Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan 5319 v Price
Medium Neutral Citation:	[2020] NSWCATAP 245
Hearing Date(s):	On the Papers
Date of Orders:	23 November 2020
Decision Date:	23 November 2020
Jurisdiction:	Appeal Panel
Before:	T Simon, Principal Member S Higgins, Senior Member
Decision:	(1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013, a hearing of the appeal of the Owners Corporation is dispensed with. (2) The Owners Corporation's application for leave to appeal is refused. (3) The appeal is dismissed.
Catchwords:	APPEAL – appeal from a cost order made under s 60 of the Civil and Administrative Tribunal Act 2013.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Antonio v Cubitt's Classic Homes Improvements Pty Limited [2016] NSWCATAP 37 House v The King [1936] HCA 40; 55 CR 499 Jubian v Clark (No 2): Clark v Jubian (No 2) [2016] ONE.TEL Ltd v Deputy Commissioner of Taxation [2000] FCA 270; (2000) 101 FCR 548 Nichols v NFS Agribusiness Pty Ltd [2018] NSWCA 84 Re Minister for Immigration & Ethnic Affairs (Cth); Ex Parte Lai Qin [1997] HCA 6; 1997) 186 CLR 622; (1997) 143 ALR 1; (1997) 71 ALJR 533 (Lai Qin) The Owners – Strata Plan 5319 v Price; Price v The

	Owners – Strata Plan 5319 [2019] NSWCATCD 3 The Owners – Strata Plan 5319 v Price [2019] NSWCATCD 51
Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan 5319 (Appellant) Cheree Price (Respondent)
Representation:	Counsel: C Bolger (Appellant) Solicitors: J O'Connell (Appellant) Jane Crittenden Lawyers (Respondent)
File Number(s):	AP 20/12832
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	13 February 2020
Before:	S Thode, Senior Member
File Number(s):	SC 18/43278

REASONS FOR DECISION

1 The appellant, is the owner of the common property in Strata Plan 5319 ('the Owners Corporation') and seeks to appeal order 2 of the Tribunal, made on 13 February 2020, that it pay the respondent, Cheree Price ('Ms Price'), her '*costs of and incidental to her application on an ordinary basis as agreed and assessed*'.

2 The appeal of the Owners Corporation was lodged on 13 March 2020. On 26 March 2020, the Appeal Panel, constituted by Deputy President Westgarth,

made orders for the filing and serving of evidence and written submissions by the Owners Corporation and Ms Price. The Appeal Panel also made an order that the appeal of the Owners Corporation is to be decided on the papers without an oral hearing unless the parties (or one of them) apply for a telephone hearing by 14 May 2020, in which case the matter would be listed for a further call over.

3 As neither party has sought an oral hearing and having regard to the material filed, we are satisfied that the issues for determination in this appeal can be adequately determined in the absence of the parties by considering the material filed and we make an order accordingly: *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), s 50(2).

4 It is noted that Ms Price recently filed written submissions, out of time, on 11 November 2020. We have not considered those submissions.

Background

5 Ms Price is a lot owner in Strata Plan 5319.

6 On 1 December 2017, the Owners Corporation commenced proceedings against Ms Price, in the Consumer and Commercial Division of the Tribunal ('the Tribunal'), in relation to unauthorised building works that had been commenced within her lot ('the Owners Corporation unapproved works application'). The unauthorised works involved the removal of three sections of the internal walls to Ms Price's lot. In response to the proceedings initiated by the Owner's Corporation, on 8 December 2017, Ms Price also commenced proceedings in the Tribunal seeking retrospective approval for the works. Her application was made under s 232 of the *Strata Schemes Management Act 2015* (NSW) ('SSM Act') on the basis that the Strata Manager had previously advised another lot owner in the building that the removal of internal wall between the kitchen and lounge room had no structural integrity for the lot above and therefore the lot owner's property.

7 Prior to the Owners Corporation commencing its proceedings, Ms Price had notified the Owners Corporation of her intention to undertake renovation work to her lot. In about August 2017, she provided the Strata Committee with a copy of her application for approval of the works, including insurances and

engineers drawing and certificates. Between August and October 2017, the Strata Committee met on three occasions to discuss Ms Price's application and there were ongoing exchanges of correspondence between Ms Price's lawyer and the Strata Manager. Being frustrated by the delays, in November 2017 Ms Price instructed her builder to commence work. He was then instructed to stop work two days later and shortly thereafter, the unapproved works application of the Owners Corporation was lodged with the Tribunal.

8 On 15 January 2018, the Owners Corporation held an Extraordinary Meeting for the approval of the building work to Ms Price's lot. The Owners Corporation specifically resolved to approve the works in relation to the proposed work to the bathroom, ensuite and laundry of Ms Price's lot. However, the draft motion in regard to the wall removal was defeated.

9 The unapproved works application of the Owners Corporation and Ms Price's cross application were heard, before Senior Member Simon (as she then was), on 18 April 2020 ('the hearing of the unapproved works proceedings').

