Supreme Court

New South Wales

Case Name:	Huang v The Owners Strata Plan 7632 t/as The Owners Strata Plan 7632
Medium Neutral Citation:	[2022] NSWSC 194
Hearing Date(s):	10, 17 June 2021
Decision Date:	2 March 2022
Jurisdiction:	Common Law
Before:	Rothman J
Decision:	(1) Leave to appeal refused; (2) Proceedings dismissed; (3) The plaintiffs shall pay the defendant's costs of and incidental to the proceedings.
Catchwords:	APPEAL – NCAT – leave to appeal – principles – appeal on question of law, with leave – leave refused – no issue of principle or of general importance – no error of law ADMINISTRATIVE LAW – jurisdiction of NCAT – strata titles – broad jurisdiction – importance of finality – alleged denial of procedural fairness – none disclosed STATUTORY INTERPRETATION – Strata Schemes Management Act 2015 (NSW) – common property – alteration of definition of boundary between lots – common property on upper surface of floor, inner surface of wall and under surface of ceiling – cosmetic work still on common property – rights and obligations of owners corporation
Legislation Cited:	Administrative Decisions Tribunal Act 1997 (NSW), s 119(1)

Civil and Administrative Tribunal Act 2013 (NSW), ss 28(1), 83(1)
Conveyancing (Strata Titles) Act 1961 (NSW), s 4(2)
Strata Schemes (Freehold Development) Act 1973 (NSW), s 5(2)
Strata Schemes Management Act 2015 (NSW), ss 28, 62, 106, 108, 109, 122, 123, 124, 132, 229, 232

Cases Cited:

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33
Australian Gaslight Co v The Valuer-General (1940) 40 SR (NSW) 126
B & L Linings Pty Ltd v the Commissioner of State Revenue (2009) 74 NSWLR 481; [2008] NSWCA 187
Carolan v AMF Bowling Pty Ltd [1995] NSWCA 69
Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd (2007) 4 DDCR 634; [2007] NSWCA 158
Huang v Owners – Strata Plan 7632 [2020] NSWCATAP 278
Jaycar Pty Ltd v Lombardo [2011] NSWCA 284
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32
Ormwave Pty Ltd v Smith (2007) 5 DDCR 180; [2007] NSWCA 210
Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd (2003) 1 STR(NSW) 154; [2003] NSWCA 5
Parisienne Baskets v Whyte (1938) 59 CLR 369; [1938] HCA 7
R v R (1989) 18 NSWLR 74
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247
Sullivan v Department of Transport (1978) 20 ALR 323 at 343; [1978] FCA 48
The Owners – Strata Plan No 7632 v Zhao and Huang (No 1) [2020] NSWCATCD
The Owners – Strata Plan No. 7632 v Zhao [2018] NSWCACD
Zelden v Sewell; Henamast Pty Ltd v Sewell [2011] NSWCA 56

Category:

Principal judgment

Parties:	Yu Huang (First Plaintiff) Cui'e Zhao (Second Plaintiff) The Owners Strata Plan 7632 t/as The Owners Strata Plan 7632 (Defendant)
Representation:	Counsel: Y Huang (Self-represented – Plaintiffs) D Knoll AM (Defendant) Solicitors: Self-represented (Plaintiffs) Grace Lawyers (Defendant)
File Number(s):	2021/00015979
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Citation:	Huang v Owners – Strata Plan 7632 [2020] NSWCATAP 278
Date of Decision:	21 December 2020
Before:	The Hon F Marks, Principal Member K Ransome, Senior Member
File Number(s):	AP 20/31659

JUDGMENT

1 **HIS HONOUR:** The plaintiffs seek to appeal against a decision of the NSW Civil and Administrative Tribunal (hereinafter "NCAT" or "the Tribunal") relating to work performed in the plaintiffs' unit (hereinafter "the works"). The plaintiffs are the owners of Lot 17 in Strata Plan 7632. The block of units consists of 18 residential units over 3 floors and Lot 17 is on the top floor. The defendant is the Owners' Corporation for the aforementioned Strata Plan.

2 In 2015, the plaintiffs renovated bathrooms in their unit. These renovations, involving tiling and waterproofing the bathrooms, were not approved by the defendant insofar as it is alleged to have involved common property. Attempts were made by the defendant to regularise the renovations, but those attempts were unsuccessful.

3 On 15 June 2017, the defendant commenced proceedings in NCAT and, on 15 March 2018, the Tribunal ordered the plaintiffs to remove unlawful common property works in both their bathrooms (hereinafter "the First Decision").[1] No appeal was lodged in relation to the First Decision.

4 On 23 August 2018, the defendant held an Extraordinary General Meeting (EGM) during which resolutions were passed in relation to the plaintiffs' unauthorised works. On 1 November 2018, NCAT ordered the plaintiffs to pay 90% of the defendant's costs. The matter did not resolve and the order of NCAT of 15 March 2018 did not result in the removal of the works.

5 On 19 December 2019, the defendant commenced further NCAT proceedings and on 25 June 2020, as a result of those further proceedings, NCAT, again, ordered the plaintiffs to remove unlawful common property works by 25 September 2020. This decision of 25 June 2020 will be referred to herein as "the Second Decision".[2]

6 The orders issued in the Second Decision were more specific and were made on particular terms. One of the orders forming part of the Second Decision was an order that the plaintiffs were to grant the defendant access to their unit for the purpose of carrying out works on their unit after 25 September 2020, by which time the unlawful works that had been performed were to have been removed.

7 On 24 July 2020, the plaintiffs appealed against the Second Decision. The appeal was an internal appeal to be heard by an Appeal Panel of NCAT. On 19 August 2020, NCAT ordered the plaintiffs to pay the defendant's costs of the second proceedings.

