Court of Appeal
Supreme Court

New South Wales

Case Name:	Huang v The Owners of Strata Plan No 7632
Medium Neutral Citation:	[2021] NSWCA 194
Hearing Date(s):	22 July 2021
Date of Orders:	3 September 2021
Decision Date:	3 September 2021
Before:	Basten JA at [1]; White JA at [33]; Emmett AJA at [52]
Decision:	Leave to appeal refused with costs.
Catchwords:	APPEALS — from exercise of discretion — procedural decisions — refusal to extend time for filing summons — reasons for delay — significance of first instance decision decided on basis of authority later overturned on appeal — interest rei publicae ut sit finis litium COSTS — costs assessment — determination — review/appeal — jurisdiction to appeal from certificates in proceedings commenced prior to 1 July 2015
Legislation Cited:	Civil Procedure Act 2005 (NSW) Legal Profession Act 2004 (NSW), ss 384, 385 Legal Profession Uniform Law Application Act 2014 (NSW), Pt 7 Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59 Local Court Act 2007 (NSW), ss 39, 40 Strata Schemes Management Act 1996 (NSW), Ch 5, ss 62, 65 Supreme Court Act 1970 (NSW), ss 69, 101 Uniform Civil Procedure Rules 2005 (NSW), Pt 50,

	rr 50.3, 50.12, 50.13
Cases Cited:	Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36 House v The King (1936) 55 CLR 499; [1936] HCA 40 Jackson v McDonald's Australia Ltd [2014] NSWCA 162 Jingalong Pty Ltd v Todd [2014] NSWCA 330 McElwaine v The Owners - Strata Plan 75975 [2017] NSWCA 239 McElwaine v The Owners – Strata Plan No 75975 [2016] NSWSC 1589 Piening v Wanless (1968) 117 CLR 498; [1968] HCA 7 R v Gregory [2002] NSWCCA 199 R v Unger [1977] 2 NSWLR 990 Wanless v Piening (1967) 68 SR 249 (NSW) Wende v Howarth (2014) 86 NSWLR 674; [2014] NSWCA 170 Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12
Texts Cited:	Nil
Category:	Costs
Parties:	Yu Huang (First Applicant) Cui'e Zhao (Second Applicant) The Owners of Strata Plan No 7632 (First Respondent)
Representation:	Counsel: Yu Huang (Applicant in person) C Purdy (Respondents) Solicitors: Vardanega Roberts Solicitors (Respondent)
File Number(s):	2020/160421
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law
Citation:	[2020] NSWSC 488

Date of Decision:	5 May 2020 (orders made 1 May 2020)
Before:	Walton J
File Number(s):	2019/205061

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

A water leak damaged a unit owned by the applicants. They brought proceedings against the owners corporation in the Local Court alleging breach of duties under the *Strata Schemes Management Act 1996* (NSW) and at common law. In late 2016, a magistrate dismissed their proceedings and awarded costs to the owners corporation.

The magistrate found that the owners corporation attempted to repair the damage, but the plumber sent for that purpose was turned away. In those circumstances, the owners corporation was not negligent under the statute or common law. Further, his Honour considered that *McElwaine v The Owners – Strata Plan No 75975* [2016] NSWSC 1589 correctly established that certain claims against owners corporations relating to waterproofing were impliedly barred by the *Strata Schemes Management Act 1996* (NSW). However, in the following year, the Court of Appeal overturned *McElwaine*.

A costs assessment certified costs in an amount of approximately $106,000. A costs review panel subsequently certified costs as $100,240 with the costs of the review being $5,392. In July 2019, the applicants filed a summons in the Supreme Court seeking a review of the certificates. The applicants then amended the summons to also appeal against the orders of the Local Court.

The summons was filed out of time. Further, although the applicants may have challenged the costs order on the basis that the substantive orders should not have been made, it was unclear on precisely what basis they challenged the magistrate's decision. A judge of the Common Law Division held that the Court lacked jurisdiction to hear an appeal from the costs assessment certificates and otherwise dismissed the summons as out of time. The applicants sought leave to appeal.

The Court (Basten JA at [32], White JA at [51], Emmett AJA at [97])**, refusing leave to appeal, held:**

1. Jurisdiction to review a costs certificate for proceedings commenced before 1 July 2015 lay only to the District Court. The primary judge made no error: [9]-[11] (Basten JA); [90] (Emmett AJA).

Legal Profession Act 2004 (NSW), ss 384 and 385 applied.

2. The bases proffered by the applicants as supporting an extension of time did not adequately explain nor justify re-consideration of the primary judge's refusal to extend time: [25]-[27] (Basten JA); [96]-[97] (Emmett AJA).

3. The primary judge's decision to refuse an extension of time was open for review, but on re-exercising the discretion, having regard to the costs already incurred and the fact that a successful appeal would result in a further trial, leave to appeal should be refused: [47]-[50] (White JA).

4. The applicants did not attempt to identify an error of law arising from the application of *McElwaine,* and although there may have been an error of law, that does not justify an extension of time within which to appeal. Litigants must decide whether to accept the burden and possible expense of challenging a decision rather than seeking a second opportunity after errors are put right by others: [26]-[31] (Basten JA); [33], [42]-[44] (White JA); [92]-[95] (Emmett AJA).

Piening v Wanless (1968) 117 CLR 498; [1968] HCA 7; *R v Unger* [1977] 2 NSWLR 990 applied.

JUDGMENT

1 **BASTEN JA**: This application for leave to appeal seeks to challenge the refusal of a judge in the Common Law Division to allow the applicants to challenge their liability to pay the costs of an unsuccessful claim brought against the respondent owners corporation in the Local Court. The matter could have been disposed of at a separate leave application, without the full hearing accorded to the applicants on 22 July 2021. The application for leave must nevertheless be dismissed.

2 In August 2015 a dispute arose between the present applicant, Ms Yu Huang, and her mother, who are the owners of a unit in Ray Road, Epping and the owners corporation for the building. The dispute related to water leaking from a bathroom pipe Ms Huang's unit into the wall and the apartments below. Ms Huang and her mother brought proceedings in the Local Court claiming damages, including the cost of repairs and a loss of rental income, from the Owners Corporation. On 30 November 2016 Magistrate Richardson delivered a judgment dismissing the plaintiffs' claims and ordering that they pay costs to the Owners Corporation.

3 In April 2017 the Owners Corporation served its costs bill on the applicants, seeking to recover an amount of some $131,000. The matter was referred for assessment and a costs assessor provided a certificate in an amount just under $106,000. The applicants appealed to a costs review panel, which assessed the Local Court costs in an amount of $100,240 and the costs of the review (payable by Ms Huang) as $5,392. For reasons which are not clear, the review panel decisions, which were sent to the Manager, Costs Assessment, on 28 March 2019 were not sent by the Manager to the parties until 5 June 2019.

4 On 2 July 2019 the applicants filed a summons in the Common Law Division which sought a review of the two certificates issued by the Manager on 5 June 2019. Curiously, the summons was originally prepared as an appeal to the District Court. For reasons which will be noted below, and as the primary judge correctly held, the Supreme Court had no jurisdiction to hear an appeal from the costs assessment certificates.

5 On 25 July 2019 the summons was amended to add an appeal against the orders of the Local Court found in a certificate said to have been issued on 3 April 2017, but sent to the parties on 18 October 2018. The orders were those made on 30 November 2016.

