Civil and Administrative Tribunal

New South Wales

Case Name:	Harris v The Owners-Strata Plan No 34056
Medium Neutral Citation:	[2022] NSWCATAP 111
Hearing Date(s):	13 December 2021
Date of Orders:	13 April 2022
Decision Date:	13 April 2022
Jurisdiction:	Appeal Panel
Before:	G Sarginson, Senior Member E Bishop, Senior Member
Decision:	(1) Leave to appeal is refused. (2) The appeal is dismissed.
Catchwords:	LAND LAW---Strata schemes---Resolution passed at general meeting---Discretion to invalidate---Applicable principles
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Regulation 2016 (NSW)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Cooper v The Owners-Strata Plan No 58068 [2020] NSWCA 250 Coulton v Holcombe [1986] HCA 33; (1986) (1986) 162 CLR 1 Garofali v Moshkovich [2021] NSWCATAP 242 Pholi v Wearne [2014] NSWCATAP 7 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Read v The Owners-Strata Plan No 2533 [2021] NSWCATAP 218

	Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Category:	Principal judgment
Parties:	Roger Harris (Appellant) The Owners-Strata Plan No 34056 (Respondent)
Representation:	Applicant Self-represented Ace Body Corporate Management (Agent for Respondent)
File Number(s):	2021/00275112
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	16 September 2021
Before:	G. Bassett, General Member
File Number(s):	SC 21/16957

REASONS FOR DECISION

1 This appeal arises from a decision of the Tribunal dated 16 September 2021. Written reasons were provided by the Tribunal.

2 The Appeal Panel hearing was conducted by telephone. The appellant appeared and Mr Clark, strata manager, appeared for the respondent ('the owners corporation').

3 At the commencement of the appeal hearing, the appellant made an adjournment application on the basis that he had not been served with some of the documents sought to be relied upon by the owners corporation in the appeal.

4 After hearing submissions from both parties, we were satisfied that the documents sought to be relied upon by the owners corporation were documents that were before the Tribunal at first instance, and there was no prejudice or procedural unfairness to the appellant in the hearing proceeding.

5 The adjournment application was refused, applying the well-established principles pertaining to adjournment applications that were referred to by the Appeal Panel in *Garofali v Moshkovich* [2021] NSWCATAP 242 at [37].

6 The appellant is a Lot owner in a 10 Lot strata scheme located on the mid-north coast of NSW.

7 The decision under appeal arose from a dispute about resolutions passed at the Annual General Meetings ('AGM') of the owners corporation on 18 June 2020 and 18 June 2021 in respect of parking on common property.

8 The resolution passed at the meeting on 18 June 2021 formed the basis of a common property rights by-law that was registered on 28 October 2021.

9 Prior to the AGM of 18 June 2020, the appellant had taken issue where the owner of Lot 6 was parking his vehicle, among other matters.

10 The Minutes of the AGM on 18 June 2020 state that in Motion 16 a resolution was passed as follows:

> **PARKING**
>
> 16. **AMENDED AND RESOLVED** that by Special Resolution the owners corporation agrees to the following:
>
> That the owners corporation approves the exclusive use of the area of common property immediately in front of each lot's garage, extending 5.4 m from the garage for the purpose of parking a vehicle, provided:
>
> –the vehicle does not obstruct the access of other residents
>
> –lot 6 is not granted this right and is instead granted the exclusive use of the parking space immediately alongside their unit
>
> –the 2x parking spaces in the centre of the complex are not to be used for parking by residents, and are only for the use of invited guests for a short period of time
>
> with the Strata Committee given the right that, if it is determined that a vehicle parked in front of a lot is creating obstruction, the owner can be asked to move the vehicle.
>
> **Meeting Note**: It was determined by the Owners Corporation not to register a Special By-law formalising this agreement.

11 The Minutes of the AGM state that 4 Lot owners attended the meeting (which was held by teleconference), being the owners of Lots 2, 3 4 and 6. The owner of Lot 4 was given a proxy vote for the owner of Lot 5.

12 The Minutes of the AGM do not state who voted for or against the Motion; nor what was the percentage of unit entitlements of those who voted in favour of the Motion.

13 In the period between December 2020 and June 2021 there was email correspondence between strata committee members (of which the appellant was one) and the strata manager about what occurred at the meeting; whether the Minutes of the meeting were accurate; and whether a common property rights by-law was required. Advice was obtained by the owners corporation from an organisation that drafts common property rights-by laws.

