Civil and Administrative Tribunal

New South Wales

Case Name:	Bruce v Knight
Medium Neutral Citation:	[2021] NSWCATAP 224
Hearing Date(s):	5 May 2021
Date of Orders:	23 July 2021
Decision Date:	23 July 2021
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member A Boxall, Senior Member
Decision:	(1) The appeal is allowed. (2) The orders made by the Tribunal on 21 January 2021 in SC 20/26294 are set aside. (3) The whole of the proceedings be remitted to a differently constituted Tribunal for a new hearing and redetermination of the respondent's application in accordance with the evidence previously adduced to the Tribunal and such further evidence as the Tribunal may allow. (4) If the appellants seek costs: (a) they must file with the Registry and give to the respondents submissions limited to five pages within 14 days of these reasons; (b) the respondents may respond within a further 14 days; (c) the appellants may reply within a further 7 days; (5) All submissions must be limited to three pages; (6) The Tribunal proposes to decide any application for costs "on the papers". If either party opposes this course, they should that issue in their submissions.
Catchwords:	LAND LAW – strata title – common property – common property rights by-law – whether unreasonable refusal

	to consent
Legislation Cited:	Body Corporate and Community Management Act 1997 (Q) Civil and Administrative Rules 2014 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Capcelea v The Owners – Strata Plan No 48887 [2019] NSWCATCD 27 Chapman v Taylor [2004] NSWCA 456 Craig v State of South Australia (1995) 184 CLR 163 Gelder v The Owners – Strata Plan No 38308 [2020] NSWCATAP 227 Macey's Group Pty Ltd v Owners – Strata Plan 33591 [2021] NSWCATAP 7 Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 The Owners – Strata Plan No 12289 v Donaldson [2019] NSWCATAP 213 The Owners – Strata Plan No 69140 v Drewe [2017] NSWSC 845
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Anthony Bruce (First Appellant) The Owners – Strata Plan 208 (Second Appellant) Alexander Knight (First Respondent) Cleo Knight (Second Respondent)
Representation:	Counsel: V F Kerr SC (Appellants) S Foda (Respondents) Solicitors: Sachs Gerace Lawyers (Appellants) Strata Title Lawyers (Respondents)

File Number(s):	2021/00056122 (AP 21/08111)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	21 January 2021
Before:	S Thode, Senior Member
File Number(s):	SC 20/26294

REASONS FOR DECISION

In these reasons a significant number of references are made to authorities for which the following legend is provided:

Ainsworth *Ainsworth v Albrecht* [2016] HCA 40;

Drewe *The Owners – Strata Plan No 69140 v Drewe* [2017] NSWSC 845

Beckett *Beckett v The Owners – Strata Plan No 74637* [2020] NSWCATD

Capcelea *Capcelea v The Owners – Strata Plan No 48887* [2019] NSWCATCD 27

Donaldson *The Owners – Strata Plan No 12289 v Donaldson* [2019] NSWCATAP 213

Endre *Endre v The Owners — Strata Plan No 17771* [2019] NSWCATAP 93

Gelder *Gelder v The Owners – Strata Plan No 38308* [2020] NSWCATAP 227

Macey's *Macey's Group Pty Ltd v Owners – Strata Plan No 33591* [2021] NSWCATAP 7

Summary

1 The appellants have appealed against the decision of the Consumer and (NSW) Commercial Division of the Tribunal (Tribunal) of 21 January 2021 (Decision).

2 The Tribunal decided, pursuant to s 149 of the *Strata Schemes Management Act 2015* (NSW)(SSMA), to make a common property rights by-law sought by

the respondents at general meeting of the Second Appellant (the Owners Corporation) on 1 June 2020.

3 For the following reasons, we have decided to allow the appeal, and to remit the matter to the Tribunal.

Preliminary

4 The parties before the Tribunal were:

- Alexander and Cleo Knight, as applicants;
- The Owners - SP 208, as first respondent
- Anthony Bruce, as second respondent.

5 According to the Notice of Appeal and Amended Notice of Appeal, the Appellants are Mr Anthony Bruce, Dr Stephen Nash and Dr Liza Rybak, while the respondents (correctly) are Alexander and Cleo Knight.

6 The Civil and Administrative Rules 2014 (NSX) provide that:

> **29 Parties to internal appeal**
>
> The parties to an internal appeal are—
>
> (a) the appellant, and
>
> (b) any person or body (other than the appellant) who was a party to the proceedings before the Tribunal at first instance, and
>
> (c) if the Attorney General or another Minister intervenes in the proceedings under section 44 of the Act—the Attorney General or Minister, and
>
> (d) any other person who is made a party to the proceedings by the Tribunal under section 44 of the Act, and
>
> (e) any other person required to be joined or treated as a party to the proceedings by a Division Schedule for a Division of the Tribunal, enabling legislation or the procedural rules.