6 A limited right of appeal lay to the Supreme Court from the orders made in the Local Court on 30 November 2016. Pursuant to s 39 of the *Local Court Act 2007* (NSW) an appeal lay as of right, but only on a question of law. Further, an appeal lay on a ground that involves "a question of mixed law and fact", but only with leave of the Supreme Court: s 40(1). Leave is required with respect to any appeal from an order as to costs: s 40(2)(c).

7 Appeals to the Supreme Court are subject to the requirements of the Uniform Civil Procedure Rules 2005 (NSW). Part 50 applies to appeals *to* the Supreme Court. Rule 50.3(1) requires an appeal to be brought within 28 days from the date on which the order of the court below was made or given. However, that time may be extended by the Supreme Court: r 50.3(1)(c).

8 The summons in the present matter was not filed until two years, seven months after the judgment of the Local Court. The amended summons, which first introduced an appeal against the orders of the Local Court, was not filed until some three weeks later. In a judgment delivered in May 2020, Walton J in the Common Law Division dismissed the amended summons.[1]

Review of costs certificate

9 Prior to 1 July 2015 costs assessments and appeals from such assessments were dealt with under the *Legal Profession Act 2004* (NSW), ss 384 and 385. That statutory regime was replaced by the *Legal Profession Uniform Law* (NSW) and, in particular, Pt 7 of the *Legal Profession Uniform Law Application Act 2014* (NSW). However, the *Legal Profession Act 2004* continued to apply "if the proceedings to which the costs relate commenced before 1 July 2015".[2] The proceedings brought by the applicants in the Local Court commenced before that date: accordingly the *Legal Profession Act* applied. Pursuant to ss 384 and 385 of that Act, the jurisdiction to review a costs certificate lay only

[1] Huang v The Owners of Strata Plan No 7632 [2020] NSWSC 488 ("Huang").
[2] Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59.

to the District Court, or to the court or tribunal which had made the costs order. As Walton J correctly held, there was no appeal to the Common Law Division from the costs certificates.[3]

10 Ms Huang and her mother were both applicants listed in the amended summons filed in this Court on 20 July 2021, seeking leave to appeal from "the whole of decisions and orders of" Walton J, and from the Magistrate. There was some doubt as to whether the applicants sought to challenge the conclusion as to the lack of jurisdiction to appeal from the costs certificates. There was no ground in the draft notice of appeal which challenged that aspect of the case in the Court below. Nevertheless, order (2) in the draft notice of appeal sought the setting aside or dismissal of all judgments, decisions and orders "of 30 November 2016 (Local Court) and 1 May 2020 (Supreme Court)".

11 It sufficient to observe that the Supreme Court had no jurisdiction to hear an appeal from the issue of the costs certificates and accordingly there was no error on the part of the primary judge in rejecting so much of the amended summons in the Common Law Division as sought to challenge the findings of the review panel.

Challenge to decision of Local Court

12 In the course of the hearing in the Common Law Division there was some confusion as to whether the applicants were challenging only the costs order made in the Local Court, or the dismissal of the claims they had made in the Local Court, which resulted in the costs order. The judge sought to resolve that issue in the course of the hearing, eliciting what appeared to be a concession from Ms Huang that she only challenged the costs order. However, that left open the possibility that she wished to challenge the costs order, but on the basis that the substantive order dismissing the proceedings should not have been made. That distinction was not clarified, although generally an order that costs follow the event and be assessed on the ordinary basis (and not on an indemnity basis) would usually follow as a matter of course from the dismissal of proceedings. There was no suggestion of any point in this case that costs should not have followed the event. It might, therefore, have been assumed in

[3] Huang at [47].

the absence of an expressed concession to the contrary, that the substantive outcome of the Local Court proceedings was under challenge.

13 Ms Huang submitted, at least implicitly, that because of a misunderstanding the primary judge failed to deal with a significant aspect of her case. However, for reasons which may be explained briefly, below, that was not so. Before turning to that issue, however, it is convenient to address the basis on which the primary judge did dismiss the applicants' amended summons.

14 As the judge correctly noted, an application for leave to appeal could properly be addressed by reference to four main factors, namely: (i) the length of the delay; (ii) the reason for the delay; (iii) whether the proposed appellant has a fairly arguable case; and (iv) the extent of any prejudice suffered by the respondent as a result of the delay in seeking leave.[4]

15 The principle of finality requires that litigation not be reopened nor extended beyond the entry of final orders, except by way of an appeal or judicial review brought within the periods prescribed by law. Any attempt to bring an appeal outside that period must be justified. The period of more than two years and seven months between the date of the orders in the Local Court and the filing of the amended summons, was potentially fatal in the absence of a persuasive explanation justifying the lapse of time.

16 While noting six "reasons for the delay" provided by the plaintiffs, the judge also held that they proffered "no explanation for the delay".[5] The reasons given by the applicants may be formulated, following the formulation of the trial judge, but not in precisely the same terms. They were: (i) the applicants were not aware of the Local Court costs order when judgment was delivered; (ii) the applicants were advised by counsel that it would be difficult to appeal without new evidence; and (iii) new evidence later became available, but only in the course of the costs assessment.

17 Point (i) is of no substance. The applicants were represented by solicitors and counsel in the course of the Local Court proceedings. Ms Huang at least was present on the final day when the judge delivered his judgment. Counsel were

[4] Huang at [52] following Jingalong Pty Ltd v Todd [2014] NSWCA 330 at [40].
[5] Huang at [55] and [57].

also present. The substance of anything counsel may have said after the hearing will be addressed below; however it cannot be said that Ms Huang was not aware of the costs order when it was made. It is more plausible, perhaps, that she had little idea what the amount of the costs would be; however, since she was presumably paying her own lawyers, that too is unlikely. But even conceding that she was ignorant of the likely extent of her liability in late 2016, she received a letter from the solicitors for the Owners Corporation on 27 April 2017 seeking payment of an amount in excess of $113,000. Thus she was aware both of the legal liability and the financial implications of that liability more than two years before commencing proceedings in the Supreme Court.

18 The allegation of unawareness is in fact diminished by the second ground (point (ii)), namely that she obtained legal advice that it would be very difficult to appeal if there were no new evidence. That claim suggests that she was aware of the consequences of the Local Court judgment, probably when it was given or, if not then, at least within a week or two thereafter, as she was given advice with respect to an appeal. Precisely what advice was given is not known.

19 The advice apparently focused on factual issues. There was no appeal to the Supreme Court from a purely factual finding made by the magistrate involving no mixed question of law and fact. Indeed, the likelihood of a grant of leave pursuant to s 40, in relation to a question which involved both law and fact was remote in this case.

20 The applicant seized upon the legal advice, as she understood it, that she could only appeal if there were new evidence providing a ground for an appeal. She submitted (point (iii)) that the “new evidence” was only revealed in the course of the costs assessments process and that she acted promptly in filing an appeal.

21 It is by no means clear how the discovery of new evidence could form a ground of appeal based on a question of law. There may be circumstances in which the discovery of new evidence, which remained unavailable because of a breach of duty on the part of the other party to the proceedings, might warrant a reopening of the case in the trial court. Even if that were possible, it does not

follow that new evidence could give rise to a ground of appeal to the Supreme Court. In any event this question need not be pursued because there was nothing in the nature of the information discovered in the process of the costs assessment which warranted consideration.