14 In essence, the email correspondence demonstrates the appellant disputed that he had voted in favour of resolution 16, and he had other concerns about the resolution, including that it was inconsistent with local Council Development Approval for the strata scheme building. The strata manager and some members of the strata committee formed the view that a common property rights by-law would need to be passed and registered, rather than the resolution passed at the AGM on 18 June 2020.

15 On 29 March 2021 the appellant filed proceedings in the Tribunal. Under the section of the application stating "*What orders do you want*" the applicant wrote as follows:

> That Motion 16 of the 2020 AGM be rescinded.

16 Under the section of the application stating "*Reasons for asking for the above orders"* the appellant wrote:

> I still have misgivings as to how this Motion was agreed to. The DA for the property stipulates 13 parking provisions (sic). 10 undercover. 3 visitors on common property. I remain unconvinced this is legal. Mediation has been declined by the owners corporation. See email from Ying Yu 12/2/2021. I would appreciate an early hearing as I am under some duress on the issue.

17 The 2021 AGM of the owners corporation occurred on 18 June 2021. According to the Minutes of the AGM, it was held in person. The owners of Lots

1, 2, 3, 5, 6, 7 and 9 attended the meeting. The owners of Lots 8 and 10 gave proxy votes.

18 The Minutes state that in Motion 16 a resolution was passed as follows:

> **PARKING**
>
> **16. AMENDED AND RESOLVED** That by Special Resolution pursuant to s 108 of the Strata Schemes Management 2015, the owners corporation agrees to the registration of a new by-law.
>
> **Special By-law #2**
>
> That the owners corporation approves the exclusive use of the area of the common property immediately in front of each Lot's garage, extending 5.4m from the garage for the purpose of parking a vehicle, provided:
>
> –the vehicle does not obstruct the access of other residents
>
> –lot 6 is not granted this right and is instead granted the exclusive use of the parking space immediately alongside their unit, equivalent to the area granted the other lots
>
> –the 2x parking spaces in the centre of the complex, furthermore to be referred to as visitor parking spaces, are not to be used for parking by residents, and are only for the use of invited guests for a short period of time
>
> –maintenance of these common property areas remains the responsibility of the Owners Corporation
>
> with the Strata Committee given the right that, if it is determined that a vehicle parked in front of a lot is creating obstruction, the owner can be asked to move that vehicle.
>
> Meeting note: Strata Managing Agent to consult with council regarding the amendment of the sketch submitted with the building DA. An amendment to visitor parking is to be lodged so as to adhere to specifications of the DA approval.

19 The hearing in the Tribunal occurred on 29 July 2021, with the appellant appearing self-represented and Mr Clark the strata manager appearing for the respondent. Neither party provided the Appeal Panel with a sound recording of the hearing or a transcript of the hearing.

20 Written reasons of the Tribunal dismissing the application were published on 16 September 2021.

21 The written reasons of the Tribunal state that the appellant "referred to no specific provisions" of the *Strata Schemes Management Act 2015* (NSW) ('the SSM Act'), but that the application "appears to be made under section 24 of the SSM Act".

22 Section 24 of the SSM Act states as follows:

> **24 Order invalidating resolution of owners corporation**
>
> (1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.
>
> (2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the *Strata Schemes Development Act 2015* have not been complied with in relation to the meeting.
>
> (3) The Tribunal may refuse to make an order under this section only if it considers—
>
> > (a) that the failure to comply with the provisions of this Act or the regulations, or of the *Strata Schemes Development Act 2015*, did not adversely affect any person, and
> >
> > (b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.
>
> (4) The Tribunal may not make an order invalidating a resolution under subsection (2) if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.
>
> (5) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

23 The reasons of the Tribunal set out the evidence of the appellant. Relevantly, the Tribunal stated (at paragraph [8] of the reasons):

> During his oral evidence, the applicant was asked to clarify his reasons for seeking to have Motion 16 invalidated. In his oral evidence he said the central thrust of his claim was that the designated parking changes in Motion 16 needed local council approval. He said the body corporate (sic) had ignored advice it was given to have council approval. Absent any council approval the motion was illegal.

24 The Tribunal found (at paragraphs [13]-15] of the reasons) that:

(1) The appellant had provided no evidence to establish Motion 16 was “illegal” (sic).

(2) The appellant had provided no evidence that Motion 16 adversely affected the interests of the appellant or other Lot owners in the use of enjoyment of Lot and common property.

(3) There was no evidence to establish the AGMs of 2020 or 2021 were not held in accordance with the requirements under the SSM Act or Regulations.