8 On 10 September 2020, the plaintiffs commenced an internal appeal of the costs order and sought a stay of all the orders in relation to the works and in relation to the orders for costs. On 21 December 2020, the Appeal Panel of NCAT dismissed the plaintiffs' appeal (hereinafter "the Appeal Decision")[3] and,

[1] The Owners – Strata Plan No. 7632 v Zhao [2018] NSWCACD.
[2] The Owners – Strata Plan No 7632 v Zhao and Huang (No 1) [2020] NSWCATCD.
[3] Huang v Owners – Strata Plan 7632 [2020] NSWCATAP 278.

on 19 March 2021, the Appeal Panel ordered that the plaintiffs pay the defendant's costs of the appeal.

9 As earlier stated, the plaintiffs seek to appeal to the Court against the Appeal Decision. The provisions of the *Civil and Administrative Tribunal Act* 2013 (NSW) (hereinafter "the Act") grant a party to an external or internal appeal, the ability, with the leave of the Court, to appeal against any decision made in the proceedings "on a question of law".[4]

10 As is clear from the terms of s 83(1) of the Act, even though the appeal is "on a question of law", the leave of the Court is still required. Further, there is no appeal permitted on a question of fact. The provisions of s 83(1) of the Act are in the same terms as s 119(1) of the *Administrative Decisions Tribunal Act 1997* (NSW), and do not provide a gateway to an appeal by way of rehearing, once a question of law is identified and sought to be argued.

11 There is no jurisdiction, under the provisions of s 83(1) of the Act, for the Supreme Court to engage in a review of the merits of a decision.[5] It is unnecessary to determine the extent of the orders that could or should be made if the Court were of a view that there demonstrated an error of law.[6]

Appeal from Second Decision

12 As already described, there was no appeal from the First Decision in NCAT. There was an appeal from the Second Decision to an Appeal Panel. The appeal is an internal appeal.

13 Pursuant to the terms of s 80 of the Act, an internal appeal is by leave in the case of interlocutory decisions and, in the case of other decisions, except on any question of law. In the case of a question of law arising in a final decision, there is a right of appeal.

14 The grounds of appeal upon which the plaintiffs relied on the application for leave to appeal and on the appeal itself were the same. They sought to challenge the orders made by NCAT in the Second Decision relating to the work on the common property, to which earlier reference has been made, and

[4] Civil and Administrative Tribunal Act, s 83(1).
[5] B & L Linings Pty Ltd v the Commissioner of State Revenue (2009) 74 NSWLR 481; [2008] NSWCA 187.
[6] Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32.

in relation to certain cleaning services and the levies fixed in relation to those cleaning services.

15 Bearing in mind that an appeal to the Court must be by leave of the Court and "on a question of law", to which these reasons have referred earlier, it is necessary to set out the purported grounds of appeal of the plaintiffs. Those grounds are:

(1) **Ground 1**: Were bathroom tiles (for example) lot property and not common property because the lot boundaries were as provided in the *Conveyancing (Strata Titles) Act 1961* (NSW);

(2) **Ground 2**: Does the Tribunal have power to make orders under the *Strata Schemes Management Act 2015* (NSW), s 124 to order the Owners Corporation to alter/remove private lot properties when those private properties do not pose a danger to anyone or cause any damage to common property? Does the Tribunal have power to make orders under the *Strata Schemes Management Act*, s 132, to order lot owners to repair disrepair common property which is respondent's responsibility? The Tribunal has gone beyond power conferred on them by the statute (exceeded their jurisdiction) is a jurisdictional error [sic];

(3) **Ground 3**: The Tribunal failed to exercise a power conferred upon them by statute/Act (failed to exercise their jurisdiction). The Tribunal ought to make order under s 62 to order the defendant to complete their unfinished common property repair work [sic] [the reference to s 62, I understand to be a reference to s 62 of the *Strata Schemes Management Act*];

(4) **Ground 4**: Procedural fairness on the question of whether the plaintiffs prolonged the proceedings [a matter relating to the order to pay costs];

(5) **Ground 5**: Hard, factual and key evidences were ignored or dismissed but the minor, hearsay and mere suspicion were used. An error of law in the area of no evidences [sic]; and

(6) **Ground 6**: The causation of the matter and who was wrong in the first place were not considered. An error of law in the area of failure to afford an "proper, genuine and realistic consideration" to the matter.

The Strata Schemes Management Act 2015 (NSW)

16 It is necessary to set out some of the provisions of the *Strata Schemes Management Act* because these issues underpin the proceedings before NCAT and the appeal to the Court. The operation of s 106 of the *Strata Schemes Management Act* makes clear that an owners corporation is under a duty properly to "maintain and keep in a state of good and serviceable repair the common property … vested in the owners corporation".

17 Further, an owners corporation, or an owner of a lot, is permitted to alter the common property for the purpose of improving or enhancing the common property.[7] Such action, while permitted, is restricted to work that is the subject of a special resolution passed by the owners corporation specifically authorising the work to be performed.[8]

18 Under the provisions of s 109 of the *Strata Schemes Management Act*, the owner of a lot, in this case, the plaintiffs, are permitted to carry out cosmetic work to the common property. Cosmetic work includes, but is not limited to, that which is defined in s 109(2) of the *Strata Schemes Management Act*, which deals with installing or replacing hooks, nails or screws for hanging paintings and other things; installing or replacing handrails; painting; filling minor holes and cracks in internal walls; laying carpet; installing or replacing built-in wardrobes; installing or replacing internal blinds and curtains; and any other work prescribed by the regulations. Any such work, if it causes damage or its removal causes damage, is required to be rectified and/or repaired.[9]

19 By operation of s 109(5)(e) of the *Strata Schemes Management Act*, work involving waterproofing is expressly excluded from the definition of cosmetic work. It is unnecessary at this stage to deal further with the provisions of the *Strata Schemes Management Act*.