22 The claim of "new evidence" had two elements. The first was evidence in the papers produced on the costs assessment by solicitors for the owners corporation revealing that the corporation had received a payment from its insurers to cover water damage which Ms Huang asserted related to the cost of repairing the leak in her unit. However, the fact that the owners corporation received a cheque from an insurer relating to water damage, did not demonstrate that it had been paid for the costs of repairs to her unit, as opposed to liability for damage to the units below. Nor did it affect the merit of her claim for damages. There was no basis for deploying this document as evidence on an appeal against the decision of the magistrate.

23 The second element of evidence related to a finding by the magistrate that a plumber contracted by the owners corporation was turned away by Ms Huang when he attended at the unit on 9 or 10 February 2015. The owners corporation relied upon a statement by the principal of the plumbing contractor, who in turn relied upon an invoice which had been issued on 15 February 2015 with a description of the work as involving an emergency call to investigate a burst pipe but "upon arrival we were informed that we were no longer required on site." Amongst the papers discovered in the course of the costs assessment was a file note by the solicitor for the owners corporation in the following terms:

> "Email to plumber for name of tradesman in attendance; perusal of email from plumber advising tradesman has no recollection of attendance".

24 It is by no means clear how, even if available in the Local Court, that evidence could have been deployed to undermine the evidence of the principal of the plumbing firm, expressly based upon the contemporaneous invoice. There is no substance in the claim that there was any new evidence that could have affected the outcome of the case. Nor is it apparent how such evidence could have formed the basis of an appeal to the Supreme Court from the judgment of the magistrate.

25 It follows that none of the three bases proffered by the applicant as justification for an extension of time within which to appeal from to the Supreme Court from the decision of the magistrate can be accepted.

26 It is true that the primary judge did not consider the proposed new evidence because he had understood the constraints on the case brought before him excluded consideration of the substantive order made by the Local Court, as opposed to its costs order. Nevertheless, had he addressed the evidence, there is no reason to suppose that the result would have been different.

27 It follows that the lapse of time since the expiration of the right of appeal has not been adequately explained, and certainly not justified, so as to permit re-consideration of the refusal of an extension of time.

28 An extension of time, at least of the order of two years seven months, would require not only a soundly-based justification for the delay, but also an available ground of appeal based on error of law. No such material was presented in this Court. Nevertheless, the Court may be satisfied that no miscarriage occurred in the present case. So far as a claim for common law damages arising out of a defect in the common property was concerned, the magistrate accepted that such a claim, if made out on the facts, would not stand in the face of the decision of Young AJ in *McElwaine v The Owners – Strata Plan No 75975*.[6] Although doubts may have attended the reasoning in *McElwaine*, it is clear that the magistrate was bound by it. On the other hand, counsel for the applicant did not seek to argue that it was wrong, nor advise that an appeal should be pursued on the basis of an alternative understanding of the legislation.

29 In fact, *McElwaine* was overturned by this Court on 20 September 2017.[7] However, in principle, a party who seeks to rely upon a change in the law cannot wait to see if the legal principle is challenged in other proceedings and then, if it is overturned, appeal out of time. As explained by Barwick CJ in *Piening v Wanless*:[8]

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[6] [2016] NSWSC 1589 (10 November 2016).

[7] McElwaine v The Owners – Strata Plan 75975 [2017] NSWCA 239 (White JA, Basten JA and Sackville AJA agreeing).

[8] (1968) 117 CLR 498 at 506; [1968] HCA 7.

> "Of course, a litigant faced with a decision of a court which is not a final court of appeal which lies across the path he wants to follow, must make up his mind whether he desires to accept the burden and possible expense of challenging that decision. He may lack the courage or the means to do so, or both, or he may see advantage in accepting the current view. But the remedy for the erroneous decision is by way of such a challenge and not … in the prolongation of litigation by affording a litigant a second opportunity after the error has been put right in other proceedings by other litigants."

30 This principle is of long standing and general application. Its operation in the civil jurisdiction was referred to by Street CJ in *R v Unger*:[9]

> "There is no difference in principle between a subsequent judicial decision which has the effect of exposing a prior misconception in relation to a principle of law which was wrongly regarded as well-founded at the time of the trial, and a subsequent judicial decision exposing the invalidity of regulations that were wrongly treated as valid at the time of the trial. The trial having been concluded and the time for appeal having gone by, the general principle is that the matter is regarded as at an end."

31 In short, although the applicants did not seek to identify any error of law, and whilst there may have been such an error, that would not have justified an extension of time within which to appeal, especially in circumstances where the delay from the date of the judgment of this Court revealing the error was some 22 months. Furthermore, the error must be material. As the applicants in effect acknowledged, they lost primarily because they failed to establish the factual basis for their claim.

32 The application for leave to appeal from the judgment in the Common Law Division should be refused with costs.

33 **WHITE JA**: I agree with Basten JA and Emmett AJA that the principles concerning the finality of judgments require that leave to appeal be refused. I have reached this conclusion notwithstanding that the costs order which the applicants seek to challenge may have occasioned a substantial injustice.

34 Emmett AJA has summarised the applicants' allegations in their Amended Statement of Claim filed in the Local Court. The applicants did not only allege that the Owners Corporation was vicariously liable for damage caused by the conduct of its contractor, but also that it was liable for failing thereafter to carry out waterproofing repairs.

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[9] [1977] 2 NSWLR 990 at 995 (CCA).

35 The learned magistrate's findings are summarised by Emmett AJA. It is not clear that the magistrate addressed that issue, but if he did, his reasons were inadequate. The magistrate based his decision upon his finding that the plumber was turned away by the applicants on 10 February 2015. That was a finding of fact that could not be challenged in the Supreme Court. But it did not resolve the question whether the Owners Corporation was in breach of the duty of care alleged in not carrying out repairs subsequently. The magistrate said:

> "Over that weekend there was some to-ing and fro-ing between the representatives of the Owners Corporation and Ms Huang and on 9 February 2015 a plumber was engaged, AGM Plumbing to go and attend to the rectification of the damage that had been occasioned on the locked property by XLR8 on 5 February and on 10 February a plumber from AGM Plumbing attended on the property and there is a dispute as to what did occur. On the evidence there is a difference of opinion between Ms Huang and the representative who went there from AGM who has put on an affidavit as to what occurred, but the problem was not attended to on 9 February, was not fixed on 9 February and thereafter there was further communication between the plaintiff and representatives of the Owners Corporation, mainly in emails which are exhibited attached to Ms Huang's affidavits and in short form, the plaintiff contends that she put it to the Owners Corporation that they should take "quick action" to restore the bathrooms of which there were two in lot 17, the subject of this dispute, to the same condition as they were before the pipes were broken.
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> There was no satisfaction, so far as the plaintiff was concerned, and she eventually approached the Office of Fair Trading for a mediation. That was on 23 February 2015 and the Owners Corporation declined to participate in the mediation and on 11 April 2015, the plaintiff commenced proceedings against the defendants. The plaintiff, at that stage, obtained some quotations from various people to attend to the rectification of the property and these quotations were forwarded by her to the Owners Corporation. There was no response. She engaged a contractor to renovate and attend to fixing the difficulties in the bathrooms, occasioned, in part, by the actions of XLR8 on 5 February. There was ..(not transcribable).. on 15 August that DeLong Contractors were engaged. On 18 August the strata managers directed that she cease that work, but she continued with that work and by February 2016 the work was completed.
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> The plaintiff in these proceedings claims that she suffered loss on two grounds. One is the cost of rectification arising from the negligent conduct of the Owners Corporation and, initially, pleaded against the second defendant, XLR8, but I point out that the action between the plaintiff and the second defendant was resolved by the payment of $15,000 and the second loss that she says she sustained is the loss of rental income and that will be the subject of fair comment later on."