25 On 10 August 2021 the local Council granted a modified Development Consent, subject to various conditions.

26 On 24 September 2021, the appellant filed a Notice of Appeal. The appeal was filed within the applicable limitation period in Regulation 25 of the Civil and Administrative Tribunal Rules 2014 (NSW).

SCOPE AND NATURE OF APPEALS

27 Internal appeals may be made as of right on a question of law, and otherwise with leave (that is, the permission) of the Appeal Panel: s 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the NCAT Act").

28 Internal appeals involve consideration of whether there has been any error of law; or any error other than an error of law sufficient to grant leave to appeal under Cl. 12 of Sch. 4 of the NCAT Act.

29 An appeal is not simply an opportunity for a dissatisfied or aggrieved party to re-argue the case they put at first instance: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10].

30 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 ('*Prendergast*') the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons.

(2) Whether the Tribunal identified the wrong issue or asked the wrong question.

(3) Whether a wrong principle of law had been applied.

(4) Whether there was a failure to afford procedural fairness.

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations.

(6) Whether the Tribunal took into account an irrelevant consideration.

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

31 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in Cl. 12(1) of Sch. 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) The decision of the Tribunal under appeal was not fair and equitable; or

(b) The decision of the Tribunal under appeal was against the weight of evidence; or

(c) Significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

32 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of Cl. 12(1) of Sch. 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

33 Even if an appellant from a decision of the Consumer and Commercial Division requiring leave to appeal has satisfied the requirements of cl. 12(1) of Sch. 4 of the NCAT Act, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b) of the NCAT Act.

34 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application;
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

35 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains discretion whether to grant leave under s 80(2) of the NCAT Act. The appellant must demonstrate something more than the Tribunal was arguably wrong (*Pholi v Wearne* [2014] NSWCATAP 78 at [32]).

CONSIDERATION

36 The grounds of appeal raised by the appellant and his oral submissions to the Appeal Panel did not clearly articulate what was the error of law of the Tribunal Member or error other than an error of law of a type sufficient for leave to appeal to be granted under Cl. 12 of Sch. 4 of the NCAT Act.

37 Rather, the appellant's submissions focussed upon raising the same issues he had raised before the Tribunal, being that Motion 16 required pre-existing local Council approval. Further, the appellant submitted that he did not believe the parking changes were consistent with local Council approval that was subsequently given on 10 August 2021. The appellant stated that he did not vote in favour of Motion 16.

38 In essence, the appellant's submissions were a repetition of the arguments he had unsuccessfully made at the Tribunal hearing.

39 We are cognisant that a self-represented litigant may have difficulty in clearly articulating grounds of appeal and the Appeal Panel must consider the substance of the matters raised on appeal to identify what are the actual appeal grounds (*Prendergast* at [12]). We are also mindful of the principle enunciated in *Coulton v Holcombe* [1986] HCA 33; (1986) (1986) 162 CLR 1 at [9] that a party is bound by the case they ran at first instance and cannot raise matters on appeal that were not raised at the hearing (either deliberately or inadvertently) unless there are the most exceptional circumstances.

40 Accordingly, we have considered the issues raised by the appellant in the context of s 24 of the SSM Act, and further comment upon the issue of s 150 of the SSM Act. Although, for reasons we will explain, the Tribunal was correct not to have considered s 150 of the SSM Act, that provision has relevance to Special By-law No 2 now that it has been registered subsequent to the Tribunal hearing.

41 In *Read v The Owners-Strata Plan No 2533* [2021] NSWCATAP 218, the Appeal Panel stated at [50]:

> Whilst the late provision of the minutes was a breach of the Act, it was not a breach which affected the conduct or outcome of the meeting. The intention of section 24 is to confer a discretion on the Tribunal to invalidate resolutions where there has been non-compliance with the Act or Regulations in relation to the meeting. In our view the late provision of the minutes after the meeting did not affect the resolutions passed at the meeting and is not a breach of the Act in relation to the meeting within the meaning and intent of section 24. If we are wrong in this view, then we consider that it is clear that the late provision of the minutes did not adversely affect any person or have any bearing on the resolutions passed at the meeting and could not have resulted in an order invalidating any resolution under section 24.

42 Section 24 of the SSM Act is not enlivened merely because there has been some non-compliance with the SSM Act or the Strata Schemes Management Regulation 2016 (NSW) ('the Regulations'). As the Appeal Panel stated in Read at [45] and [50], the non-compliance with the SSM Act or the Regulations needs to be "*in relation to the meeting"* (emphasis added).