10 Subsequent to the hearing of the unapproved works proceedings, on 20 June 2018, the Owners Corporation held an Annual General Meeting ('AGM'). Before that AGM were two draft motions of Ms Price. One draft motion related to the making of a property rights by-law in regard to the removal of the three sections of internal wall to Ms Price's lot ('the wall removal works by-law'). The other motion related to the making of minor renovations to Ms Price's lot ('the minor renovations by-law'). Both draft motions were defeated at the AGM.

11 On 8 October 2018, following the defeat of her motions and prior to the Tribunal having determined the unapproved works proceedings, Ms Price commenced the proceedings that are the subject of this appeal ('Ms Price's strata application'). In these proceedings Ms Price sought an order, under ss 149(1)(a) and 232(1) of the SSM Act for the making of a common property rights by-law and the making of a minor renovations by-law in the same terms as those that were defeated at the 20 June 2018 AGM of the Owners Corporation. Attached to Ms Price's strata application was a copy of each of the defeated draft motions.

12 The 2017 unapproved works application of the Owners Corporation and Ms Price's cross application were determined on 3 January 2019, with Ms Price being ordered to reinstate the walls that had been removed and remove all unauthorised works to the floor space: see *The Owners – Strata Plan 5319 v Price*; *Price v The Owners – Strata Plan 5319* [2019] NSWCATCD 3. Neither Ms Price, nor the Owners Corporation appealed that decision. Nor did the Owners Corporation make an application for costs in regard to those proceedings.

13 On 28 March 2019, the Owners Corporation lodged an application with the Tribunal seeking an order that Ms Price's strata application be dismissed on the grounds of an Anshun Estoppel: *The Owners – Strata Plan 5319 v Price* [2019] NSWCATCD 51. That application was heard, before Senior Member Smith, on 16 May 2019. On 11 June 2019, Senior Member Smith, dismissed the application of the Owners Corporation and subsequently made an order that Ms Price's costs in regard to that application be paid by the Owners Corporation: *The Owners – Strata Plan 5319 v Price* (6 September 2019).

14 Ms Price's strata application was listed for hearing on 18 November 2019. On this day, without a hearing on the merits of Ms Price's strata application, the Tribunal (constituted by Senior Member Thode) made orders by consent, under ss 149(1)(a) and 232(1) of the SSM Act, in essentially in the same terms as sought by Ms Price in her strata application. That is, the Tribunal made an order for the making of a by-law in the terms of the wall removal works by-law attached to Ms Price's strata application and a by-law (with one amendment) in the terms of the minor renovations by-law attached to Ms Price's strata application. The Tribunal also made orders for Ms Price and the Owners Corporation to file and serve their evidence in regard to costs, which both parties had agreed could be determined on the papers. The Tribunal determined that application on 13 February 2020 and also published its reasons for decision. A copy of that decision was received by the Owners Corporation on 14 February 2020.

Jurisdiction of the Appeal Panel

15 There is no dispute that the decision of the Tribunal the subject of appeal is an '*ancillary decision*' for which the Owners Corporation has a right of appeal on a question of law or with the leave of the Appeal Panel, on any other grounds: see *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act'), ss 4(1) and 80(2)(b) and *Antonio v Cubitt's Classic Homes Improvements Pty Limited* [2016] NSWCATAP 37, at [57] and [58].

16 The Owners Corporation contends that each of their grounds of appeal raise a question of law. In the alternative, the Owners Corporation seeks leave to appeal on the grounds that they have suffered a substantial miscarriage of justice: NCAT Act, Sch 4 clause 12 which provides:

> **12 Limitations on internal appeals against Division decisions**
>
> (1) 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).
>
> Note—
>
> Under section 80 of this Act, a party to proceedings in which a Division decision that is an internally appealable decision is made may appeal against the decision on a question of law as of right. The leave of the Appeal Panel is required for an internal appeal on any other grounds.

17 For the reasons that follow, we are not satisfied that the Owners Corporation has established a question of law. Nor are we satisfied that the Owners Corporation has established that it has suffered a substantial miscarriage of justice warranting the grant of leave to appeal. In our view, the grounds of appeal relied on by the Owners Corporation essentially challenge the Tribunal's findings of fact, which in our view were open to it on the material before it.