36 The magistrate also said:

> "The Owners Corporation, on its own evidence in Court, conceded that it did not respond to her from 9 February to mid June that year. What she is saying, when you put all that together, all of which is evidenced, in my opinion, is that

> the Owners Corporation was negligent because it really failed reasonably to 10 discharge its obligations arising from the Act, and, in particular, s 62.
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> In response to that, the Owners Corporation would say this that Mrs Huang had made it clear, on their view, that she wanted full renovations done to both bathrooms and not just the rectification identified in the resolution passed by 15 the extraordinary general meeting. She does not deny that, but she wanted further work done beyond that. She even had the discussion with the representatives of XLR8D Showers about doing further work for her beyond that the encapsulated by the resolution and obtained a quotation. She gives evidence in her affidavit of this and she says that the quotation was too much.
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> The evidence of the Owners Corporation is that when they organised for AGM on the 9th to go to the property to attend to the rectification of the broken pipes, she turned the plumber away on the 10th. She said she wanted to get an independent report before proceeding to rectification, which report the Owners Corporation said she never got. She demanded the keys be returned and the Owners Corporation would say she took a long time herself to turn her mind to rectification. Yes, she did go off to Fair Trading and they declined to do that, but during this period of time, which was from February right through, that is February 2015 right through to April 2016, leaving aside the Fair Trading issue, she is overseas from December 2015 to 2016, attending on her father, I believe, that the work that she engaged to be done took, from recollection, from August 2015 to April 2016 when the evidence before the Court is that it would take, give and take a few days, two weeks to attend to the rectification necessary pursuant to the obligations that fell on the Owners Corporation. She proceeded to do the work without their approval and she proceeded to do the work in circumstances where they had directed her not to do so and she continued to do that work.
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> In my view, there is argument both ways on the question of negligence.
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> …
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> She wears the onus, in my opinion, and when you look at the requests for the returning of the keys, the insistence there being an independent report that she was going to commission, the length of time is very relevant here because the length of time goes straight to the question of loss of rental income. It takes nearly a year to do that that the expert says would take two weeks. So length of time is, in my view, a relevant consideration and, whilst I initially erred on the side of the plaintiff in regard to the issue of negligence, I come down finally to the view that it has not been established to the requisite standard on the balance."

37 This reasoning does not address the applicants' complaint that the Owners Corporation was in breach of its duty of care in not taking steps to rectify the cause of water ingress between February 2015 and at least December 2015. Rather, the magistrate said that:

> "So there is in incident on 5 February and then there is an attempt to rectify the problem on 10 February and it is the conduct in and around that time that really determines whether the Owners Corporation has been negligent or not."

38 A substantial part of the applicants' case in the Local Court was not addressed.

39 Nonetheless, no appeal or application for leave to appeal to the Supreme Court was filed until 2 July 2019, some two years and seven months after the magistrate gave judgment.

40 It is reasonably clear that whether the Owners Corporation were liable to pay damages in tort for negligence did not depend upon whether the applicants turned the plumber away on 10 February 2015. But there were two practical difficulties. The applicants' claim, after settlement of their claim against the contractor, was only for $33,952. Success in the Supreme Court would in all likelihood have required the proceedings to be remitted for determination of the Owners Corporation's defence to the claim of its continuing failure to repair.

41 The second practical difficulty was that in *McIlwaine v The Owners – Strata Plan No 75975* [2016] NSWSC 1589, Young AJ had held that no action in nuisance lay against an owners corporation for failing to waterproof the common property resulting in water damage to the plaintiff's lot. His Honour's reasoning applied equally to a claim for common law damages for negligence. For an appeal to the Supreme Court to have succeeded, it would have been necessary for the applicants either to persuade a single judge not to follow that decision or else take the case to the Court of Appeal.[10]

42 The applicants did not give evidence as to what legal advice they received after 30 November 2016. They submitted to the primary judge that they were advised that it would be difficult to appeal if there were no new evidence. Therefore it cannot be assumed that the decision in *McIlwaine* was perceived to be an obstacle to the applicants' filing an appeal or an application for leave to appeal to the Supreme Court within the prescribed period of 28 days, or even in a timely manner.

43 In *R v Unger* [1977] 2 NSWLR 990, Street CJ articulated a powerful reason of policy as to why the parties should not be entitled to an extension of time to appeal on the ground that a previous judicial decision that would have barred the appeal had been overturned. Street CJ said (at 995):

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[10] Young AJ's decision in McIlwaine was reversed by this court on 20 September 2017: McIlwaine v The Owners – Strata Plan 75975 [2017] NSWCA 239.

> "Although in pure theory the overruling or modification by judicial decision of previous conceptions of legal principle does no more than correct a departure from the timeless perfection of the law, the plain fact is that legal principle is constantly evolving and being moulded in the light of the changing and developing social context. Recognizing this, there has always been an unwillingness to permit the re-opening of past decisions. Indeed the process of appeal, either civil or criminal, is a comparatively recent and statutory concept—it finds no basis in the common law itself. This finality of decision in each individual case leaves the courts free to permit a judicious flexibility in the development of principle in later cases, free from inhibition lest such development may set at large disputes that have previously been resolved. The concept of merger in judgment, both in the civil and in the criminal field, to which Dixon C.J. referred, equally with the doctrine of res judicata, serves this requirement of flexibility for potential development of the law."

44 However, the principle is not absolute. In deciding whether an extension of time should be granted, the interests of justice including the consideration supporting the finality of judicial decisions are important: *R v Gregory* [2002] NSWCCA 199, at [41]. But they are not the only considerations. Nonetheless, having regard to the paucity of evidence as to why a timely application was not made to appeal or to seek leave to appeal, I do not think that the possibility (and it is no more than a possibility) that the decision in *McIlwaine*, as it then stood, influenced the advice the applicants were given as to the prospects of a successful appeal should be given any weight.

45 The primary judge's refusal to extend the time for the bringing of the appeal was a discretionary decision to which the principles in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 apply. The primary judge addressed the reasons for delay, the merits of the applicants' claim, and prejudice to the respondent. The primary judge was prepared to accept that the applicants may have operated under some confusion about the appeal process and it could be inferred that this partially excused the delay. Nonetheless his Honour said that the appeal was still out of time, being brought 68 days after the decision of the Review Panel on the costs assessment. He said there was no explanation for that delay ([57]). But if the delay of two years and four-and-a-half months were to be excused, the further delay of 68 days would be inconsequential.

46 As to the second issue, the merits of the case, the primary judge said:

> "[60] In response to the plaintiff's contentions, the defendant made the following submissions:

> The plaintiffs did not engage with an appeal limited to challenging the Local Court costs order and tended to stray into the merits of the application originally brought before the Local Court.
>
> The plaintiffs, in their submissions, opposed any costs order other than on the ordinary basis. However, there is no evidence that the plaintiffs sought any departure from the usual position under r 42.1 of the UCPR that costs follow the event. Therefore, the plaintiff's submissions raised a challenge to the Richardson LCM's exercise of the discretionary power to award costs; a contention that was not made in the court below.
>
> Had the plaintiffs challenged the Local Court costs order at the outset, then the issues that arose could have been determined by the Supreme Court in the normal course. However, as there was no challenge to the Local Court costs orders by the plaintiffs, the defendant incurred the expenses of preparing a bill in assessable form and of resisting the plaintiff's application for review of the costs assessment. In the instance that the Local Court costs order is disturbed, the aforementioned expenses will have been thrown away and further assessment expenses will be incurred by the defendant."