7 The respondents below who are now appealing are The Owners - SP 208 and Anthony Bruce. Unless an application to be joined as parties is made, they and they alone are correct appellants to the appeal. As no application to be joined to the appeal proceedings has been made, Dr Stephen Nash and Dr Liza Rybak are not parties to the appeal.

8 In these reasons we will refer to the appellants collectively as “the owners corporation”, and the respondents as “the Knights”.

Background

9 The appeal concerns a six lot residential strata scheme. The scheme was a subdivision of what the owners corporation describes as a “Georgian Mansion built around 1860”.

10 Mr Bruce and Ms Sally Bayes own Lot 1. Dr Stephen Nash and Dr Liza Rybak own Lot 2. The respondents Mr and Mrs Knight own Lot 3. Mr Peter Cook owns Lot 4, and Lots 5 and 6 are owned by David and Susan Race. Lots 1, 2 and 3 are located on level one and lots 4, 5 and 6 are located on level two. Each lot has one unit entitlement.

11 The Knights wish to renovate their lot. The proposed works are extensive, involving the construction of an en suite bathroom and the renovation of another, relocation of the laundry, renovation of the kitchen, the installation of air conditioning units and the installation of timber board floating flooring

12 On three occasions during 2020 they submitted a by-law to the owners corporation to carry out those works and sought a special privilege in respect of the common property to carry out those works and a right of exclusive use and enjoyment of that part of the common property affected by the works.

13 A change to the by-laws of a strata scheme may only be made by special resolution (see s 141 of the SSMA). A special resolution is a resolution in respect of which not more than 25% of the value of votes are cast against the resolution. It was common ground that the proposed by-law was a common property rights by-law within the meaning of s 142 of the SSMA.

14 On each occasion (namely 24 March, 1 June and 6 August 2020) the resolution to make the by-law was defeated by three votes to two, with the owners of Lots 3, 5 and 6 voting for the resolution, and the owners of Lots 1 and 2 voting against the resolution. The owner of Lot 4 lot was unfinancial and could not vote. The votes of the owners of Lots 1 and 2 represented 40% of the value of the votes cast, and so exceeded the 25% threshold described in [13]. Those votes were thus sufficient to block the relevant resolution.

15 On 22 June 2020 (prior to a notice for the 6 August 2020 meeting being sent on 27 July 2020), the Knights filed an application in the Tribunal seeking an

order under s 149 of the SSMA making the by-law that was rejected at the 1 June 2020 meeting.

16 That application and the decision of the meeting of 1 June 2020 were the subject of the Decision and this decision of the Appeal Panel.

The Decision

17 The Decision is organised as follows. After a brief introduction, the "background facts" are summarised at [1] to [6]. Over the next four pages, the Respondents' (being the applicants before the Tribunal) submissions are summarised at [7] to [19]. This was then followed by two pages which summarise the Appellants' submissions at [20] to [27]. On pages 10 and 11 the Decision sets out the relevant legislation and the relevant principles to be applied at [28] to [33]). In particular the Decision states at [33]:

> 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] and these reasons were discussed in the recent decision of Gelder v The Owners – Strata Plan number 38308 [2020] NSWCATAP 227.

18 The Decision's "Consideration" section commences at [34] and continues to [43]. The appellants point to the following underlined passages in which they say the Tribunal stated the law incorrectly or applied the law incorrectly:

> 34. For the following reasons I am of the view the owners corporation unreasonably refused the making of an exclusive rights by-law. The applicant bears the onus of proof in establishing that the refusal was not reasonable. It is not incumbent upon the respondent to establish that it acted reasonably and with good judgement. I interpret s 149(1)(a) as requiring a determination as to whether the owners corporation's refusal of consent to the making of a common property rights by-law was unreasonable under s 149(1). The starting point of my inquiry must be the owners corporation's reasons for the refusal of the making of the by-law at the time of refusal, and not the reasons for the refusal that the owners corporation articulated at the time of the hearing and after careful preparation of legal submissions.
>
> 35. The review must be based on the material available to the owners at the time of the refusal and not on the material available to the tribunal at the time of the hearing. The authorities have approached the review as one of what was before, or reasonably available to the owners corporation at the time they refused consent to the by-law or the common property alteration. …
>
> 36. The reasons for the owners' refusal was helpfully outlined in the minutes of meetings taken at the three general meetings. The reason for refusal was summarised in paragraph 13 above …