The Notice of Appeal of the Owner's Corporation

18 In its Notice of Appeal, the Owners Corporation identified 10 grounds of appeal as follows:

> i. The Tribunal erred in finding that there were special circumstances under s 60(2) of the Civil and Administrative Tribunal Act 2013.
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> ii. The Tribunal erred in finding that the Appellant [the Owners Corporation] surrendered to the respondent in agreeing to compromise and settle proceedings.
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> iii. The Tribunal erred in finding that the Appellant's [the Owners Corporation] conduct necessitated the Respondent's appearance at the hearing.
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> iv. The Tribunal erred in finding that the Appellant [the Owners Corporation] acted unreasonably in the conduct of the proceedings and or that the Appellant's [the Owners Corporation] conduct established a basis for making a cost order.
>
> v. The Tribunal failed to apply the correct principles of law.
>
> vi. The Tribunal identified the wrong issue or asked the wrong question.
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> vii. The Tribunal took into account irrelevant considerations.
>
> viii. The Tribunal made findings in the absence of evidence and or that were not open to be made.
>
> ix. The Tribunal made a decision so unreasonable that no reasonable decision maker would make it.
>
> x. The Tribunal failed to provide procedural fairness to the Appellant. [the Owners Corporation]

19 The Owners Corporation gave the following reasons as to why the Appeal Panel should grant it leave to appeal:

(1) the order was made in the absence of evidence;

(2) the order has a significant financial impact on the Owners Corporation;

(3) the Tribunal accepted late submissions from Ms Price and the Owners Corporation was not given an opportunity to respond to these;

(4) the nature of the proceedings which involved an application to change (or alter) by laws regarding works sought to be undertaken to Ms Price's unit. The Owners Corporation maintained a position that required Ms Price to comply with existing by-laws, which Ms price did not wish to do and commenced work without approval;

(5) the proceedings were settled on a compromise basis and there was no hearing on the merits;

(6) there was no evidence to support a finding as to the likely success in the proceedings or that the Owners Corporation had acted unreasonably in the conduct of the proceedings;

(7) the Owners Corporation had sought to resolve the proceedings and Ms Price did not respond to offers or rejected them. The proceedings were ultimately resolved on the morning of the hearing when agreement was finally reached with Ms Price. It was Ms Price who caused the matter to remain listed for hearing;

(8) the Tribunal made findings that were not open on the evidence; and

(9) the decision discourages parties to litigation to resolve proceedings without a hearing on the merits and determination.

20 As noted below, the Owners Corporation did not ultimately press every ground set out above.

Reply to Appeal of Ms Price

21 In her Reply to Appeal, Ms Price submitted that she supported the of the Tribunal that the Owners Corporation pay her costs of and incidental to her strata application on an ordinary basis as agreed and assessed. Ms Price also contended that leave to appeal should not be granted.

22 In response to the Owners Corporation's grounds of appeal, Ms Price submitted:

(1) the Tribunal's power to make an order for costs against a party is not limited to cases where there has been a hearing on the merits;

(2) the financial impact of the cost order on the Owners Corporation is not relevant to the Tribunal's finding that special circumstances existed within the meaning of s 60(2) of the NCAT Act to warrant an award of costs;

(3) the Owners Corporation had an opportunity to respond to her supplementary submissions and it did so on 19 December 2019;

(4) the issue of costs was not settled on 18 November 2019;

(5) on the morning of the hearing, the Owners Corporation agreed to the Tribunal making an order in regard to the common property rights by-law and the general resolution as presented to its 20 June 2018 annual general meeting. The only amendment sought by the Owners Corporation in regard to the general resolution was for a five-star rating, as opposed to the use of Quiet Step 5 star acoustic underlay, and certification of the achievement of that rating. That amendment had not previously been requested by the Owners Corporation, who abandoned all other requested amendments on the morning of the hearing;

(6) the Tribunal did not make findings that were not available on the evidence; and

(7) whether the Tribunal's decision discourages parties generally, to resolve or not resolve proceedings without a hearing on the merits, is not a basis on which it could be concluded that the Tribunal erred.

23 In reply to the Owners Corporation's application for leave to appeal, Ms Price contended that the Tribunal had not determined the matter of costs arbitrarily and the decision of the Tribunal was consistent with the principles expressed in the authorities relied on by the Tribunal and the Owners Corporation.

Material before the Tribunal

24 Other than the Notice of Appeal and Reply to Appeal, the only material that is before the Appeal Panel are the very detailed written submissions of the Owners Corporation and a small bundle of documents the Owners Corporation filed and served in support of its submissions. Included in the bundle of documents is the following:

(1) a copy of the orders made by the Tribunal on 18 November 2019 in regard to Ms Price's strata application;

(2) a copy of Ms Price's written submissions on costs to the Tribunal dated 2 December 2019 and her supplementary submissions dated 10 December 2019;

(3) a copy of the Owners Corporation submissions on costs dated 16 December 2019 and the affidavit of Jane Kardos, sworn on the same day and provided in support of the Owners Corporation's submission on costs;

(4) a copy of an email from the solicitor of the Owners Corporation, Jane Kardos, sent to the Tribunal on 17 December 2019, in which Jane Kardos submits that the Tribunal should ignore or disregard the supplementary submissions of Ms Price as they were filed without the leave of the Tribunal and raise matters outside the scope of the question of costs as at the finalisation of the proceedings on 18 November 2019;

(5) a copy of the Tribunal's decision of 13 February 2020 on costs;

(6) a copy of the Tribunal's decision, published on 3 January 2019, in regard to the 2017 unapproved works application of the Owners Corporation and Ms Price's cross claim - *The Owners – Strata Plan 5319 v Price*; *Price v The Owners – Strata Plan 5319* [2019] NSWCATCD 3;

(7) a copy of the Tribunal's decision, published on 11 June 2019, in regard to the March 2019 application of the Owners Corporation seeking dismissal of Ms Price's 2018 strata application: *The Owners – Strata Plan 5319 v Price* [2019] NSWCATCD 51; and

(8) a copy of the Tribunal's decision, dated 6 September 2019, in regard to Ms Price's application for cost in regard to the March 2019 application of the Owners Corporation seeking dismissal of her 2018 strata application.