20 As expressed by the Court of Appeal,[10] lot owners own all of the premises within their lot and may carry out building works on those premises without the endorsement of the owners corporation, provided that the work does not impinge upon property which is common to all unit holders, such as waterproofing.[11]

Jurisdiction of NCAT

21 These reasons have already discussed the jurisdiction of the Appeal Panel in an internal appeal from a decision of a single member of the Tribunal. In this case, the Appeal Panel were exercising the jurisdiction of hearing and

[7] Strata Schemes Management Act, s 108(1).
[8] Strata Schemes Management Act, s 108(2).
[9] Strata Schemes Management Act, s 109(3).
[10] Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd (2003) 1 STR(NSW) 154; [2003] NSWCA 5.
[11] Ibid, at [155]-[163] (Heydon JA, with whom Santow JA agreed).

determining an appeal against the Second Decision. The jurisdiction to hear and determine such an appeal does not seem contentious.

22 Nevertheless, the plaintiffs raise issues associated with the jurisdiction of the Tribunal relating to the orders made for the Owners Corporation to perform work and, for the purpose thereof, to enter the plaintiffs' unit. It is necessary to deal with the jurisdiction of the Tribunal to make such orders.

23 Before dealing with the powers of the Tribunal, it is necessary to refer to the provisions of s 122 of the *Strata Schemes Management Act*. The provisions of s 122 enable the owners corporation to enter onto any part of the parcel of the scheme, which would include that part of the scheme that is owned by a lot owner, in this case, the plaintiffs, to carry out work required or authorised by the owners corporation in accordance with the Act, being the *Strata Schemes Management Act*.

24 Further, the provision allows the owners corporation (or its agents, employees, or contractors) to enter a lot for the purpose of determining whether any work is required. Where the work to be carried out is not emergency work, the corporation requires the consent of the lot owner or, in the absence of such consent, an order of the Tribunal.

25 The order of the Tribunal that is required is an order under Div 4 of Pt 7 of the *Strata Schemes Management Act*, which Division includes s 124. The provisions of s 124 of the *Strata Schemes Management Act* permits the Tribunal, and gives it jurisdiction, to make an order requiring the occupier of a lot, which term includes the lot owner, to allow access to the lot to enable the owners corporation to carry out work and/or to enable inspection.

26 The work to be carried out is work that is required pursuant to the terms of ss 118, 119, 120 or 122. As a consequence of the operation of s 124 of the *Strata Schemes Management Act*, there can be no doubt that the Tribunal has power, in relation to work on common property or work to remedy a defect affecting common property of more than one lot owner, to permit an owners corporation to enter premises and to carry out works with/out the consent of the owner.

27 In the case of an emergency, no consent is required. Where it is not an emergency, and the owner of the lot does not consent, then an order of the Tribunal is required.

28 Over and above the foregoing, the jurisdiction of the Tribunal also extends, where the owners corporation applies for an order, to ordering that the owners of a lot perform work or take other steps to repair damage or pay the owners corporation a specified amount for the cost of repairs of the damage occasioned by the lot owners. Thus, where work has been performed initially by lot owners, and the Tribunal, on application by the owners corporation, is satisfied that the work performed has caused damage to the common property, the Tribunal may order the lot owners to rectify the damage or pay an amount for the rectification of the damage.[12]

29 The Tribunal has power and jurisdiction to make ancillary orders in relation to any of the orders described above.[13] Over and above the foregoing, the Tribunal has the jurisdiction, on application by an interested person, which plainly would include lot owners and the owners corporation, to make orders to settle a complaint or dispute about the operation, administration or management of the strata scheme; the exercise or failure to exercise a function conferred or imposed under the *Strata Schemes Management Act*; and, the exercise of, or the failure to exercise, a function conferred or imposed on an owners corporation.[14]

30 This provision gives the Tribunal a very wide jurisdiction relating to any dispute or complaint about the specified matters. Given the obligations on the owners corporation to maintain common property, an issue relating to waterproofing that is affecting other lots in a strata scheme, and about which there has been a complaint, would invariably invoke the jurisdiction of the Tribunal with respect to the exercise or failure to exercise a function conferred or imposed on the owners corporation or on the lot owner.

31 For completeness, it is necessary to refer to the provisions of s 28 of the Act which confers on the Tribunal jurisdiction and functions "as may be conferred

[12] Strata Schemes Management Act, s 132.
[13] Strata Schemes Management Act, s 229 and other sections.
[14] Strata Schemes Management Act, s 232.

or imposed on it by … other legislation".[15] The Act, by operation of s 29(2), also gives the Tribunal jurisdiction to make ancillary and interlocutory decisions.

Consideration

32 The plaintiffs' submissions are lengthy and difficult to summarise in a manner that is appropriate for a judgment of the Court on the narrow issues raised. It is sufficient, for present purposes, to note that the full submissions have been read and considered. To some extent, the plaintiffs' submissions will become obvious in dealing with the Court's attitude to each of the grounds of appeal.