> 37. The owners did not refuse approval because of the appropriation of common property referred to in these reasons as part or part of "the atrium". It appears that the reasons for refusal relied upon at the hearing were very different and distinct to those reasons for refusal offered by the respondent at the three meetings as outlined in the respective minutes of meeting. …
>
> 38. The reasons for refusal advanced at the hearing divert significantly from those provided and as minuted at the three general meetings. I agree with the submissions of the applicant that the applicants addressed each of the concerns as posed during the meetings and that each of the concerns were adequately and completely addressed.
>
> 39. The alterations and additions proposed by lot three will result in minor covering of the common property atrium or light well, which is approximately 6 square meters in size, but this was not raised as a concern of the owners corporation until shortly before the hearing.
>
> 40. [The Decision then sets out various matters relating to the atrium and concludes] …
>
> In any event, none of these issues are of any relevance to the application before me as they were not raised as matters of concern during any of the general meetings.
>
> 41. During cross-examination the respondent Mr Nash considered that there were no objection [sic] raised in respect of the atrium and that objections in respect of works to the kitchen played no part in the owners refusal to the making of the by-law. The objections that were raised at the general meetings were addressed and resolved to the best of the applicant's ability. I am satisfied that the alterations and additions imposed by the by-law have a negligible impact on the respondent's use and enjoyment of their lots and common property and I find on the objective assessment of the matter, the respondent's refusal was unreasonable.

Grounds of Appeal

19 By an Amended Notice of Appeal filed at the commencement of the hearing, the Appellants submit that the Tribunal made errors of law, namely:

(1) in determining the question whether the Owners Corporation unreasonably refused to make the common property rights by-law tabled by Lot 3 at the Extraordinary General Meeting held on 1 June 2020 under s 149(1)(a) of the SMAA only by reference to reasons for refusal advanced by some lot owners at the time of refusal;

(2) in determining the question whether the Owners Corporation unreasonably refused to make the by-law under s 149(1)(a) of the SSMA by disregarding reasons for that were not articulated by lot owners at the time of refusal;

(3) by finding that a reason advanced at the meeting on 1 June 2020 for refusing the by-law was unreasonable within the meaning of s 149(1))(a) of the SSMA on the basis of circumstances that did not exist at the time of refusal;

(4) by finding that the Appellants bore the onus of proving that the Owners Corporation's refusal was not unreasonable, rather than that the respondents bore the onus of proving that the Owners Corporation's refusal was unreasonable, in dealing with the appellants' submissions concerning Lot 3's failure to pay compensation for the exclusive use of the atrium;

(5) by failing to determine whether prior kitchen renovations were subsumed by the currently proposed kitchen renovations, so that the by-law imposes the obligation of repair and maintenance of all kitchen works on Lot 3;

(6) by failing to consider whether the loss of amenity suffered by Lots 1 and 2 as a result of the by-law was a reasonable basis for the Owners Corporation to refuse the by-law under s 149(1)(a);

(7) alternatively to (6), the Tribunal erred at law by failing to separately consider whether to make an order under s 149(1) of the SSM Act having regard to the matters set out in s 149(2).

20 In addition to the grounds that were set out in the Amended Notice of Appeal, the submissions of the appellants suggested that the written reasons of the Tribunal were inadequate. This was a further appeal point about which oral submissions were made at the hearing of the appeal.

Reply to Appeal

21 The respondents' Reply is very brief. It states:

> (1) The respondents deny that the Tribunal erred at law in determining the question whether the owners corporation unreasonably refused to make the common property rights by-law tabled by Lot 3 at the extraordinary general meeting held on 1 June 2020 ("the by-law") only by reference to reasons for refusal advanced by some lot owners at the time of refusal.
>
> (2) The Respondents deny that the Tribunal erred at law in determining the question whether the owners corporation unreasonably refused to make the by-law by disregarding reasons for refusal that were not articulated by lot owners at the time of refusal.

22 We note that at the time the Reply was filed, the respondents were responding to the Notice of Appeal, which relevantly consisted of only the first two grounds set out in the Amended Notice of Appeal.

Nature of an appeal

23 Section 80 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any

question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

24 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right.