The decision of the Tribunal the subject of this appeal

25 At the commencement of its reasons for decision the Tribunal dealt with the objection of the Owners Corporation to the supplementary submissions filed by Ms Price on 10 December 2019. At [5], the Tribunal decided to allow the late submissions filed by Ms Price.

26 The Tribunal went on to set out, in some detail, the written submissions of Ms Price and those of the Owners Corporation.

27 At [33] the Tribunal said that its jurisdiction as to costs was that set out in s 60 of the NCAT Act; namely that s 60(1) requires parties to pay their own costs unless the Tribunal is satisfied that special circumstances warrant an award of costs. The Tribunal also set out in full the terms of s 60.

28 At [34], the Tribunal said it '*must consider, among other things, the situation that applies in proceedings that have been determined without a hearing on the merits.*'

29 After noting that Ms Price's claim had not been heard and determined on the merits, the Tribunal went on to cite the decision of McHugh J in *Re Minister for Immigration & Ethnic Affairs (Cth); Ex Parte Lai Qin* [1997] HCA 6; 1997) 186 CLR 622; (1997) 143 ALR 1; (1997) 71 ALJR 533 (*Lai Qin*) and the decision of Burchett J in *ONE.TEL Ltd v Deputy Commissioner of Taxation* [2000] FCA 270; (2000) 101 FCR 548 in regard to the circumstances where the discretion to make a cost order may be exercised in the absence of a hearing on the merits.

30 At [39], the Tribunal said that the issue it needed to determine was whether it was unreasonable of the Owners Corporation to maintain a defence and to proceed to a hearing, or whether '*some intervening event or settlement so removed or modifies the subject of the dispute … no issue remains between the parties other than costs*.' In this regard the Tribunal found that it was persuaded that the former was the case and that the Owners Corporation effectively surrendered to Ms Price and concluded that the appropriate order

was that the Owners Corporation was to pay Ms Price's costs of the hearing on 18 November 2019.

31 At [40], the Tribunal said:

> I am not persuaded that the conduct by the owners corporation necessitated the applicant's [Ms Price's] preparation and appearance at the hearing and that a failure to agree to the by-law as prepared on behalf of the applicant only to settle on the morning of the hearing, amounts to a 'capitulation' within the meaning of *Lai Qin*. I do not accept the owners corporation's submissions that there was a lingering legitimate concern about the load bearing wall in the kitchen, as deposed by Ms Sharpe. The owners corporation accepted the by-law on the basis of 'the Plan' prepared by Cosmo Farinola of Cardno which was tabled at various EGMS and AGM's since late 2017. The owners corporation demanded that the Cardno engineer's opinion needed to be 'peer reviewed'. Ms Price acquiesced and obtained a second engineering opinion by Mr Angelo D'Ambrosio dated 18 July 2017, I August 2017 and 30 August 2017 respectively. After provision of two independent expert opinions there was in my view no further reason for the owners corporation to resist the making of the by-law on the basis of engineering concerns. …

32 At [41], the Tribunal accepted that the Owners Corporation's unsuccessful Anshun Estoppel application '*unnecessarily prolonged what should have been a very straightforward application for approval of a by-law*'. And, at [42], the Tribunal said:

> The fact that the minor renovations by-law was amended on the morning of the hearing simply to state that the carpet with a 5 star acoustic rating according [to] the relevant guideline did in my view not advance the owners corporation's case in any material way from a position that that had always been conceded by Ms Price and had always been approved by the owners corporation, and which the by-law in its previous unamended form had already ensured. There was no benefit for the owners corporation to withhold consent until the morning of the hearing. For these reasons I am satisfied that the owners corporation has been responsible for prolonging unreasonably the time taken to complete the proceedings.

33 At [46] the Tribunal said:

> … [The] consent orders speak for themselves, the applicant was substantially successful in her action and the by-law should have been approved without the necessity to appear at a contested hearing. I am persuaded that the applicant has established 'special circumstances' and that the owners corporation conducted the proceedings causing disadvantage to the applicant, and the owners corporation has unnecessarily prolonged proceedings within the meaning of s 60 of the Act …

34 At [47] to [48], the Tribunal set out its orders.

Has the Owners Corporation identified an error of law?