33 Before embarking upon a consideration of each of the grounds of appeal, it is necessary to recite in a little more detail the factual basis for the dispute between the plaintiffs and the defendant. As earlier stated, the plaintiffs are the Lot Owners of Lot 17. Before the Tribunal, the plaintiffs alleged that water first commenced leaking from their unit into Lot 11 in 2012, which was not contested in these proceedings and is accepted/assumed, without deciding. It is accepted/assumed, without deciding, that the Owners Corporation obtained a plumbing inspection report and quotation, which was approved in September 2014. Apparently, it was while this work was being carried out that, on 5 February 2015, damage was caused to the water pipe, in what is the plaintiffs' main bathroom.[16]

34 The plaintiffs alleged that from that time on their unit became uninhabitable. The plaintiffs deny that they refused entry to the Owners Corporation's contractors to complete the repair of the damaged water pipe, and that they never offered to repair the damage caused.[17]

35 In the First Decision of the Tribunal, being the decision of 15 March 2018, the Senior Member of the Tribunal made findings as to the work on the bathroom carried out by the plaintiffs in 2015. Those findings were extracted, with the necessary changes, at [25] of the Appeal Panel decision, as follows:

> "I find, and it is not directly disputed by the [appellants/plaintiffs in these proceedings], that [they] renovated their bathroom and ensuite, including completely replacing the tiles on the walls and floor and replacing certain

[15] Civil and Administrative Tribunal Act, s 28(1).
[16] Second Decision, The Owners – Strata Plan No 7632 v Zhao and Huang (No 1) [2020] NSWCATCD at [5], [7].
[17] Appeal Decision, Huang v Owners – Strata Plan 7632 [2020] NSWCATAP 278 at [24].

> fittings in those rooms. I find also that the [plaintiffs] performed those works, or had them performed, without obtaining prior or any approval from the owners corporation and without going through the usual procedure in relation to obtaining a special by-law.
>
> I find that the works conducted by the [plaintiffs] beyond the repair of one water pipe and the waterproofing of the shower recesses was undertaken by the [plaintiffs] for their own reasons, unrelated to the original works being conducted by the [respondent/defendant in these proceedings] and that they alone bear any responsibility for added time, expense and possible losses resulting from those works.
>
> I find also that the owners corporation has attempted over the past years to satisfy itself that the subject works could be subsequently approved, provided they can be properly certified and indemnity arrangements made. It is in my opinion both striking and unusual that the [plaintiffs] have not availed themselves of those offers, which would have resolved all issues between the parties."[18]

36 The findings in the foregoing extract were never the subject of appeal, as earlier pointed out. Nor have their force, validity and effect ever been called into question in any formal process, according to the Appeal Decision. The Appeal Panel determined that those findings remained "binding on the appellants as was acknowledged in the reinstatement decision and they remain binding for the purpose of these appeal proceedings."[19]

37 The First Decision and the Second Decision determined that, on the evidence as accepted, water continued to leak from Lot 17, owned by the plaintiffs, into Lot 11. No evidence was adduced by the plaintiffs in the Appeal Proceedings in NCAT to the contrary. Instead, the plaintiffs argued before the Appeal Panel that the common property ended at the middle of the floor, presumably meaning the concrete floor, and did not include the tiles or waterproofing.

38 Further, the plaintiffs argued before the Appeal Panel that there was no waterproof membrane in the main bathroom prior to the work performed by the plaintiffs. Apparently, which is unnecessary to determine, the building code, as it existed at the time of the construction of the premises, did not require waterproofing. Such a requirement first commenced in 1988.

39 With those short facts in mind, the Court is in a position to deal with each of the grounds of appeal. Before doing so, it is necessary to set out some general observations.

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[18] Appeal Decision, Huang v Owners – Strata Plan 7632 [2020] NSWCATAP 278 at [25].
[19] Ibid, at [26].

40 The first issue with which it is necessary to deal is the meaning of the term "question of law". Where a party submits that there was no evidence upon which a fact was capable of being found, such a submission is a complaint that amounts to an error of law. However, where there is a scintilla of evidence, or the complaint regards the weight to be given to some evidence as distinct from other evidence, the issue is one of fact and does not raise a question of law.[20]

41 In dealing with the issue of whether a ground raised a question of law alone, the Court of Criminal Appeal in *R v R*[21] said:

> "The distinction between the existence of evidence and the sufficiency or reliability of that evidence provides convenient categories for most purposes of analysis, but in truth that distinction is not absolutely rigorous. This does not invalidate the distinction. It simply means that it is to be applied with due regard to its limitations; what is involved is a matter of judgment rather than calculation."[22]

42 The Court of Appeal dealt with the issue more fully in *Ormwave Pty Ltd v Smith*[23] during which Beazley JA (as her excellency then was) referred to the judgment of the High Court in *Australian Broadcasting Tribunal v Bond*[24] in which Mason CJ stated:[25]

> "The question whether there is any evidence of a particular fact is a question of law. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law. … So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law." (Citations omitted.)

43 As referenced in the judgment of Beazley JA in *Ormwave*, supra, Mason CJ went on to make clear that the absence of evidence means the absence of probative evidence, and an inference will be reviewable on the ground that it was not reasonably open on the facts.[26]

44 In *Bond*, Mason CJ referred to the classic delineation of a question of law by Sir Frederick Jordan CJ in *Australian Gaslight Co v The Valuer-General*.[27] The passage in the judgment of Sir Frederick Jordan CJ is to the following effect:

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[20] Kostas, supra.
[21] R v R (1989) 18 NSWLR 74.
[22] Ibid, per Gleeson CJ at 84, Maxwell and Wood JJ agreeing.
[23] Ormwave Pty Ltd v Smith (2007) 5 DDCR 180; [2007] NSWCA 210.
[24] Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33 ("Bond").
[25] Ibid, at 355-366.
[26] Ibid, at 359 (Mason CJ).
[27] Australian Gaslight Co v The Valuer-General (1940) 40 SR (NSW) 126.