25 Relevantly, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right. Relevantly, these include:

(1) whether the Tribunal identified the wrong issue or asked the wrong question: *Prendergast* at [13](2); *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82];

(2) whether a wrong principle of law had been applied: *Prendergast* at [13](3); *Chapman v Taylor* [2004] NSWCA 456 at [33], per Hodgson JA (Beazley and Tobias JJA agreeing).

26 As this appeal raises questions of law, namely whether the Tribunal identified and applied the correct principles of law, it is not necessary to set out the principles governing appeals requiring leave of the Appeal Panel.

Appellant's submissions

27 The appellants' submissions are lengthy and detailed. There were some "side issues" which were explored at some length, including whether or not the authorities prescribe a "one step" or "two step" approach in the interpretation and application of s 149. However, ultimately it was common ground between the parties that the Tribunal correctly applied the "two step" approach consistent with authorities such as *Donaldson* and *Gelder.*

28 The primary submission of the appellants is that in determining whether the owners corporation unreasonably refused to make a common property rights by-law on 1 June 2020 the Tribunal erred at law by confining itself to reasons given by and material available to owners at the time of the general meeting and thus failing to consider reasons given by and material available at the time of the hearing.

29 In support of this submission they say:

(1) the Tribunal is not confined to examination of the material that was before the owners corporation at the relevant meeting for the purpose of

identifying the circumstances at the time of refusal: *Donaldson* at [98]-[116]. In particular, the appellants rely on the comments of the Appeal Panel that the statement of Latham J in *Drewe* at [41] that the answer to the question of whether the owners corporation's refusal of consent at the relevant meeting is to based on the material then available" is "best understood as a reference to the circumstances at the time, rather than evidence which may prove, disprove or objectively colour those circumstances" at [105];

(2) the Tribunal erred in finding otherwise when it found that “The review must be based on the material available to the owners at the time of their refusal and not on the material available to the Tribunal at the time of the hearing." Although the Tribunal suggested that the "the authorities" supported that proposition, it did not identify any authorities. Nor did the Decision refer to the Appeal Panel's contrary decision in *Donaldson*;

(3) the Tribunal erred in finding that it was confined to considering reasons advanced by owners at the meeting, since that also would exclude material that might concern the circumstances at the time;

(4) the Tribunal erred in not considering reasons for refusal which were “different and distinct to those offered at the three meetings”;

(5) the Tribunal erred in deciding that it was confined to reasons given at the meeting in that it was “primarily influenced” by the fact that different reasons relied on might be the result of “careful preparation of legal submissions”.

30 The appellants also submit that the Tribunal also erred at law by:

(1) finding that a reason advanced at the meeting on 1 June 2020 for refusing the by-law was unreasonable within the meaning of s 149(1)(a) of the SSMA on the basis of circumstances that did not exist at the time of refusal;

(2) finding that the appellants bore the onus of proving that the owners corporation's refusal was not unreasonable, rather than that the respondents bore the onus of proving that the owners corporation's refusal was unreasonable, in dealing with the appellants' submissions concerning Lot 3's failure to pay compensation for the exclusive use of the atrium;

(3) by failing to determine whether prior kitchen renovations are subsumed by the currently proposed kitchen renovations, so that the by-law imposes the obligation of repair and maintenance of all kitchen works on Lot 3;

(4) failing to consider whether the loss of amenity suffered by Lots 1 and 2 as a result of the by-law was a reasonable basis for the owners corporation to refuse the by-law under s 149(1)(a) or, alternatively, by failing to separately consider whether to make an order under s 149(1) of the SSMA having regard to the matters set out in s 149(2) of the SSMA.

31 The appellants say that the appeal should be allowed, the orders made by the Tribunal on 21 January 2021 set aside and case be reconsidered by the Tribunal under ss 81(1)((a),(d) and(e) of the NCAT Act.

Submissions of the respondents

32 The respondents submit that there is no dispute that the Tribunal was correct in stating that 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.

33 The respondents submit that the underlined passages in paragraphs [34] and [35] of the Decision (as set out above), was the correct approach to be taken, and in this respect rely on the comments of Latham J in *Drewe* at [27] that that question fell to be determined having regard to the circumstances at the time of the refusal of consent, based on "material then available" (at [41]).

34 The respondents note that the Appeal Panel in *Donaldson* at [105] considered that the expression "material then available" used by Latham J in *Drewe* was "best understood as a reference to the circumstances at the time, rather than evidence which may prove, disprove or objectively colour those circumstances". However, they submit that the expression "circumstances at the time" and "the material then available" both mean reasons relied upon by the owners corporation when considering an application pursuant to s 149 of the SSMA.