35 In this appeal and before the Tribunal below, the Owners Corporation and Ms Price have been legally represented.

> It is accepted that the applicable provision in determining Ms Price's application for costs in her 2018 strata application is s 60 of the NCAT Act. For completeness, that section relevantly provides:
>
> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> > (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
> >
> > (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
> >
> > (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
> >
> > (d) the nature and complexity of the proceedings,
> >
> > (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
> >
> > (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
> >
> > (g) any other matter that the Tribunal considers relevant.

36 The Owners Corporation concedes that, as the decision to award costs under s 60(2) of the NCAT Act is discretionary it needs to persuade us that the Tribunal committed one of the errors set out by the High Court in *House v The King* [1936] HCA 40; 55 CR 499 at 505. That is, to succeed in its appeal on a question of law, the Owners Corporation must demonstrate that the Tribunal acted on a wrong principle, made a material error of fact, failed to have regard to material considerations or reached a conclusion which was, on the facts, unreasonable or plainly unjust.

37 It is convenient to deal with the issues raised by the Owners Corporation in the same order they are dealt within its written submissions.

The Tribunal failed to apply the correct principles of law (v) and identified the wrong issue or asked the wrong questions (vi)

38 The Owners Corporation submitted that the Tribunal erred in approaching the question of costs by considering the application of the cost principles enunciated in *Lai Quin* and *One Tel Ltd* before considering whether there were special circumstances. In this regard, the Owners Corporation accepted that the cost principles enunciated in *Lai Quin* and *One Tel Ltd* can form the consideration as to whether there are special circumstances, but they do not have primacy. In support of that contention, the Owners Corporation cited the decision of the Appeal Panel in *Rodny v Strike* [2020] NSWCATAP 20 ('*Rodny*').

39 In our view, the decision in *Rodny* does not support the contention of the Owners Corporation.

40 In *Rodny,* the issue was whether the appellant's withdrawal of their application amounted to special circumstances. At [112] and [113], the Appeal Panel said the following:

> 112 …[the] withdrawal of an application, which has been the subject of lengthy preparation and the incurring of significant costs, shortly before the hearing is, in our view, a matter that constitutes special circumstances warranting an order for costs.
>
> 113 There will be circumstances in which the withdrawal of proceedings is justified by factors out of the moving party's control. An example is where the proceedings have become futile by reason of a legislative amendment or a change of position by the defendant/respondent or a third party. As McHugh J stated in *ex parte Lai Qin* at [625]:
>
> > If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

41 In our opinion, for the same reasons set out in *Rodny*, a party's ultimate consent to the orders sought, without a hearing on the merits, can amount to special circumstances.

42 In this case, we can find no error by the Tribunal as contended by the Owners Corporation. As we have noted, in its reasons for decision, at [33], the Tribunal

set out in full the terms of s 60 of the NCAT Act. It also expressly stated that s 60 required parties to pay their own costs unless it was satisfied that special circumstances warrant an award of costs.

43 In our view, on a fair reading of the Tribunal's reasons for decision, it was in the context of s 60 that the Tribunal went on to consider the principles in *Lia Qin* and *ONE.TEL*. That is, the principles in those decisions were referred to merely for the purpose of determining whether the circumstances in which Ms Price's strata application was settled, without a hearing, did or did not amount to special circumstances within the terms of s 60(3) of the NCAT Act.

44 Hence, we are not satisfied that the Tribunal incorrectly identified or confused the issues for determination as contended by the Owners Corporation. That is, we are not satisfied that the Owners Corporation has established that the Tribunal failed to apply the correct principles of law, or that it identified the wrong issue or asked the wrong questions.

The Tribunal erred in finding that there were special circumstances (i)

45 In our view this ground of appeal is misconceived and does not give rise to a question of law.

46 It is the contention of the Owners Corporation that, at [46] of its reasons for decision, the Tribunal approached its decision on costs on the basis of Ms Price having succeeded in her application. This, as pointed out by the Owners Corporation was contrary to the decision of the Appeal Panel in *Jubian v Clark (No 2): Clark v Jubian (No 2)* [2016] NSWCATAP 153, at [29], that mere success (or failure) of an application does not give rise to special circumstances. Alternatively, the Owners Corporation contended that the Tribunal had at least elevated the import of Ms Price's success in its finding of special circumstances.

47 In our view, paragraph 46 of the Tribunal's reasons for decision, cannot be read in isolation as contended by the Owners Corporation.

48 We do not understand the Owners Corporation to contend that the circumstances giving rise to Ms Price's strata application, how it was prosecuted and defended and ultimately determined or settled was of no

relevance to determining whether there were special circumstances warranting an order for costs. In our view, this was the approach taken by the Tribunal in determining whether there were special circumstances. For example, at [39], the Tribunal found that it was unreasonable for the Owners Corporation to maintain a defence and to proceed to a hearing because it had '*effectively surrendered*' to Ms Price. While the Tribunal went on to conclude, in the same paragraph, that it was appropriate to make a cost order in favour of Ms Price, it is in the following paragraphs (at [40] to [46]) where the Tribunal sets out its reasons for that conclusion.