47 It was necessary and appropriate for the applicants to address the merits of their claim in the Local Court in order to advance their contention that the costs order should be set aside, notwithstanding that they did not seek to set aside the judgment in favour of the respondent. The substance of their complaint is that the judgment was wrong and costs should not have been ordered against them. The fact that they did not seek to set aside the judgment is explicable by the small amount at stake and the likelihood of a new trial being ordered if the appeal were successful. The amount for which costs were assessed demonstrates that the costs order could now be seen to be the most significant issue.

48 The primary judge misapprehended that the applicants' challenge to the costs order in the Local Court was premised upon a challenge to the correctness of his Honour's finding that judgment should be given for the Owners Corporation (even though the summons did not seek the setting aside of that judgment). For that reason, and because the primary judge was prepared to excuse all but 68 days of the delay in filing the summons, whereas the further 68 days' delay is inconsequential, his Honour's decision to refuse the extension of time for filing the summons is open to review.

49 On the re-exercise of the discretion, it is important, as Basten JA observes, that on 27 April 2017 the applicants received a letter from the solicitors for the Owners Corporation claiming costs of $130,915.48. Rather than then seeking

an extension of time to seek leave to appeal from the costs order of the Local Court (or from the substantive order giving judgment for the Owners Corporation) the applicants sought an assessment of costs and then appealed to the Review Panel from the costs assessment. That decision was productive of both delay and the incurring of substantial costs by the Owners Corporation.

50 If an extension of time were granted, a successful appeal would not resolve the parties' dispute. A successful appeal would not result in judgment for the applicants but rather a new trial. Having regard to the costs already incurred, that should not occur.

51 For these reasons, I agree that the application for leave to appeal should be refused with costs.

52 **EMMETT AJA**: The proceedings in this Court arise out of claims made by Ms Yu Huang and Ms Cui'e Zhao (**together the Claimants**) in relation to water damage occasioned to an apartment in Epping jointly owned by them (**the Epping Unit**). The Claimants began proceedings in the Local Court of New South Wales against the Owners Corporation in respect of the strata plan relating to the Epping Unit (**the Owners Corporation**). An undated amended statement of claim was subsequently filed in the Local Court (**the Amended Statement of Claim**) and the Owners Corporation filed a defence to the Amended Statement of Claim on 10 November 2015.

53 On 30 November 2016, for reasons delivered *ex tempore* on that day, a Local Court Magistrate (**the Magistrate**) ordered that there be a verdict for the Owners Corporation. The Magistrate also ordered:

> "Costs on ordinary basis as agreed between parties or assessed".

As will become apparent, by that order, his Honour was requiring the Claimants to pay the whole of the costs of the Owners Corporation of the proceedings in the Local Court.

54 The Owners Corporation filed an application for a costs assessment claiming a total amount of costs in the sum of $130,915.48. A certificate of assessment of costs was issued on 31 January 2019 in the sum of $105,764.15. The Claimants applied to have that assessment reviewed by the Costs Review

Panel. On 28 March 2019, the Costs Review Panel assessed the total amount payable by the Claimants to the Owners Corporation at the sum of $100,240.15.

55 Following receipt of the certificate of the assessment from the Costs Review Panel, the Claimants commenced proceedings in the Common Law Division of the Supreme Court on 2 July 2019 by way of summons seeking leave to appeal from the assessments. An amended summons commencing an appeal was filed on 25 July 2019. By the amended summons, the Claimants applied to set aside the assessment of costs as well as the orders made by the Magistrate. On 1 May 2020 a judge of the Common Law Division (**the primary judge**), for reasons published on 5 May 2020, ordered that the amended summons be dismissed and that the Claimants pay the Owners Corporation's costs of those proceedings.

56 On 17 November 2020, the Claimants filed a summons seeking leave to appeal to this Court. They filed an amended summons seeking leave to appeal on 20 July 2021. On 22 July 2021, leave was granted *nunc pro tunc* for the filing of the amended summons.

57 By the amended summons, the Claimants seek leave to appeal to this Court from the whole of the decision and orders of the Magistrate of 30 November 2016 and the whole of the decision and orders of the primary judge of 1 May 2020. By their draft notice of appeal filed with the summons seeking leave, the Claimants sought orders that all judgments, decisions and orders of the Local Court of 30 November 2016 and of the Supreme Court of 1 May 2020 be set aside.

58 While the Claimants were represented by counsel at the hearing in the Local Court, they were not represented by legal practitioners either before the primary judge or before this Court. As a consequence, there have been misunderstandings and apprehensions as to the ultimate relief sought by the Claimants and the basis for that relief. In any event, for the reasons that follow, the amended summons seeking leave to appeal should be dismissed with costs.

Proceedings in the Local Court against the Owners Corporation

59 The allegations made in the Amended Statement of Claim may be restated as follows:

(1) The Claimants are the registered proprietors of the Epping Unit;

(2) The Owners Corporation is the registered proprietor of the common property on the land that is the subject of the relevant strata plan (**the Common Property**);

(3) Under the *Strata Schemes Management Act 1996* (NSW) (**the Strata Act**), the Owners Corporation is a body corporate capable of participating in proceedings;

(4) Under s 62 of the Strata Act and under the common law, the Owners Corporation owes a duty of care to the Claimants to maintain the Common Property and keep it in good repair;

(5) The Owners Corporation resolved to undertake repairs to the main shower recess and *ensuite* shower recess of the Epping Unit (**the Waterproofing Repairs**) and appointed XLR8 Showers Pty Limited (**Accelerate**) to undertake the repairs;

(6) Negligently and in breach of the duty of care referred to above, in carrying out the repairs, Accelerate caused damage to the Epping Unit and failed to complete the Waterproofing Repairs in that an external pipe was struck and burst, the pipes flooded and damaged the subfloor of the Epping Unit and the shower facilities in the Epping Unit became unusable;

(7) As a result of the conduct of Accelerate as contractor for the Owners Corporation and the failure of the Owners Corporation to complete the Waterproofing Repairs, the Claimants have suffered damage for the cost of repairs and for lost rent;

(7A) The Owners Corporation is vicariously liable to the Claimants for the damage caused by Accelerate;

(7B) The work carried out by the Owners Corporation was work required to be carried out in accordance with the Strata Act;

(7C) The Owners Corporation entered the Epping Unit with consent of the Claimants in accordance with s 65(4) of the Strata Act;

(7D) The Owners Corporation is liable for the damage caused or arising out of the work done by Accelerate;

(8) The Claimants claim the following:

8.1 $33,000;

8.2 Damages;

8.3 Interest under the *Civil Procedure Act 2005* (NSW); and

8.4 Costs

60 The Owners Corporation's defence to the Amended Statement of Claim put in issue the allegations of duties owed by the Owners Corporation and breach of such duties.

61 The original claim in the Local Court was for the sum of $46,911. While the Claimants had originally sued Accelerate, that claim was settled by the payment of the sum of $15,000 and there was therefore a reduction in the amount claimed in the Amended Statement of Claim.