35 Thus the respondents submit:

> 17. At that point in time when the owners corporation has decided to refuse a s 149 of the SSMA application, the reasons relied upon by the owners corporation must have crystallised or there were no reasons at all. It is not a moving feast. The goalposts are fixed. Any new reasons that may eventuate after the point in time of refusal are not relevant to the consideration of whether the refusal at that fixed point in time was unreasonable.
>
> 18. Whilst a reason may be relied upon at that time of refusal that is supplemented after the meeting with further investigation and the provision of evidence, it does not change or add to the reasons relied upon for the refusal at that moment in time.

Submissions of the Appellants in Reply

36 The appellants say that the respondents' "centrepiece" submission (namely that "circumstances at the time" and the expression "the material then

available" both mean the "reasons relied upon by the owners corporation") should be rejected. They submit that "circumstances", "material" and "reasons" each has a discrete and different meaning. They say that "circumstances" means the factual matrix in existence at the relevant time, "material" means the evidence available to prove the circumstances, and the "reasons relied upon" means the subjective reasons for which particular owners oppose the proposed by-law.

37 The appellants submit that it was made plain by the Appeal Panel in *Donaldson* at [102] when it addressed the comments of Latham J in *Drewe* at [27] and [41] that "circumstances" are something different to "material".

38 The appellants submit that the respondents' submission that when the Appeal Panel in *Donaldson* referred to "material available" it meant reasons, not evidence, must also be rejected. They said the passages relied on by the respondents from *Donaldson* do not support the submission.

39 Finally, the appellants submit that if, contrary their submission, the Appeal Panel accepts that "material" and "reasons" are synonymous expressions as the respondents contend, then subsequent reasons must, equivalently to subsequent material, be "admissible", providing they go to the circumstances existing at the time of the meeting.

Consideration

40 The issues that arise for our consideration are as follows:

(1) Did the Tribunal identify the correct principle of law?

(2) If yes, did the Tribunal apply the principle correctly?

(3) If no, what orders should the Appeal Panel make?

Did the Tribunal identify the correct principle of law?

41 To answer the first question, it is necessary to identify the correct principle of law.

42 Section 149 and its equivalents has been considered in many decisions of the Tribunal, the Appeal Panel and the Supreme Court. We summarise below the more important and useful statements of principle.

43 The starting point, chronologically, is *Drewe*, a decision of the Supreme Court, and referred to in several of the decisions referred to below. On appeal to the Court, the plaintiff owners corporation submitted that the Tribunal had misapplied s 140 of the *Strata Schemes Management Act 1996* (NSW) (1996 SSMA) (since repealed) in finding that a refusal to make a special by-law at a general meeting was unreasonable. Section 140 of the 1996 SSMA was the equivalent of s 149 of the SSMA.

44 Relevantly, the Court found:

> 27 Subsection 2 [of s 140 of the 1996 SSMA] required the Adjudicator to approach the first defendant's application by determining whether the plaintiff unreasonably refused consent to the installation of the wooden bi-fold doors that the first defendant had already installed? [sic] without prior approval. Further, that question fell to be determined having regard to the circumstances at the time of the refusal of consent, namely at the AGM on 17 February 2015.
>
> …
>
> 41 … The question to be asked and answered was whether the Owners Corporation's refusal of consent at the AGM, based on the material then available, was unreasonable, not whether the grounds were objectively reasonable …
>
> (emphasis added)

45 We note that the Court refers to "circumstances" in [27] but to "material" in [41]. However, as the Appeal Panel noted in *Donaldson* at [105], her Honour's statement is best understood as a reference to the circumstances at the time, rather than evidence which may prove, disprove or objectively colour those circumstances; see too *Endre* at [45] below.

46 *Capcelea* was a decision of the Tribunal which relevantly stated:

> 36. In determining what the owners corporation or particular owners had in mind at the relevant time as the grounds for their decision, there may be the evidence in the minutes of the relevant meeting if they record debate and reasons, but such a record raises questions as to adequacy and completeness if it is anything less than an approved transcript of relevant deliberations prior to the taking of the decision.
>
> 37. In addition to that source, individual owners can provide evidence of their reasons and, on the view expressed in *Milman v Owners SP 1389* [2005] NSWCTTT 196, should do so, in order to assist in the type of inquiry in these proceedings.
>
> …
>
> 56. The fundamental assessment, on which the challenging owners bear the onus of proof as further discussed below, is whether or not, taking into account

> those interests, rights and expectations, the decision to refuse the proposed by-law was unreasonable.