49 In our view, while the Owners Corporation might disagree with the findings of the Tribunal that it, and not Ms Price, had effectively '*surrendered*' or '*capitulated*' within the meaning of *Lai Qin* does not mean that the Tribunal elevated the importance of Ms Price's apparent success to make a finding of special circumstances.

50 Accordingly, we find that the Owners Corporation has failed to establish this ground of appeal.

The Tribunal erred in finding that the Owners Corporation surrendered to Ms Price in agreeing to compromise and settle the proceedings (ii)

51 As there had been no hearing on the merits, it is the contention of the Owners Corporation that it was not open to the Tribunal to make a finding that it had surrendered to Ms Price. Having made such a finding, the Owners Corporation contended was at odds with the warning in *Lai Qin* that '*the court cannot try a hypothetical action between parties*' as to do so '*would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided*': see also *Nichols v NFS Agribusiness Pty Ltd* [2018] NSWCA 84 at [8] and [9]. That is, it is the contention of the Owners Corporation that as there had been no hearing on the merits of Ms Price's strata application it was not open to the Tribunal to undertake an investigation as to whether the Owners Corporation had '*capitulated or surrendered*'. In this case, there was a dispute between the parties as to the content of the by-laws, where the Tribunal had found, in earlier proceedings, that Ms Price had engaged in unlawful building works.

52 Even if the circumstances did permit or warrant consideration of whether one party surrendered to the other, the Owners Corporation went on to contend that the agreement embodied in the consent orders '*clearly show that there was no capitulation or surrender*' by it and that a '*compromise position was achieved*'.

53 In our view, this ground of appeal does not raise a question of law and is merely a challenge to the Tribunal's finding of fact that the Owners Corporation '*capitulated or surrendered*' to Ms Price.

54 The task before the Tribunal was to consider whether there were special circumstances warranting an order for costs in Ms Price's favour in regard to her strata application. That application, sought orders, under ss 149 and 232 of the SSM Act, for the making of by-laws in the terms of the draft motions that were attached to her application. In its reasons for decision, at [14], the Tribunal noted that Ms Price had commenced proceedings seeking these orders on the basis of the unreasonable refusal of the Owners Corporation of these by-laws, which occurred on 20 June 2018.

55 It is not disputed that, more than 12 months after Ms Price had lodged her strata application, on the morning of the hearing, the Tribunal made orders by consent that gave effect to the making of by-laws in the terms of those attached to her application. The only amendment being that made to the draft motion concerning the minor works.

56 In her written submissions on costs, Ms Price contended that:

> … [with] no changes to the proposed works or by-law from those which owners had voted upon on 20 June 2019, the only conclusion that can be drawn from its [the Owners Corporation] conduct is that it had no concerns about the proposed works or wording of the by-law, as if it did, it would presumably have insisted on amendments being made to the by-law or asked the Tribunal to determine the matter. …

57 At [21] to [32], the Tribunal set out at length the submissions of the Owners Corporation. Earlier in its decision, at [3], the Tribunal noted that it had regard to the affidavit evidence of Jane Kardos. At [24] to [26] the Tribunal set out the concerns of the Owners Corporation in regard to the draft motions attached to Ms Price's strata application. At [27] to [30] the Tribunal set out the arguments of the Owners Corporation as to active settlement discussions in which it had engaged in order to resolve the matter without any intervention of the Tribunal.

58 Based on the material that was before the Tribunal and the submissions that were made, in our view, it was open to the Tribunal to consider whether there had in fact been a compromise reached or whether, to use the Tribunal's words, the Owners Corporation had in effect '*surrendered*' as asserted by Ms Price.

59 In this regard, the Tribunal rejected many of the arguments put forward by the Owners Corporation. For example, at [40], the Tribunal did not accept the contention of the Owners Corporation that there was a legitimate lingering '*concern about the load bearing wall in the kitchen*' to Ms Price's lot. The Tribunal also rejected, as having no merit, the assertion of the Owners Corporation that it had been concerned about the adequacy of insurance.

60 And at [42], the Tribunal found that the agreed amendment to the minor renovations by-law did not '*advance the owners corporation's case in any material way from the position that had always been conceded by Ms Price and had always been approved by the owners*'.

61 Hence, we are satisfied that on the material before it, it was open to the Tribunal to finding that the Owners Corporation had surrendered to Ms Price.

The Tribunal erred in finding that the Owners Corporation acted unreasonably in the conduct of the proceedings and or that the conduct of the Owners Corporation established a basis for making the order

62 The Owners Corporation contends that the Tribunal erred in making its findings at [41] and [42] that:

(1) the Anshun Estopple proceedings unnecessarily prolonged Ms Price's strata application;

(2) after the Anshun Estopple proceedings had been dismissed there was no position the Owners Corporation could have maintained to resist the orders sought by Ms Price;

(3) the Owners Corporation '*could/should have consented to the by law at an earlier stage (presumably after the determination of the Anshun Estopple proceedings)'.*

63 We can find no finding by the Tribunal in regard to (3) above. What the Tribunal did find at [42] was that it was satisfied that the Owners Corporation had been responsible for prolonging unreasonably the time to complete the proceedings.