> "(1) The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact, not of law. This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence; although evidence is receivable as to the meaning of technical terms; and the meaning of a technical legal term is a question of law: *Commissioners for Special Purposes of Income Tax v Pemsel*.
>
> (2) The question whether a particular set of facts comes within the description of such a word or phrase is one of fact.
>
> (3) A finding of fact by a tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its finding, and there is evidence capable of supporting its inferences.
>
> (4) Such a finding can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences. Thus, if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law." (Citations omitted.)

The foregoing passage, was also confirmed in *Ormwave*, supra.[28]

45 As Beazley JA pointed out in *Ormwave*, there is authority for the proposition that even perverse findings of fact do not give rise to an error of law. Nevertheless, a decision-maker who acts without evidence that is probative or evidence from which an inference can be drawn, will be classified as having acted without evidence. In *Haider*[29], Basten JA said:

> "[33] The basis for this challenge [a challenge on the basis of no evidence] was unclear, but appeared to derive from the assertion by the Commission that there was 'no evidence' in relation to a particular matter. Needless to say, a statement to that effect, even if wrong, does not demonstrate legal error. Broadly speaking, error of law will arise in circumstances where a fact is found where there is in truth no relevant and probative material capable of supporting it, or an inference is drawn from a particular fact, which is not reasonably capable of supporting the inference: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367 (Deane J), referred to by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [25]; and see *Bruce v Cole* (1998) 45 NSWLR 163 at 187-189 (Spigelman CJ)."[30]

[28] Ormwave Pty Ltd v Smith, supra at [13] (Beazley JA and the authorities cited therein).
[29] Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd (2007) 4 DDCR 634; [2007] NSWCA 158.
[30] Haider, supra, at [33] (Basten JA).

46 Over and above the foregoing, it is necessary to reiterate that while an applicant may apply for leave to appeal against every error of law, not every error of law will vitiate the decision that has been made. The Court is unlikely to grant leave unless there is some jurisdictional error created or there is an error of law that is material to the decision made by the Tribunal.

47 In that sense, the error of law must contribute to the decision which, in the absence of the error of law, may have been decided otherwise. In other words, can it be said that but for the error of law alleged by an applicant for leave, the decision might have been different by reason of the possibility that the Tribunal would not have made the findings of fact or reached the conclusion which is sought to be overturned.[31]

48 I reiterate that any appeal must be an appeal on a question of law and is available only with the leave of the Court.

49 Moreover, for leave to be granted, the applicant must demonstrate something more than that the conclusion at which the decision-maker has arrived is arguably wrong. Litigation of the kind with which NCAT is dealing in this area often turns on detailed factual issues and, almost by definition, the parties are emotionally committed to their version of the factual dispute. Finality of decision making is an extremely important aspect of the NCAT jurisdiction.[32]

50 As Campbell JA recited and reiterated, emanating from the comments of Kirby P in *Carolan*, supra, leave will ordinarily be granted only where the issues raised involve principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond being merely arguable.[33]

51 It is next necessary to reiterate the findings that have been made in NCAT with respect to the current dispute, and at what stage. In doing so, the principle of finality stated above is an important aspect within the NCAT procedures itself.

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[31] Bond, supra, at [80] (Mason CJ).
[32] Jaycar Pty Ltd v Lombardo [2011] NSWCA 284 at [46] (Campbell JA);.Carolan v AMF Bowling Pty Ltd [1995] NSWCA 69; Zelden v Sewell; Henamast Pty Ltd v Sewell [2011] NSWCA 56.
[33] Carolan, supra (Kirby P).

52 The First Decision determined that the plaintiff carried out work that was unauthorised, and that the plaintiff was required to remove the work. It did so as a result of finding, as a matter of fact, that the works performed by the plaintiffs had not been authorised by the Owners Corporation.

53 As earlier stated, those included the tiling of the bathrooms and waterproofing. Further, NCAT has consistently determined that the lack of waterproofing in Lot 17 was the cause of a leak affecting other lots.

54 The plaintiffs dispute that the leak about which complaint has been made has been caused by the work undertaken by them or the lack of waterproofing in their unit. But that dispute is a dispute of fact and the determination of the cause of the leak was based upon evidence adduced.

55 The plaintiffs, possibly because they were unfamiliar with the litigation process, did not adduce evidence inconsistent with the findings of fact made in the first decision and the second decision that the leak was caused from the work performed and/or the failure to waterproof, either adequately or at all, the bathrooms in the plaintiffs' unit. Further, before the Tribunal, as already noted, the plaintiffs submitted that the leak was from their unit at least initially.

56 It is for the plaintiffs to establish, before the Appeal Panel, any fact that they allege has been wrongly determined. The plaintiffs failed to address any such issue and failed to adduce evidence, expert or otherwise, that would allow the Appeal Panel to determine otherwise. If the Appeal Panel were to have determined that the cause of the leaking was not Lot 17, it would have been acting otherwise than in accordance with the evidence adduced before it and such a finding would have been made without evidence to that effect.

57 It is necessary to deal with each of the grounds of appeal.

58 The grounds of appeal before the Appeal Panel upon which the plaintiffs relied were summarised by the Appeal Panel at [22] of the appeal decision. That summary is in the following terms:

> "(1) there was a failure to assess building defects in accordance with section 18E of the *Home Building Act 1989*

(2) there was inadequate reasoning as to why a lump sum of $9020 was ordered to be payable, particularly when the appellants had not had an opportunity to see a copy of the detailed scope of works

(3) there was inconsistency in the respondent being allowed to remove and reinstate one bathroom in lot 17 and the appellants being ordered to remove and reinstate both bathrooms at the same time

(4) although explained in the Grounds in an obscure manner, the decision incorrectly directed responsibility for the repair of the bathrooms of lot 17 to the respondent, because the floors of the bathrooms were not common property and were the property of the appellants. In addition, the original flooring in the bathrooms of lot 17 did not contain waterproofing, and it was the total responsibility of the respondent to the exclusion of the appellants to make good the waterproofing of the bathrooms."