47 *Endre was a decision of the* Appeal Panel which relevantly stated:

> 45 … the determination of whether a refusal is unreasonable must depend upon the conduct of the owners corporation and all the relevant circumstances.
>
> 52 … what the Tribunal is required to do is determine whether, in all the circumstances, the refusal of the respondent to approve the work was unreasonable.
>
> 53 That is not to suggest that individual lot owner's views are not relevant to determining whether the refusal by an owners corporation was unreasonable. Rather, it is one of the factors to be taken into account when determining whether the refusal to approve works was unreasonable in all the circumstances.

48 *Donaldson* was an appeal to the Appeal Panel by an owners corporation against a decision of the Tribunal. Relevantly, the respondents were the owners of a lot in the strata scheme. The first respondent was wheelchair bound. The respondents wanted to construct a lift in place of the then existing staircase from the carpark to their lot. They requested the owners corporation to make a common property rights by-law to allow them to construct the lift and associated works. The owners corporation refused.

49 The respondents then made an application to the Tribunal. Relevantly, they sought an order that the Tribunal prescribe a change to the by-laws to enable the construction of the proposed works pursuant to s 149 of the SSMA. The Tribunal found that the owners corporation had unreasonably refused to make the by-law sought by the respondents and made an order that that by-law be made and registered.

50 The owners corporation appealed to the Appeal Panel, which dismissed the appeal. Relevantly, the Appeal Panel stated:

> 99 We disagree that the Tribunal is confined to examination of the material before the appellant at its meeting.
>
> 100 Section 149 poses the question whether a refusal was unreasonable. It does not contain any express limitation to the effect that in judging unreasonableness, a Tribunal's consideration is limited to the material before an owners corporation meeting.
>
> 101 *Drewe* is authority for the proposition that the question of unreasonable refusal is to be determined having regard to the circumstances at the time of refusal (see at [27]).

> 102 So much may be accepted. But "circumstances" is different to "material". Subsequent evidence or "material" which goes to the circumstances existing at the time of the meeting is, in our opinion, admissible.
>
> 103 This would seem to us to be common sensical. For example, if a meeting was informed that an important fact existed, when in truth it did not, there seems no sensible reason to exclude subsequent proof of the incorrectness of that fact. The incorrect fact may have been innocently put forward, or perhaps dishonestly put forward, but on either case the decision of the meeting would have been based upon an incorrect fact

51 *Beckett* was referred to by the appellants in their submissions. Relevantly the applicants sought orders granting them exclusive use rights over, or a special privilege to access, two areas of common property accessible only from their lot. The Tribunal held at [84] that, in making a s 149(2) decision the Tribunal was not limited to material that was put before the Owners Corporation.

52 *Macey's* appears to be the Appeal Panel's most recent statement on the issue. At [54] and [55] it stated:

> 54. In making a determination under subs 149(1)(b), s 149(2) requires the Tribunal to have regard to the interests of all lot owners and to the rights and reasonable expectations of the owner deriving a benefit under a common property rights by-law. This involves balancing the competing interests in determining whether the relevant refusal is unreasonable: *Reen v Owners Corporation SP 300* [2008] NSWSC 1105 at [57]-[58] (which dealt with the equivalent s 158 found in the 1996 Management Act); *Ainsworth v Albrecht* [2016] HCA 40 at [49].
>
> 55. Whether the reasonableness of any refusal is to be assessed having regard to circumstances that existed at the time the resolution is passed or whether events occurring after that time may be taken into consideration is unnecessary to decide, that issue not being raised on appeal. Having regard to decisions such as *Owners Corporation Strata Plan 7596 v Risidore & Ors* [2003] NSWSC 966 at [13] and *The Owners – Strata Plan No 69140 v Drewe* [2017] NSWSC 845 at [27], both of which dealt with the refusal of an owners corporation to consent to a work order under s 140 of the 1996 Management Act (now s 126 of the SSMA), the better view would seem to be that reasonableness must be assessed by reference to circumstances known prior to the passing of the relevant resolution. In part, this is because whether consent is unreasonably withheld to a resolution to repeal by-law needs to be determined in the context of what, if any, compensation is being offered to a party adversely affected by the removal of any exclusive use rights or special privileges and the reasonable expectations that affected party may have concerning the enforceability of such compensation.
>
> (emphasis added)

Analysis of the principle

53 We summarise the principles to be applied as follows:

(1) reasonableness must be assessed by reference to circumstances known at or prior to the passing of the relevant resolution: *Maceys*; *Beckett*; *Drewe*;

(2) the determination of whether a refusal is unreasonable depends on the conduct of the owners corporation and all the relevant circumstances: *Endre*;

(3) "circumstances" are different to "material". Subsequent evidence or "material" which goes to the circumstances existing at the time of the meeting is admissible: *Donaldson*;

(4) the Tribunal is not confined to examination of the material before the meeting: *Donaldson*; *Beckett*;

(5) individual owners can provide evidence of their reasons: *Capcelea*.