62 Section 62(1) of the Strata Act relevantly provided that an Owners Corporation must properly maintain, and keep in a state of good and serviceable repair, the common property. Section 65(1) relevantly provided that an Owners Corporation may enter on any part of the relevant parcel for the purpose of carrying out work required to be carried out by the Owners Corporation in accordance with the Strata Act. Section 65(5) provided that a person must not obstruct or hinder an Owners Corporation in the exercise of its functions under s 65. Section 65(6) provides that an Owners Corporation is liable for any damage to a lot or any of its contents caused by or arising out of the carrying out of any work, or the exercise of a power of entry referred to in s 65, unless the damage arose because the Owners Corporation was obstructed or hindered.

63 The Magistrate found that, for some time well prior to the instance giving rise to the present dispute, there had been problems with the shower recesses in the building in which the Epping Unit is located, and that the Owners Corporation had decided to engage Accelerate to do work in the Epping Unit. His Honour found that, on 5 February 2015, Accelerate commenced doing work and, in the course of doing so, damaged copper water pipes, causing the overflow of water requiring the water supply to be turned off. His Honour found that AGM Plumbing was engaged to attend to the rectification of the damage that had been occasioned on 5 February 2015 and that, on 9 February 2015 (or

10 February 2015 as the case may be), a plumber from AGM Plumbing attended at the Epping Unit. His Honour observed that there was a dispute as to what then occurred. In any event, his Honour found that the damage was not rectified and there were subsequent communications between the Claimants and the Owners Corporation in which the Claimants sought the completion of the rectification work.

64 After referring to s 62, the Magistrate said that that part of the case was not pressed and referred to a number of authorities as justification for that agreement between the parties. His Honour then dealt with the alleged common law duty of care, saying that the duty must be established with precision,[11] having regard to the common law principles and multi-factor approach.[12] His Honour then said that, in deciding whether there has been a breach of a duty of care, the tribunal of fact must first ask itself whether a reasonable man in the position of the defendant would have foreseen that its conduct involved a risk of injury to the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk.[13] His Honour said that the perception of the reasonable man's response called for a consideration of the magnitude of the risk and the degree of probability of its occurrence along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities the defendant may have. His Honour then referred to the contentions advanced on behalf of the Claimants as to the importance of the Court having regard to the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of the plaintiff to take steps to protect itself. His Honour observed that vulnerability refers to the inability of the plaintiff to take steps to protect itself from economic loss arising from the defendant's conduct and is also concerned with a reasonable foreseeability of loss if reasonable care is not taken by the defendant.[14]

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[11] See Jackson v McDonald's Australia Ltd [2014] NSWCA 162.

[12] See Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12 and Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185 at 199-205; [2014] HCA 36 at [19]-[36].

[13] Citing Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

[14] Citing Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36.

65 The Magistrate observed that, in circumstances where the owner of a lot in a strata plan is not able to undertake work on the Common Property without the consent of the Owners Corporation and cannot protect itself against the acts or omissions of the Owners Corporation, the owner of a lot is in a position of vulnerability to the Owners Corporation. His Honour said that, if the common law duty of care is available to Ms Huang, the circumstances that existed in the relationship between the Claimants and the Owners Corporation was one of vulnerability. His Honour observed that the capacity of the Claimants to seize control of the situation was dependent not only on approval from the Owners Corporation but on their taking the positive steps they are required to do.

66 The Magistrate then considered the question of whether the loss occasioned by the Claimants was caused by the negligence of the Owners Corporation and whether the damages relating to any such loss had been properly identified by the Claimants. His Honour said that the duty of the Owners Corporation was to take all reasonable steps necessary to ensure that the positive obligations imposed under s 62, along with other provisions of the Strata Act are met. His Honour formulated the question as to whether the Owners Corporation had discharged those obligations in a reasonable way and that if they had not, they were negligent, assuming such a cause of action exists.

67 The primary judge then referred to the incident of 5 February 2015 and the attempt to rectify that problem on 9 February 2015 and observed that it was the conduct in and around that time that determined whether the Owners Corporation had been negligent. His Honour referred to requests on behalf of the Claimants to the Owners Corporation after 5 February 2015 to fix the problems as quickly as they could. However, between April 2015 and early 2016, no work was done by the Owners Corporation despite it being made clear on the part of the Claimants that they wanted the work done. His Honour found that the Claimants then attended to the work themselves, advising the Owners Corporation of quotes, “to receive no reply, so [the Claimants] did the work [themselves]”. It was conceded that the work that the Claimants wanted to do in the bathrooms in the Epping Unit exceeded by a long margin the work required to be done to rectify the original leak which had been the subject of the resolution passed by the Owners Corporation to effect repairs.

68 The Magistrate then referred to the dispute between the Claimants and the Owners Corporation as to the occurrence on 9 February 2015. The evidence of the Owners Corporation was that they organised for AGM Plumbing to attend to the rectification of the broken pipe but that the plumber was turned away on 9 February 2015. The evidence adduced by the Owners Corporation was that the Claimants said they wanted to get an independent report before proceeding with rectification. The evidence on behalf of the Claimants, on the other hand, was that the plumber who attended said he could only stay for a while and was there to inspect the situation. Ultimately, the Magistrate concluded that he could not prefer the Claimants' view over the view of the Owners Corporation. His Honour concluded that the Claimants failed both under the statutory cause of action and under the common law cause of action. His Honour held that costs should be awarded in favour of the defendant on the ordinary basis.

Proceedings in the Common Law Division

69 The amended summons filed in the common law division contained a lengthy narrative under the following headings:

- Appeal against Local Court judgment/order;
- Appeal against cost assessment and cost review determinations;
- [Owners Corporation's solicitors] legal representation;
- Local Court proceeding and outcomes;
- [Owners Corporation's] legal costs;
- Costs of cost assessment and review panel;
- Consequence of failure to disclose;
- Issues to be resolved; and
- Other considerations.

70 Under the first heading, the amended summons dealt with grounds for appeal from the decision of the Local Court. First, reference was made to the discovery of "new critical evidence" concerning the question of whether or not the plumber from AGM was turned away on 9 February 2015. The evidence was said to have been discovered during the costs assessment process. The Magistrate found that the plumber was turned away notwithstanding the

evidence given on behalf of the Claimants. The basis for that conclusion was a business record of AGM Plumbing Services in the following terms:

> "Attended emergency callout to [the Epping Unit] to investigate burst pipe in shower wall ruptured by waterproofing contractors as they were stripping tiles.
>
> Upon arrival, we were informed that we were no longer required on site."

In addition, the Magistrate had before him an affidavit sworn by Ms Sheree Frisina, the strata manager of the building in question. Ms Frisina said that, on 9 February 2015, she received a telephone call from a person at AGM Plumbing during which the person said words to the following effect:

> "The unit owner will not allow us into the property."

On that day, Ms Frisina received an email from the first claimant specifying a number of conditions before she would allow any new repair work to the Epping Unit stating that she would obtain a report from an "independent plumber" and provide the Owners Corporation with a copy before any further repair works would be carried out by the contractors of the Owners Corporation.

71 The so-called new evidence relied upon by the Claimants was a notation in the bill of costs prepared by the Owners Corporation's solicitors of the following item on 11 May 2016:

> "Perusal of email from plumber advising tradesman has no recollection of attendance."

The Claimants contend that, had that material been available, that may have made a significant difference to the findings by the Magistrate. However, even if the tradesman had no recollection, it was the contemporaneous note and the affidavit from Ms Frisina upon which the Magistrate based his conclusion.

72 The second ground was that the amount of the claim was "inequitably large" and impossible for the Claimants to pay in circumstances where one of the Claimants is aged 80 and is frail. The third ground relied upon was "the treatment" received by the Claimants during the costs assessment proceedings.