59 The appeal has been taken, in this Court, against the decision of the Appeal Panel. The Appeal Panel allowed an extension of time for the appeal to be lodged and dismissed the appeal. It also awarded costs to be paid by the plaintiffs/appellants. In many ways, the summons in this Court seeks to re-agitate the same issues that the Appeal Panel determined.

60 As earlier stated, Ground 1 of the Summons, being the appeal to this Court, asks whether the bathroom tiles were lot property and not common property and alleges error on the part of the Appeal Panel in that it did not apply the *Conveyancing (Strata titles) Act 1961* (NSW). It is necessary to deal with the history of the legislation covering boundaries. I have already set out some of the issues arising under the *Strata Schemes Management Act*.

61 At the time that the strata plan for the property in question was registered, namely Strata plan 7632, the *Conveyancing (Strata Titles) Act 1961* applied. This was by virtue of the operation of the *Strata Titles Act 1973* (NSW), which was later amended and titled the *Strata Schemes (Freehold Development) Act* 1973. The *Strata Schemes (Freehold Development) Act* 1973 came into force in 1974, after the registration of the current Strata plan 7632.

62 By operation of s 4(2) of the *Conveyancing (Strata Titles) Act 1961*, the boundary between two lots or the common property and the lot was defined as the centre of the wall, floor or ceiling. The terms of s 4(2) of the *Conveyancing (Strata Titles) Act* were as follows:

"(2) Unless otherwise stipulated in the Strata plan, the common boundary of any lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be."

63 There was no provision in this Strata Plan, being 7632, to stipulate otherwise than in accordance with the provisions of the foregoing statute.

64 The provisions of s 5(2) of the *Strata Schemes (Freehold Development) Act 1973* define the boundary differently. Except as otherwise described in the floor plan itself,[34] the boundaries were described in the following terms: for a vertical boundary, relevantly, the inner surface of the wall; and, in the case of a horizontal boundary, relevantly, the upper surface of that floor or the under surface of that ceiling. Again, nothing in the current strata plan brought into operation the provisions of s 5(2)(b) of the *Strata Schemes (Freehold Development) Act* 1973.

65 Nevertheless, the definition of the boundary contained in the *Strata Schemes (Freehold Development) Act* did not apply, initially, to strata plans registered prior to the commencement of that Act in 1974. As a consequence, the strata plan controlling the plaintiffs' Lot and the other units in the building were not immediately governed by the terms of the *Strata Schemes (Freehold Development) Act* and the boundaries remained as they were defined in the *Conveyancing (Strata Titles) Act 1961* as the centre of the floor, wall or ceiling respectively.

66 In 1974, the *Strata Titles (Amendment) Act 1974* (NSW) was promulgated and commenced operation on 1 July 1974. The *Strata Titles (Amendment) Act 1974* inserted a savings and transitional provision into the *Strata Schemes (Freehold Development) Act* 1973.

67 By Clause 3(1) of those transitional provisions, where a former lot had a boundary that was the centre of the floor, wall or ceiling, from the appointed day the boundary became the upper surface of the floor, the inner surface of the wall or the under surface of the ceiling respectively. Again, there was an exception if there were express provisions in the strata plan. There continued to be no special provisions in the strata plan relevant to these proceedings.

68 As a consequence, on and from 1 July 1974, the boundary between the various lots was, relevantly, the upper surface of the floor, the inner surface of

[34] See s 5(2)(b) of the Strata Schemes (Freehold Development) Act 1973 (NSW).

the wall and the under surface of the ceiling. That definition, of necessity, applied only to those floors, walls or ceilings that divided lots from each other or from common property.

69 It must be said that the definition creates obvious difficulties. As earlier recited, *Strata Schemes Management Act* allows the owner of a lot to carry out cosmetic work to common property in connection with the owner's lot.[35]

70 As earlier recited, cosmetic work includes painting and carpeting. On one view of the submission of the defendant in these proceedings, if the floor were painted, it could have been carried out by the plaintiffs without authority. If the floor were carpeted, it could have been carried out by the plaintiffs without authority. The defendant submits that the laying of tiles is work on common property and must be authorised.

71 As is clear from the terms of s 109 of the *Strata Schemes Management Act*, even the work of painting and carpeting is work on common property. But s 109 of the *Strata Schemes Management Act* is an exemption from the restrictions on owners of lots prohibiting them from carrying out work on common property.

72 The terms of s 109 allow for the carrying out of "cosmetic work" which is defined inclusively. On one view, the laying of tiles is in no different category than the laying of carpet. Each is fixed to the floor and, sometimes, to a wall. Of course, carpet may be removed more easily than tiles can be.

73 The plaintiffs do not allege that the tiles are cosmetic work, nor that error of law occurred as a consequence of the Appeal Panel's failure to determine the tiles were cosmetic work. Further, the plaintiffs have never argued in any one of the three proceedings before NCAT that the laying of the tiles was cosmetic work and was permitted without authority.

74 On the contrary, the plaintiffs argued that the tiles were not common property at all. The terms of s 109 of the *Strata Schemes Management Act* makes clear that even carpet and painting is "work on common property".

[35] Strata Schemes Management Act 2015, s 109.

75 Even if the plaintiffs were to have argued that the laying of the tiles was cosmetic work and, therefore, permitted without authorisation, the plaintiffs would have needed to grapple with the issue of waterproofing.