43 Consequently, the first step is establishment of non-compliance with the SSM Act or the Regulations *"in relation to the meeting"* that involved the passing of a particular Resolution or the election of persons to the strata committee at the meeting. Relevant matters include the meeting procedures in Sch. 1 of the SSM Act.

44 It follows that the party bringing the application must identify and establish the particular non-compliance with the SSM Act or the Regulations that occurred *"in relation to the meeting"* which affected the conduct or outcome of the meeting*;* not matters that involve purported non-compliance with legislation other than the SSM Act or the Regulations; or a breach of the common law. Further, non-compliance with the SSM Act or the Regulations that was not *"in relation to the meeting"* falls outside the ambit of s 24 of the SSM Act.

45 It is only if the party bringing the application establishes there has been a non-compliance with the SSM Act or the Regulations *"in relation to the meeting*" which affected the conduct or outcome of the meeting that the discretion of the Tribunal to invalidate any Resolution passed at the meeting or the election of persons at the meeting is enlivened under s 24 (1) of the SSM Act; involving the considerations in s 24 (3) of the SSM Act.

46 There is nothing in the reasons of the Tribunal or the submissions of the appellant that satisfies us the appellant raised any non-compliance with the SSM Act or Regulations "*in relation to the meeting"* in respect of the AGMs on 18 June 2020 and 18 June 2021 other than Motion 16's purported inconsistency with the Development Approval of the strata scheme and local Council parking requirements. The only other matters raised involved alleged parking on common property and rubbish left on common property. They are not matters that involve any particular non-compliance with the SSM Act or the Regulations *"in relation to the meeting"* which affected the conduct or outcome of the meeting.

47 We are not satisfied that any error of law has been established, or any error to which leave to appeal should be granted under Cl. 12 of Sch. 4 of the NCAT Act.

48 However, there is one further matter that warrants discussion.

49 When the hearing of the Tribunal occurred on 29 July 2021, Special By-law 2 had been passed, but not registered. The strata manager stated at the appeal hearing that Special By-law 2 was registered on 28 October 2021.

50 Under s 141 (1) of the SSM Act, an owners corporation may change the by-laws of a strata scheme by a special resolution passed at a general meeting. However, pursuant to s 141 (2) of the SSM Act, a change to the by-laws has "no effect" until it is registered with the Registrar-General. Notification of change of by-laws cannot be lodged with the Registrar-General more than 6 months after the passing of the resolution to make the by-law (s 141 (4) of the SSM Act).

51 Sections 142 and 143 of the SSM Act state as follows:

> **142 Common property rights by-law**
>
> For the purposes of this Act, a ***common property rights by-law*** is a by-law that confers on the owner or owners of a specified lot or lots in the strata scheme—
>
> (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
>
> (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the

whole or any specified part of the common property in a particular manner or for particular purposes),

or that changes such a by-law.

143 Requirements and effect of common property rights by-laws

(1) An owners corporation may make a common property rights by-law only with the written consent of each owner on whom the by-law confers rights or special privileges.

Note—

Any addition to the by-laws will require a special resolution (see section 141).

(2) A common property rights by-law may confer rights or special privileges subject to conditions specified in the by-law (such as a condition requiring the payment of money by the owner or owners concerned, at specified times or as determined by the owners corporation).

(3) A common property rights by-law may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

(4) After 2 years from the making, or purported making, of a common property rights by-law, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

52 It is clear that the driveway and parking areas to which Special By-law 2 apply involve all Lot owners being given a right of exclusive use and enjoyment over common property in respect of a particular area to park upon.

53 It is unclear whether all Lot owners provided their written consent in accordance with s 143 (1) of the SSM Act. However, that was not a matter raised by the appellant before the Tribunal as a failure to comply with the SSM Act or the Regulations pursuant to s 24 of the SSM Act.

54 Had Special By-law 2 been registered prior to the Tribunal hearing on 29 July 2021, it may have been appropriate for the Tribunal to consider whether the appellant's cause of action was, in substance, an application under s 150 (1) of the SSM Act to invalidate a by-law on the basis that the owners corporation did not have the power to make the by-law; or in the alternative that the by-law was harsh, unconscionable, or oppressive (*Cooper v The Owners-Strata Plan No 5806*8 [2020] NSWCA 250).

55 However, as Special By-law 2 had not been registered at the relevant time, the Tribunal had no jurisdiction to consider s 150 of the SSM Act and it is unnecessary to explore the issue further for the purpose of this appeal.

ORDERS

(1) Leave to appeal is refused.

(2) Appeal dismissed.

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