64 In regard to the Anshun Estopple proceedings, the Owners Corporation contends that these proceedings were of no relevance to Ms Price's application for costs. However, what was relevant, which the Tribunal failed to take into account, was Ms Price's failure to comply with the orders made by the Tribunal in the unapproved works proceedings initiated by the Owners Corporation.

65 In our view, the Anshun Estopple proceedings and how they had impacted on the progress of Ms Price's strata application were a relevant matter for the Tribunal. They were proceedings, initiated by the Owners Corporation, on 28 March 2019, some five months after Ms Price had lodged her strata application and also after two directions hearings, on 14 November 2018 and 30 January 2019. In this regard we note the following remarks of the Tribunal, at [20] and [21], in its decision on costs following the dismissal of the Anshun Estopple proceedings (see *The Owners – Strata Plan 5319 v Price* (6 September 2019)):

> 20 This application was unnecessary. The issues raised in it could, and should, have been ventilated at the hearing of the by-law application which was initially set down for hearing on 16 May 2019. if the estopple issue had been raised as a full defence to the by-law application the issue raised by the application filed on 8 October 2018 would now be finally determined.
>
> 21 I am satisfied therefore that the applicant's unnecessary filing of an application seeking summary dismissal based on Anshun estopple has unnecessarily delayed the finalisation of the proceedings and has involved the lot owner, Ms Price, in additional unnecessary litigation.

66 Hence, in our view, the findings of the Tribunal, at [41] of its reasons for decision were open to it on the material before it.

67 It is difficult to see how Ms Price's failure to have complied with the orders made by the Tribunal, on 3 January 2019, in regard to the unapproved works application of the Owners Corporation was of any relevance to the cost order Ms Price was seeking in regard to her strata application. Ms Price's strata application was commenced on a completely different basis. As noted by the Tribunal in the Anshun Estopple proceedings (see *The Owners – Strata Plan 5319 v Price* [2019] NSWCATCD 51), at [49], it was not open to Ms Price, as at the hearing of the unapproved works application, to have sought orders under s 149 of the SSM Act because the alleged unreasonable refusal of the Owners Corporation to approve her proposed motions had not occurred until 20 June 2018 which was subsequent to the hearing of the unapproved works

application of the Owners Corporation. Furthermore, at no time did the Owners Corporation seek to enforce the orders made by the Tribunal in its determination of the unapproved works proceedings.

68 Accordingly, we are not satisfied that this ground of appeal has been established.

The Tribunal erred in finding that the conduct of the Owners Corporation necessitated the appearance of Ms Price at the hearing (iii)

69 In regard to this ground of appeal, the Owners Corporation, relies on its earlier contention that the parties had reached an agreement or settlement in advance of the hearing and hence there was no need for Ms Price to enter an appearance on the day of hearing.

70 Again, this ground of appeal does not raise a question of law. It is another challenged to the factual findings of the Tribunal, which in our opinion was available to it on the material before it. In this regard, as we have noted, the Tribunal appears not to have been persuaded by what had been deposed by Ms Kardos in her affidavit that a settlement had been reached prior to the morning of the hearing.

71 Again, in our opinion, the Owners Corporation has not established this ground of appeal.

The Tribunal made findings in the absence of evidence (viii)

72 It is the contention of the Owners Corporation that the following findings of the Tribunal were not available on the evidence, or not open or available to be made because there was no hearing on the merits:

(1) the finding at [41] that it should have been apparent to the [owners corporation] after the dismissal of the Anshun Estopple Proceedings that there was no position which could have been maintained to resist [Ms Price's] order;

(2) the finding at [42], that [Ms Price] had always conceded that the flooring would comply with a 5 star acoustic rating; and

(3) the finding at [45], that Ms Price had been entirely successful and the Owners Corporation was entirely unsuccessful.

73 In our view, this is yet another challenge to the Tribunal's findings of fact. For the reasons we have given above, at [53] to [59], on the material before the Tribunal, it was open to tit to make these findings of fact.

The Tribunal took into account irrelevant considerations (vii)

74 The Owners Corporation contends that the Tribunal erred in having regard to conduct of the Owners Corporation that occurred after the hearing, on 18 November 2019. That conduct was referred to in the supplementary submissions filed and served by Ms Price, on 10 December 2019. Attached to the submissions were the following:

(1) a copy of a notice, on the letterhead of the strata managing agent, that had been placed on the noticeboard of the Owners Corporation after Ms Price had filed and served her written submissions on costs. That notice was in the following terms:

> It should be noted that Unit 8 has finally provided the bulk of the information necessary to proceed with her renovations nearly 30 MONTHS after it was initially requested (*we are still waiting her floor board acoustic testing results …*). The information we now have is what has always been sought. Our Community has wasted a substantial amount of money, and Unit 8 has, surprisingly, substantially delayed her own renovations.