76 Accepting, without deciding, for present purposes, that waterproofing was not inserted between the floor and the tiles at the time of the initial construction of the building and accepting, as I am asked, that the leak to the lower levels of the units emanated from the plaintiffs' lot, the Owners Corporation would have been under a duty to apply waterproofing to the bathroom floors. That would have been part of the duty imposed upon the Owners Corporation by s 106 of the *Strata Schemes Management Act*, which requires the Owners Corporation properly to maintain and to keep in a state of good and serviceable repair the common property.

77 As a consequence, even if the tiles could be said to be cosmetic work, the insertion and application of properly fixed waterproofing barriers would not be cosmetic work and does not fall within the genus of types of work otherwise described in the definition of cosmetic work in s 109(2) of the *Strata Schemes Management Act*. Further, as earlier mentioned, waterproofing is expressly excluded from the term "cosmetic work".[36]

78 As a consequence, this ground of appeal must fail. It fails on two bases.

79 First, the precise ground upon which the plaintiffs rely is incorrect. The boundary, in relation to the bathroom floor, is the upper surface of the floor and includes the tiles.

80 Secondly, the insertion of tiles and waterproofing, particularly the waterproofing, goes beyond cosmetic work and would not be permitted to be carried out by the plaintiffs without the authorisation of the Owners Corporation. Further, the Owners Corporation is under a duty to ensure that the waterproofing is inserted and/or applied in order to keep the building properly maintained and in a state of good and serviceable repair.

81 The second ground of appeal asks the Court to determine whether the Tribunal has the power to make orders under the *Strata Schemes Management Act* to

[36] Strata Schemes Management Act 2015, s 109(5)(e).

order the Owners Corporation to do work in lot properties when those properties do not pose a danger to anyone or cause damage to common property. Further, it seeks "judicial advice" answering the question as to whether the Tribunal has the power to make orders for lot owners to repair common property and appeals on the basis that the Tribunal has exceeded its power.

82 The provisions of s 124 of the *Strata Schemes Management Act* grant the Tribunal jurisdiction, on application by an Owners Corporation, to make an order requiring the occupier of a lot to allow access to the lot to enable the Owners Corporation to carry out work referred to in ss 118, 119, 120 or 122 and/or to determine whether such work needs to be carried out. It also permits, and/or grants jurisdiction to permit, the Owners Corporation to gain access to a lot in order to enable the Owners Corporation to inspect, as referred to in ss 122 or 123 of the *Strata Schemes Management Act*.

83 I have already dealt with the provisions of s 122 of the *Strata Schemes Management Act.* I reiterate that it provides that an Owners Corporation may, either through its agents, employees or contractors, enter any part of a lot in order to carry out work required or authorised to be carried out by the Owners Corporation. I have already indicated that the application of a properly fitted waterproofing barrier is work that is required to be carried out by the Owners Corporation. As a consequence, s 124 permitted orders to issue from NCAT that required the plaintiffs to allow entry to their Lot in order to allow the Owners Corporation to carry out that work.

84 Further, in order to apply an appropriate waterproofing barrier, it would be necessary to lift the tiles on the floor and to reapply tiles. Such work would be work related to its functions under this section and, because the tiles form part of the common property, the duty imposed upon the Owners Corporation by s 106 of the *Strata Schemes Management Act* to maintain properly and to keep in a state of good repair the common property applies to all the tiles on the bathroom floor.

85 The fact, if it were the fact, that the tiles may be cosmetic work, defined by s 109 of the *Strata Schemes Management Act*, permits the owner to carry out

such work. The provisions of s 109 of the *Strata Schemes Management Act* do not impede the capacity of the Owners Corporation to carry out work on the common property, whether or not it is also "cosmetic work".

86 Moreover, the provisions of s 122 permit the Owners Corporation to enter any part of the strata building in accordance with an order of the Tribunal, if the occupier of the lot does not consent to that entry. There was an order of the Tribunal to that effect. As a consequence, the Owners Corporation was entitled to enter to perform the work.

87 Over and above the foregoing, the provisions of s 124 of the *Strata Schemes Management Act* are not predicated on the work that may be done, or the area upon which work may be done, being a danger to anyone or causing damage to common property. That is not a consideration that limits the Owners Corporation. Nor is it a limitation on the power of the Tribunal.

88 As has been clarified earlier in these reasons, assuming for present purposes that the work of laying tiles was cosmetic work, it is still work on common property and forms part of the common property, as it forms the upper surface of the floor. Once the plaintiffs performed work on the tiles, if the Tribunal was satisfied that the work carried out by the plaintiff's had caused damage to common property, the Tribunal was authorised to order that the owner perform work or take other steps to repair the damage.

89 The facts before the Tribunal and the conclusions of fact of the Tribunal in each of the three decisions of the Tribunal are to the effect that the work performed by the plaintiffs had caused damage and had not been completed. The determination of those facts is for the Tribunal and does not require the objective existence of the facts. It is sufficient if the Tribunal is satisfied of their existence,[37] assuming the satisfaction is based on probative evidence and/or was reasonably open. Ground 2 of the appeal must fail.

90 Ground 3 of the appeal complains that the Tribunal failed to exercise a power conferred upon it and failed to order that the Owners Corporation complete unfinished common property repair work. There is no doubt that there is work

[37] Parisienne Baskets v Whyte (1938) 59 CLR 369; [1938] HCA 7.

on the common property that is unfinished. It seems that may be the only issue of fact on which the parties are in agreement. There is some dispute as to where the fault lies for the failure to finish it.

