finding that the owner's refusal of consent was unreasonable. Where a particular form of by-law has not been presented to the lot owner for consent, there cannot have been an unreasonable refusal to consent.

104 In the present case, the form of the amended by law (which deleted the word 'slab') was not presented to the appellant for her consent. It follows that she has not refused consent, let alone done so unreasonably.

105 As noted above, there may be *de minimis* exceptions, for example the correction of typographical or grammatical errors where there is no substantive change to the wording to which the lot owner has refused to consent. The Tribunal appears to have been operating on such a basis, as it stated at paragraph [97] of the Reasons that the removal of the word 'slab" simply corrected a technical error and did not change the proposed amendment to which the appellant refused consent.

106 We disagree. As the respondent submitted, the effect of the deletion of the word "slab" is to change the lower boundary of the appellant's exclusive area from the upper surface of the slab upon which Lot 2 sits to the upper surface of the ground in the Lot 2 Courtyard. This is a substantial change – as described above, the difference in these heights is approximately a metre. It matters not that the change may be thought to be favourable to the appellant, the point remains that this form of by-law was not presented to the appellant for her consent.

107 Thus, the Tribunal made an order giving effect to an amendment to which the appellant had not refused consent or even been given the opportunity to do so. It follows that the appellant could not have refused consent unreasonably and the finding necessary to enliven the Tribunal's discretion could not have been made. As such, the Tribunal made an order which was beyond its power to make, and by doing so it made an error of law.

108 As noted above, the respondent submitted that the amendment to Special By-Law 1 should be made under s 81(1) of the NCAT Act. We decline to do so, in circumstances where the jurisdiction of the Tribunal depends upon satisfaction of the precondition in s 149 of unreasonable refusal of consent to the proposed amendment and that has not occurred. The same reasoning applies to the power under s 232 of the SSMA.

109 The absence of power is also the answer to the respondent's other submissions. If there is no power to make the order sought, it does not matter

whether it seems unfair (from the respondents' perspective) to not make the order sought. It is thus unnecessary to address the various aspects of that suggested unfairness, although we do note that the position in which the respondent finds itself may have been avoided had the proposed amendment not gone beyond providing access to the Lot 2 Courtyard on reasonable terms.

Leave to appeal

110 In view of our conclusions on the above grounds of appeal it is unnecessary to consider whether leave to appeal should be granted.

Orders

111 We make the following orders:

(1) The appeal is allowed.

(2) Paragraphs (2) and (3) of the Orders made by the Tribunal on 8 July 2020 in file numbers SC 19/48418 and 20/06550 are set aside.

(3) In lieu of paragraph (3) of the Orders made by the Tribunal on 8 July 2020, order that:

> The Owners – Strata Plan No. 38308 is to take all steps necessary to ensure that the by-law referred to in paragraph (1) of these orders is registered and effective.

(4) If any party desires to make an application for costs of the appeal:

(a) that party is to so inform the other party within 14 days of the date of these reasons;

(b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons;

(c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;

(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

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

Registrar

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

Amendments

05 November 2020 - Orders on coversheet corrected.

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