Consideration

54 We see no error with the Tribunal commencing its task with "the starting point" being the reasons for the refusal of the making of the by-law at the time of refusal (Decision at [34]), however it would have been helpful if the Tribunal had made findings of what was recorded in the minutes of the 1 June 2020 meeting. And we see no error in the Tribunal's initial statement at [33] that "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".

55 However, we consider that, for the following reasons, the Tribunal erred in its statement of the principles to be applied.

56 First, we do not accept the statement that "the review [of the Tribunal] must be based on the material available to the owners at the time of the refusal". The Tribunal stated that the "authorities have approached the review as one of what was before, or reasonably available to the owners corporation at the time they refused consent to the by-law or the common property alteration". We note that the Tribunal did not state what authorities it was referring to in making that statement. That is not a correct statement of principle because:

(1) the weight of authority is that the question of unreasonable refusal is to be determined having regard to the circumstances at the time of refusal: *Donaldson, Drewe*; and

(2) "circumstances" are different to "material", and subsequent evidence or material which goes to the circumstances existing at the time of the meeting or circumstances known prior to the passing of the relevant resolution is admissible: *Donaldson, Maceys.*

57 Secondly, the Tribunal appears to have equated “reasons” with “circumstances” when it stated in [38] that the reasons for refusal advanced at the hearing diverted significantly from those provided and as minuted at the three general meetings.

58 Here we note that we see no relevance in the meeting of 24 March 2020. Not only was that meeting not the subject of the application before the Tribunal, but we do not accept that there could have been or were reasons given at the meeting for refusing to pass the special by-law at the 1 June 2020 meeting.

59 As to the minutes of the 1 June 2020 meeting, these record the following:

> S. Nash (Lot 2) stated that the owners of Lot 3 had made significant departures from the plans previously proposed and had appointed a new architect. C. Knight (Lot 3) explained that the architects had not changed. One set of drawings was made by JJ Drafting under instruction from MCK architects and the subsequent drawings are those of MCK Architects.
>
> The owner of Lot 1 advised that they had insufficient time to seek architectural advice in relation to the new plans submitted by MCK Architects. They would like MCK Architects to include measurements on the plans and noted one of the significant changes is the glass doors from the bathroom, which given the proposed excavation behind the side doors, seems implausible due to resultant topography. The owner of lot 1 also questioned the veracity of the measurements of the JJ Drafting drawings which did not correlate with the plans from MCK Architects.
>
> The owner of Lot 1 and Lot 2 requested that the plan to be left in the foyer and provide a further 5 week time frame for their own investigations and architectural advice.
>
> In response, A Knight (Lot 3) directed the owner of Lot 1 to refer to the existing floorplans which includes all of the necessary measurements of the existing floor plan and noted that there are little to no physical changes to spacing or room other than potential minor changes to internal layouts.
>
> A Knight (Lot 3) corrected S. Bayes (Lot 1) to note that they are replacing the existing door from bathroom with the window.
>
> S Nash (Lot 2) stated that the drawings lacked reference to the proximity of the adjacent units. The managing agent referred S Nash (Lot 2) to the strata plan.
>
> The motion was put to the vote and **defeated**.
>
> Lots 3, 5 & 6 – Unit entitlements in favour – 3
>
> Lots 1 and 2 – Unit entitlements against – 2

60 The minutes of the 6 August 2020 meeting are not relevant, unless they set out a discussion that occurred at the 1 June 2020 meeting. On this point, they refer to Dr Nash’s dissatisfaction with the content of the minutes of 1 June 2020 on the basis that they did not accurately record certain of his views, which are set

out in an email from him appended to the later minutes. As well, the minutes record Dr Nash opposing the motion and the making of the by-law for "various reasons that have already been raised" and that:

> [t]here are current Tribunal proceedings concerning a previous motion to make this by-law. It is not clear why this motion is being presented again. It creates a risk of duplicity however in light of the current proceedings, Lot 2 cannot comment".

61 Thirdly, the Tribunal's statement that:

> it appears that the reasons for refusal relied upon at the hearing were very different and distinct to those reasons for refusal offered by the respondent at the three meetings as outlined in the respective minutes of meeting

is difficult to assess in the absence of findings on either matter.