91 However, the allocation of fault is not the basis upon which the Tribunal must act. It is, to say the least, difficult to understand how a party can argue that a tribunal is in error for failing to exercise a discretion that it was not asked to exercise. At no time during the proceedings before the Appeal Panel, whose conclusion is that which is under appeal, did the plaintiffs apply for an order that the defendant complete the unfinished common property repair work.

92 Ultimately, this ground of appeal seeks to revisit the exercise of discretion by the Tribunal. Essentially, the ground of appeal asks the Court to find error as a result of the Tribunal not exercising a discretion to make orders that it was not asked to make.

93 This is in every sense a request for the Court to be involved in a merits review of that which was appropriate arising from the proceedings before the Appeal panel, or, in the alternative, by NCAT in the Second Decision or possibly the First Decision. This ground of appeal is not an appeal on a question of law.

94 Even if it could be so categorised, because it involves so fundamentally an examination of the discretionary reasons upon which the Tribunal did not exercise a known power and because it was not the subject of an application, I find it difficult to understand how it can be agitated. In any event it does not involve an issue of general importance, nor an issue of principle and I would deny leave to appeal on this ground.

95 Ground 4 raises findings of fact relating to the exercise by the Appeal Panel of its jurisdiction to award costs against the plaintiffs. It is said that there was a denial of procedural fairness and an absence of sufficient reasons.

96 The Appeal Panel's decision on costs was delivered on 19 March 2021. The plaintiffs were given a right to be heard. The plaintiffs were given a reasonable opportunity to prepare and to present any arguments and matters that they said were relevant to the question of costs.[38]

[38] Sullivan v Department of Transport (1978) 20 ALR 323 at 343; [1978] FCA 48.

97 The plaintiffs' submissions were summarised by the Appeal Panel in its decision on costs at [9] of that decision. There is no denial of procedural fairness.

98 The issue of costs is a matter plainly within the jurisdiction of the Tribunal. The Tribunal stated its conclusions of fact upon which it relied for the purposes of exercising its discretion on costs and, given the nature of costs orders, it was unnecessary for it to do otherwise.

99 There can be no appeal against the conclusion of fact in circumstances where the facts were open to the Appeal Panel and the plaintiffs were given a reasonable opportunity to prepare and to present the case. In those circumstances, there is neither a denial of procedural fairness as a result of the failure to provide a reasonable opportunity to prepare and to present their case, nor is there error of law associated with the inadequacy of reasons.

100 It is unnecessary, in relation to such an application, for the Tribunal to do more than identify the conclusions of fact. It is unnecessary in relation to a costs argument to deal at length with the factual findings, most of which were the subject of findings in one or other of the three Tribunal decisions already made.[39]

101 Any reasonably informed onlooker, reading the reasons for decision on costs of the Appeal Panel, would readily understand why costs were awarded. The reasons are adequate. The ground of appeal fails; it does not raise an issue of public importance, of importance, or of principle; and, I would otherwise deny leave.

102 As to the submission of the plaintiffs on the issue of costs relating to the necessity to find "special circumstances", the Tribunal expressly found special circumstances. Special circumstances do not equate with exceptional circumstances. They are circumstances that relate to the individual and take it out of the ordinary. This evaluative task, namely the determination of whether special circumstances exist to warrant the making of an order for costs, does not raise a question of law.

[39] Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 at 281 (McHugh JA).

103 Ground 5 of the appeal alleges that evidence was ignored or dismissed, and that other evidence was utilised to make findings of fact. It is said, in relation to this ground, that such an error discloses an error of law in the nature of no evidence.

104 I have previously referred to the distinction between errors of law and errors of fact and errors of mixed law and fact. Where a court or tribunal gives weight to some evidence and no weight to other evidence, without more, there is no error of law. If there is evidence to support a finding, however much one party feels that such evidence is wrong or ought not be relied upon, there is evidence to support the finding. Further, the weight to be given to particular evidence is a matter that is a finding of fact for the decision-maker of fact. This ground does not raise a question of law.

105 The mere recitation in the ground of appeal that there was "no evidence" does not bare scrutiny. Fundamentally, the complaint in this ground is that the Tribunal relied upon facts it ought not have relied upon and did not rely upon other facts upon which the plaintiffs believe it should have relied. That is not an error of law and could not be.

106 The Court is not entitled to engage in a fact-finding exercise or to determine the merits of the fact finding or the exercise of a discretion. This ground must fail.

107 Lastly, the plaintiffs rely upon an error by the Tribunal as to who was initially at fault and, in so doing, failed to afford a "proper, genuine and realistic consideration" to the matter.

108 Assuming, without deciding or accepting, that the Owners Corporation was at fault in not completing works it originally undertook, such an assumption would not give rise to any error of law that affected the determination of the Tribunal.

109 The Tribunal was faced with an emotionally charged dispute between the lot owners, the plaintiffs, and the Owners Corporation. That dispute revolved around tiling and waterproofing that was needed in the lot owners' unit. The work was work on common property. The Tribunal is charged with the sometimes-difficult task of seeking to resolve these emotionally charged

disputes in circumstances where, regardless of fault, it must choose a path that best resolves finally the issues in contention.

110 The orders made at first instance, in the Second Decision, confirmed by the Appeal Panel by the dismissal of the appeal, were orders that, were they to be obeyed, would resolve the issues.

111 Ultimately, the plaintiffs have not shown error of law and have not raised an appeal that is arguable on a question of law. Further, none of the questions raised are issues of principle, general public importance or disclosed an injustice which is more than merely arguable.

112 In those circumstances, the Court makes the following orders:

(1) Leave to appeal refused;

(2) Proceedings dismissed;

(3) The plaintiffs shall pay the defendant's costs of and incidental to the proceedings.

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