73 Under the heading "Local Court Proceeding and Outcomes", the amended summons complained that the Costs Review Panel did not consider the

outcome of the Local Court proceedings but simply stated that they did not have the authority to reduce the determinations. The Claimants asserted that the Magistrate had not ordered them to pay 100% of the legal costs of the Owners Corporation and that the Claimants had "won a big part of the [L]ocal [C]ourt proceedings". The amended summons asserted, there were three areas in the proceedings in the Local Court as follows:

(1) repair the initial water damage caused by the common property water leaking, which was accepted by the insurers of the Owners Corporation;

(2) repair the water pipe damage caused by Accelerate, the Owners Corporation's plumber; and

(3) compensate the Claimants for the loss of rent.

The Claimants say that they repaired the damage at their own cost and did not receive anything from the insurer, whose payout was applied for legal costs. The Claimants assert that they won the second issue and that resulted in a reduction in their claim of $15,000. They also received $7,000 by way of costs from Accelerate but the Owners Corporation has not paid the other 50%. The third issue was the only one on which the Claimants lost, they asserted, being the question of whether the plumber from AGM was turned away on 9 February 2015.

74 The issues to be resolved, as alleged in the amended summons were:

- the majority of the plumbing system remains unrepaired and there is water damage continuing to occur to the flooring in the Epping unit; and
- although the insurer approved a claim by the Owners Corporation, the Owners Corporation has not paid the Claimants who have only been paid 50% of their claim plus costs.

The amended summons then claimed a stay of the enforcement of the costs order and an entitlement to raise objections to the amounts claimed in the bill of costs.

75 In his reasons of 5 May 2020, the primary judge began by observing that the appeal was brought from the decision of the Magistrate on 30 November 2016 in so far as that judgment determined that the Claimants pay the costs of the Owners Corporation. His Honour also said that the Claimants sought to appeal from the costs assessment of 31 January 2019 and the subsequent decision of the Costs Review Panel of 28 March 2019. His Honour then outlined the

factual background to the proceedings, including the water damage, the proceedings in the Local Court and the costs assessment. His Honour observed that in the amended summons, three bases for the appeal were identified as follows:

- appeal against the costs order of the Local Court;
- appeal against the costs assessment; and
- appeal against the costs review decision.

76 The primary judge observed that the amended summons "was out of date to bring an appeal by 2 years and 7 months". His Honour referred to r 50.12 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). That rule provides that a summons seeking leave to appeal must be filed within 28 days after the material date and that an application for an extension of time must form part of the summons seeking leave to appeal.

77 The primary judge summarised the grounds of appeal in the amended summons as follows:

(1) there is new evidence relating to an issue that was disputed during the Local Court hearing, namely, whether the Claimants turned away the plumber from AGM Plumbing;

(2) the amount of $130,915.48 claimed by the Owners Corporation in its bill of costs was inequitably large and impossible for the Claimants to pay;

(3) the Claimants were treated badly in that the costs review decision was issued prior to their making a second set of submissions;

(4) the costs assessment was not fair and reasonable in determining the legal costs of the Owners Corporation;

(5) the costs assessor failed to provide adequate reasons; and

(6) the reasons provided in the costs review decision were inadequate and due consideration was not given to the Claimants' submissions.

His Honour observed that the Claimants sought an order that the costs assessment and the costs review decision be set aside and that the Local Court costs order be set aside. His Honour formulated the issues raised by the proceedings as follows:

(7) Is the appeal from the costs assessment and costs review decision outside the jurisdiction of the Court;

(8) Should an extension of time be granted to bring the appeal from the decision of the Local Court;

(9) If time were granted to bring the appeal, should leave be granted to bring the appeal; and

(10) Assuming that leave is granted, did the appeal from the Local Court have merit.

78 The primary judge concluded that an appeal did not lie to the Supreme Court from either the costs assessment or the costs review decision. His Honour concluded that the provisions of the *Legal Profession Act 2004* (NSW) (**the 2004 Act**) continued to apply to appeals from the costs assessment and the costs review decision. His Honour held that the right of appeal from the costs review decision was confined, under the scheme of the 2004 Act, to appeals provided for in s 384(1) and s 385(2), neither of which confer jurisdiction in relation to appeals from cost review decisions upon the Supreme Court. His Honour concluded that, the rights of the Claimants, if any, in respect of the costs review decision could only be enforced in either the District Court under s 384 or the Local Court, by leave of that Court, under s 385 of the 2004 Act. His Honour observed that the Claimants had not sought to invoke the supervisory jurisdiction of the Court.

79 The primary judge accepted that where there has been a costs review decision, that decision operates to supersede the decision of the original costs assessor.[15] His Honour accepted that, in the Local Court's special jurisdiction conferred by the 2004 Act, the jurisdictional limit of $100,000 of the Local Court's jurisdiction did not apply. In the result, his Honour concluded that the Local Court's statutory jurisdiction to entertain appeals from costs assessors or Costs Review Panel decisions would not be subject to any jurisdictional limit. Accordingly, his Honour held, it followed that, in the absence of judicial review proceedings, there was no jurisdiction to entertain the appeal against the costs assessment or costs review decision. His Honour therefore dismissed the appeal from the costs assessment and costs review decision.

80 The primary judge then addressed the question of an extension of time under UCPR r 50.12 and UCPR r 50.13. His Honour said that the factors to be taken

[15] Citing Wende v Howarth (2014) 86 NSWLR 674; [2014] NSWCA 170 at [20] and [24].

into account when considering whether or not to grant an extension of time were as follows:

- the length of the delay;
- the reason for the delay;
- whether the proposed appellant has a fairly arguable case; and
- the extent of any prejudice suffered by the respondent as a result of the delay in seeking the leave.

His Honour then considered those four matters.

81 First, the primary judge observed that the decision of the Local Court was made on 30 November 2016. The Claimants should have filed their initiating process within 28 days. However, the summons was not filed until 2 July 2019. Accordingly, his Honour concluded, the appeal was out of time by approximately two years and seven months. His Honour accepted the contention by the Owners Corporation that the length of the delay was considerable.

82 The primary judge referred to the reasons advanced on behalf of the Claimants for the delay. They say that they were not aware of the costs order made by the Local Court until they received an invoice from counsel for the Owners Corporation on 27 April 2017. They said that they promptly sought leave to appeal after they were informed of the decision of the Costs Review Panel. They say that any delay after that time was “trivial” and were advised by their lawyer at the time of the Local Court order that it would be difficult to appeal in the absence of new evidence. The primary judge accepted that the Claimants may have operated under some confusion with respect to the appeal process even though they did seek some advice in relation to it. However, his Honour said, even adopting that relatively generous approach, the appeal is out of time by reference to the cost review decision by 68 days. His Honour observed that there was no explanation for that delay.

83 In dealing with the merits of the appeal, the primary judge observed that the Claimants argued the merits of the principal issue before the Local Court and not the costs order, which was, in essence, that the costs follow the event. His Honour observed that no grounds or contentions were directed to the question

of whether the Local Court should have awarded costs against the Claimants given that their claim failed. Rather, his Honour said, the Claimants sought to revisit the conclusion of the Magistrate as to the principal claim itself: the evidence that the Claimants sought to lead before his Honour was directed to the principal claims in the Local Court.