62 Here we note that the affidavit of Dr Nash before the Tribunal contained evidence of the considerations he and his partner Dr Rybak addressed when they considered the special by-law. He stated that:

> 8 In considering the by-law, Liza and I considered: the terms of the by-law; the various and changing plans that were provided to us; the reports obtained by Mr and Mrs Knight and provided to us. Liza and I discussed the issues raised by these documents at length and on many occasions. We also considered together the condition of the building, the positioning of the lots in relation to each other, and the particular importance of maintaining Trahlee as a heritage significant building, among various other matters.
>
> 9 After considering all of the above matters at length and in depth, the reasons why Lot 2 voted against the motion and opposed the making of the by-law are set out below.

63 Dr Nash then sets out why and he and Dr Rybak voted against the Knights' motion at each of the three general meetings, which clearly includes the meeting of 1 June 2020. In summary, he sets out the reasons that Lot 2 voted against the motion for the special by-law at [10] to [28]. In total Dr Nash states some 18 reasons why he and Dr Rybak voted against the special by-law.

64 Ms Bayes gave evidence on behalf of herself and her partner Mr Bruce. Relevantly she too gave direct evidence of why she voted against the proposed by-law:

> 17. The next general meeting was held on 1 June 2020. A motion to make a redrafted by-law was on the agenda. There were also new plans that had been prepared by MCK Architects dated 5 May 2020.There was a short letter from Urbis dated 12 May 2020. There were also the September 2019 plans prepared by JJ Drafting that apparently showed the Lot "as is". All this material

was attached to the notice of meeting that we received on 20 May 2020 and by post within a couple of days later.

18. As soon as I saw the new MCK Plans, I could see that they were completely different to the JJ Drafting plans presented on 24 March. This was the first time that I saw that work was proposed to the light atrium area, that is common property. Windows and doors at boundaries had changed. A window was changed to a door and a step was added. A modern window with translucent glass had been introduced. The bathroom was completely different. The kitchen was significantly changed. The steps from the living room were changed. There were lots of other details that were different. | was particularly concerned about the proposed works to the boundaries of the lot. There were no measurements on any of the 6 MCK Plans. The measurements on the JJ Drafting Plans did not correlate with the depicted scale. I read the new by-law. The text did not correlate with the text on the new plans. As far as I could see, we were dealing with a completely new proposal.

19. At the meeting on 1 June 2020, I attended (by Zoom) to vote for Lot 1. Anthony also attended. Both Anthony and I spoke to oppose the proposed by-law. Our objections were:

(a) The works requiring special and ordinary resolutions should be separated;

(b) The new plans from MCK did not have any measurements;

(c) There are no measurements in the glass dome area;

(d) We had not had enough time to seek advice regarding the significant changes from the original proposal; and

(e) We could not reconcile the text of the by-law with the new plans.

(f) The Knights agreed that they would provide another copy of the MCK plans with measurements and give us 5 weeks to consider them and seek advice.

65 The evidence of Ms Bayes is not referred to by the Tribunal. In the absence of findings about her evidence, we consider that there is force in the appellants' submissions that the Tribunal erred in finding that the reasons advanced by the owners of Lots 1 and 2 were adequately and completely addressed at the time of the refusal of the by-law.

66 It is in this context that the Decision needs to be reviewed. We are not satisfied that the Tribunal stated and applied the correct principles of law, and we have concerns about the reasoning process that lead the Tribunal to the conclusions it made: *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231.

67 Having concluded that the Tribunal misstated and misapplied the correct principles of law, it follows that the appeal must be allowed.

68 The appropriate course is to remit the matter to the Tribunal.

Orders

69 The Appeal Panel orders:

(1) The appeal is allowed.

(2) The orders made by the Tribunal on 21 January 2021 in SC 20/26294 are set aside.

(3) The whole of the proceedings be remitted to a differently constituted Tribunal for a new hearing and redetermination of the respondent's application in accordance with the evidence previously adduced to the Tribunal and such further evidence as the Tribunal may allow.

(4) If the appellants seek costs:

(a) they must file with the Registry and give to the respondents submissions limited to five pages within 14 days of these reasons;

(b) the respondents may respond within a further 14 days;

(c) the appellants may reply within a further 7 days;

(5) All submissions must be limited to three pages;

(6) The Tribunal proposes to decide any application for costs "on the papers". If either party opposes this course, they should that issue in their submissions.

****

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