(2) a copy of the email exchanges, sent on 22 and 25 November 2019, between Ms Price's solicitor and the solicitor for the Owners Corporation in which the Owners Corporation was requested to sign Ms Price's complying development certificate. The response of the Owners Corporation was: '*We have yet to receive the NCAT orders and will need to wait for this prior to enacting any of the orders*'.

75 In her supplementary submissions, Ms Price submitted that the abovementioned notice and email exchanges were indicative of the obstructive and unco-operative behaviour of the Owners Corporation in refusing her internal renovations.

76 The Owners Corporation filed and served its written submissions on costs six days later, on 16 December 2019. These submissions did not address Ms Price's supplementary submissions. However, in an email, sent the following day, from the solicitor of the Owners Corporation to the Tribunal and Ms Price's solicitor, the Owners Corporation submitted that the supplementary submissions should be disregarded as they were filed without the leave of the Tribunal and raised matters outside the scope of the question of costs as to the

finalisation of the proceedings that occurred on 18 November 2019. As we have noted above, this would appear not to have been the position of the Owners Corporation on 25 November 2019, when it said that it could not sign Ms Price's complying development certificate as it had not received a copy of the orders given by the Tribunal: see NCAT Act, ss 61 and 62 as to when a decision takes effect.

77 In its reasons for decision, at [4] and [5] the Tribunal noted the objection of the Owners Corporation to Ms Price's supplementary submissions and stated that for the reasons that followed it had decided to allow the submissions.

78 In its reasons for decision, having found, at [42], that it was '*satisfied that the owners corporation has been responsible for prolonging unreasonably the time taken to complete proceedings'*, at [43], the Tribunal went on to say:

> 43 In light of my finding it is not necessary to consider whether the owners corporation has acted unreasonably and has caused disadvantage to the applicant. However, to give finality to the issues between the parties I have considered further arguments raised in the 10 December 2019 submissions.

79 At [44], the Tribunal found that the Owners Corporation's unwillingness to sign Ms Price's complying development certificate after the by-laws were approved by agreement at the hearing was unreasonable.

80 At [45], the Tribunal found that, in the circumstances where Ms Price's application had been entirely successful and the owners corporation's application entirely unsuccessful, the notice on the notice board of the Owners Corporation was a '*matter relevant*' within the meaning of s 60(3)(g) of the NCAT Act.

81 In our view, the Tribunal's reasoning in regard to the conduct the subject of Ms Price's supplementary submissions is not altogether clear. However, this is not a ground of appeal relied on by the Owners Corporation.

82 In any event, we can see no error in the Tribunal having regard to those matters set out in Ms Price's supplementary submission in the context put forward by Ms Price. However, we agree with the Owners Corporation that they could not of themselves form the basis on which a finding of special circumstances could be made. In our view, for the reasons set out above, this is not the basis on which the Tribunal determined that there were special

circumstances warranting an order for costs. In this regard, in our view, the finding of the Tribunal, at [46], is a summary of the findings in made at [39] to [42] and not a summary of what is said at [43] to [45].

83 The Owners Corporation also had ample opportunity to respond to Ms Price's supplementary submissions but chose not to and instead sough to have them disregarded.

84 Accordingly, we find this ground of appeal has not been established.

The Tribunal made a decision so unreasonable that no reasonable decision-maker could make it (ix)

85 The Owners Corporation contends that, when considered objectively, the circumstances of the proceedings, their resolution and the requirements of s 60(2) of the NCAT Act, the decision to award costs was so unreasonable that no reasonable decision-maker would make it: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332.

86 For the reasons we have given above, and in the absence of the Owners Corporation having established any of its grounds of appeal, we are not satisfied that the Owners Corporation has established this ground of appeal.

Should leave to appeal be granted?

87 The principles that have been applied to a grant of leave to appeal were summarised by the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17, at [84], as follows (citations omitted):

> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact …;
>
> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

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

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

…;

(3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21] and the authorities cited there.

88 The same grounds in respect of errors of law are relied on by the Owners Corporation in its application for leave to appeal. In this regard it is contended that the proceedings were not fair and equitable and against the weight of evidence.

89 In our view, for the reasons given above, we are not satisfied that the Owners Corporation has established an error of law. Nor are we satisfied that the findings made by the Tribunal were finding that were not available to it on the material before it.

90 Hence, we are not satisfied that the Owners Corporation may have suffered a substantial miscarriage of justice warranting a grant of leave to appeal.

Conclusion and orders

91 For the reasons set out above, we are not satisfied that the Owners Corporation has identified any error in the decision or reasons for decision of the Tribunal that raises a question of law or warrants the grant of leave to appeal under cl 12 of Schedule 4 of the NCAT Act. And on this basis we order:

(1) Pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013, a hearing of the appeal of the Owners Corporation is dispensed with.

(2) The Owners Corporation's application for leave to appeal is refused.

(3) The appeal is dismissed.

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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