84 The primary judge accepted that the Claimants did not engage with an appeal limited to challenging the Local Court's costs order and tended to stray into the merits of their claim in the Local Court. The Owners Corporation contended that had the Claimants challenged the Local Court's costs order at the outset, the issues that arose could have been determined in the ordinary course.

85 In a sense, his Honour's conclusion is correct. However, it is clear that the Claimants were not seeking to challenge or impugn the exercise of discretion by the Magistrate in ordering that costs should follow the event. Clearly, the only basis upon which the costs order could be challenged was that the Magistrate had reached an erroneous conclusion in ordering a verdict for the Owners Corporation.

86 The primary judge accepted that disturbing the costs order would prejudice the Owners Corporation having regard to the expense incurred in preparing a bill in assessable form and resisting the Claimants' application for review of the costs assessment. While that was no doubt some prejudice to the Owners Corporation, the prejudice to the Claimants in suffering a costs order in a sum in excess of $100,000 far outweighs the inconvenience or prejudice to the Owners Corporation in having had to prepare a bill of costs. There was no evidence as to the costs involved in that exercise.

87 Having regard to the delay in bringing the appeal and the absence of any explanation for the delay, the weak merits of the appeal and the prejudice to the Owners Corporation, the primary judge refused to exercise his discretion to extend time to bring the appeal from the decision of the Local Court. His Honour therefore dismissed the amended summons and ordered the Claimants to pay the costs of the Owners Corporation.

Proceedings in this Court

88 The amended summons seeking leave to appeal was stated to be brought under s 101 and s 69 of the Supreme Court Act. No submissions were advanced in support of judicial review under s 69 of the decision of the Local Court. No such relief would be available in relation to the decision of a judge of the Supreme Court.

89 The draft notice of appeal relies on eight grounds, which may be restated as follows:

(1) Section 62 and s 65(6) of the Strata Act were not followed in that the obligation and responsibility of the Owners Corporation under those provisions were conceded and accepted but were not enforced;

(2) Section 65(6) of the Strata Act was wrongly applied to the Claimants and should have been applied to the Owners Corporation;

(3) Hard and factual evidence was ignored and the hearsay of a non-independent and tampered witness's false statements was preferred;

(4) New evidence proved that the Owners Corporation's witness had been tampered, had intentionally fabricated a false statement on the alleged denial of access and lied to and misled the Magistrate;

(5) The Magistrate did not provide any reasons for his judgment and decision;

(6) The Local Court did not consider the root cause of the issue in that, if the Owners Corporation had met its obligation to complete the unfinished work and repair to the damaged water supply pipe, there would have been no Local Court proceedings;

(7) The Owners Corporation did not provide a costs agreement required by s 105 of the Strata Act, the claimed legal costs were disproportionate to the amount claimed by the Claimants, the cost assessment was not fair for a number of reasons, the Claimants' submissions were not given due consideration and the Costs Review Panel made its decision before the due date for the Claimants' submission; and

(8) The Costs Certificate in respect of the Review Panel was only officially issued by the Supreme Court Costs Manager to the Claimants on 5 June 2019 and the original summons in the Common Law Division was filed within 28 days of that time, such that the primary judge erred in concluding that there was a time gap of 68 days for which there was no explanation.

Disposition of these Proceedings

90 The primary judge made no error in concluding that he had no jurisdiction to entertain a review of the cost assessment or the decision of the Costs Review

Panel. In essence, however, the costs assessments depend upon the order for costs made by the Magistrate on 30 November 2016. The real question is whether the Claimants should be granted leave to challenge the substantive decision of the Magistrate on 30 November 2016 to enter a verdict for the Owners Corporation.

91 The Magistrate referred to a decision in which Young AJ summarily dismissed a claim by a lot owner against an Owners Corporation in nuisance for allegedly failing to waterproof the common property that resulted in water entry to the plaintiff's lot causing physical damage. Young AJ held that such a claim was impliedly barred by the Strata Act.[16] Curiously, the Magistrate considered that the decision did not bind him. Nevertheless, his Honour regarded the decision as correct and decided to follow it. Before reaching that conclusion, however, the Magistrate concluded that the cause of action in negligence should be dismissed because he accepted that the AGM plumber had been turned away on 9 February 2015.

92 It would have been open to the Claimants to appeal to the Supreme Court under s 39 of the *Local Court Act 2007* (NSW), which relevantly provides that the party to proceedings in the Local Court who is dissatisfied with the judgment or order of the Court may appeal to the Supreme Court but only on a question of law. Under s 40, a party to proceedings before the Local Court who is dissatisfied with the judgment or order of the Court on a ground that involves a question of mixed or in fact may appeal to the Supreme Court but only by leave of the Supreme Court. However, the Claimants did not appeal or seek leave to appeal under s 39 or s 40 as they were entitled to do.

93 Rather, they took no further action until the Owners Corporation sought to enforce the order for costs made by the Magistrate by having the costs assessed. It was not until after the assessment and the decision of the Costs Review Panel that the Claimants commenced proceedings in the Supreme Court. Even then, as the primary judge indicated, it was not entirely clear that they were seeking to raise the question of the correctness of the decision of the Magistrate based on *McElwaine*.

[16] See McElwaine v The Owners – Strata Plan No 75975 [2016] NSWSC 1589 ("McElwaine").

94 The decision of Young AJ was reversed by this Court on 20 September 2017.[17] It might be thought to be unjust or inequitable that a case be decided on the basis of a view of the law that is subsequently shown to be erroneous.[18] However, the doctrine of finality must lead to a different conclusion: that is to say *interest rei publicae ut sit finis litium*.[19] That principle may lead to a difficult quandary for a litigant faced with a decision of a court that is not a final court of appeal that would prevent the path that the litigant wishes to follow. Such a litigant must make a decision as to whether to accept the burden and possible expense of challenging that decision. Litigation should not be prolonged of by affording a litigant a second opportunity after an error has been put right in other proceedings by other litigants. The remedy for such a litigant is to challenge the decision.[20]

95 It may be that the Claimants were advised by the lawyers who appeared for them before the Magistrate that they did not have good prospects of success in an appeal in the light of the decision of Young AJ. Nevertheless, the litigants in the case decided by Young AJ had the courage to challenge his decision. It would have been open to the Claimants to challenge that decision by way of appeal to the Supreme Court from the decision of the Magistrate on a question of law or, with leave, on a mixed question of fact and law.

96 The disproportion between the order for costs and the amount involved before the Magistrate is concerning. Nevertheless, the process laid down by the 2004 Act was undertaken. There has been no challenge to the assessment as such. The only challenge appears to have been to the order for costs made by the Magistrate, based on the proposition that the Owners Corporation was not successful on all questions argued. However, had the Claimants sought to challenge the decision of the Magistrate within the time limited by the rules, there may have been a different result.

97 In the event, there was, as the primary judge found, a significant delay of two years and seven months from the time when notice of appeal should have

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[17] See McElwaine v The Owners - Strata Plan 75975 [2017] NSWCA 239.
[18] See Wanless v Piening (1967) 68 SR (NSW) 249 at 262.
[19] It is in the public interest that there be an end to litigation.
[20] See Piening v Wanless (1968) 117 CLR 498 at 506; [1968] HCA 7.

been filed to the time when the proceedings were commenced in the Common Law Division. I do not consider that there was any error on the part of the primary judge in refusing to extend the time for the commencement of the proceedings. That result is unfortunate for the Claimants. However, the interest of finality of litigation requires that leave to appeal to this Court from the decision of the primary judge be refused with costs.

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