



Civil and Administrative Tribunal

New South Wales

Case Name: Sha v Strata Plus Pty Ltd

Medium Neutral Citation: [2022] NSWCATCD 8

Hearing Date(s): 31 January 2022

Date of Orders: 2 February 2022

Decision Date: 2 February 2022

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision:

- (1) The proceedings as against the first respondent are dismissed.
- (2) The application of the first respondent filed on 9 December 2021 is otherwise dismissed.
- (3) The application of the second respondent filed on 2 December 2021 is dismissed.
- (4) The application of the third respondent filed on 8 December 2021 is dismissed.
- (5) The hearing fixed for 18 February 2022 is vacated.
- (6) The applicant is to provide in hard copy to the second and third respondents and the Tribunal, either in person or by post, all documents (see note 3 at [85] below) on which the applicant seeks to rely at the hearing, and a statement of the orders that the applicant is seeking, by 2 March 2022.
- (7) Each of the second and third respondents is to provide in hard copy to the applicant, each other and the Tribunal, either in person or by post, by 30 March 2022:
 - (a) the respondent's points of defence (see note 2 at [85] below), and any cross application and points of cross claim (see note 1 at [85] below);
 - (b) all documents (see note 3 at [85] below) on which the respondent seeks to rely at the hearing in response

to the claim of the applicant.

(8) The proceedings are adjourned for directions to a date after 30 March 2022 to be fixed by the Registrar.

Catchwords: CIVIL PROCEDURE - Summary disposal - Dismissal of proceedings - Frivolous or vexatious proceedings - No reasonable cause of action disclosed - Want of due despatch

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Competition and Consumer Act 2010 (Cth)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: BDK v Department of Education and Communities [2015] NSWCATAP 129
Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2) [2016] NSWCATAP 224
Brunsprop Pty Ltd v Joanne Hay & Wes Davies [2015] NSWCATAP 152
CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21
EJE v Western Sydney Local Health District [2021] NSWCATAP 247
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94
Flight Centre Travel Group Limited T/A Aunt Betty v Goel [2021] NSWCATAP 44
Matumaini v Automobile Industries Pty Ltd [2017] NSWCATAP 93
Murabito v Commissioner for Fair Trading [2020] NSWCATAP 63
The Owners – Strata Plan No. 76929 v Baldwin [2021] NSWCATAP 420
The Owners – Strata Plan 5319 v Price [2020] NSWCATAP 245
Vickery v The Owners Strata Plan 80412 (2020) 103 NSWLR 352; [2020] NSWCA 284
Zucker v Burbank Montague Pty Ltd [2018] NSWCATAP 135

Texts Cited: NCAT Procedural Direction 3 for Expert Witnesses

Category: Procedural rulings

Parties: Guanya Sha (Applicant)
Strata Plus Pty Ltd (First Respondent)

Parkview Constructions Pty Ltd (Second Respondent)
The Owners - Strata Plan No 94140 (Third Respondent)

Representation: Applicant (self-represented)

Solicitors:
Strata Title Lawyers (First Respondent)
Salim Rutherford Lawyers (Second Respondent)
Vardanega Roberts (Third Respondent)

File Number(s): SC 21/28000

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 In these proceedings, the applicant, Guanya Sha who is the owner of lot 8, seek orders against the first respondent, Strata Plus Pty Ltd which is the strata managing agent, the second respondent, Parkview Constructions Pty Ltd which carries on business as a builder, and the third respondent, The Owners - Strata Plan No 94140, which is the owners corporation responsible for the management of the strata scheme related to strata plan no 94140 (SP94140).
- 2 Each of the respondents has made an application seeking orders for the dismissal of the proceedings as against it and the applicant pay the costs of the proceedings as against it pursuant to one or both of s 55(1)(b) and (d), and s 60(2), of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).
- 3 I have decided that the proceedings as against the first respondent should be dismissed, the first respondent's dismissal application should otherwise be dismissed, and the second respondent's dismissal application and the third respondent's dismissal application should be dismissed.

The factual background

- 4 SP94140 is a residential complex at Hornsby.
- 5 The applicant alleges that there has been water damage to the bathroom and ensuite ceilings of lot 8 which was discovered in June 2020, and for which the respondents are responsible but has not been repaired.

- 6 Lot 8 had been occupied by tenants under a residential tenancy agreement with the applicant. Due to the water damage the applicant reduced the rent for lot 8 from 9 September 2020 to 13 April 2021 when the tenants left. Since 13 April 2021 lot 8 has been vacant.

The history of the proceedings

- 7 On 26 June 2021, the applicant commenced proceedings SC 21/28000 against the first and second respondents who were named as Strata Plus and Parkview by filing a strata schemes application, in which he sought compensation in the amount of \$10,458 for the cost of repairs and the loss of rent for lot 8, and the following accompanying documents (collectively the application accompanying documents):
- (1) a water condensation inspection report dated 3 November 2020 of Jodi Mawad;
 - (2) an undated letter of the applicant addressed to the Tribunal containing a summary of his complaint;
 - (3) a report dated 21 January 2021 of Mark Kavanagh (Mr Kavanagh) of Integrated Building & Engineering Consultancy (the Kavanagh report);
 - (4) the two letters dated 23 April 2021 of Kiki Li, Property Manager of McGrath Estate Agents, dealing with the tenancy of lot 8 and the current market rental of lot 8;
 - (5) tax invoices of EMD Industrial Services dated 9 June 2020 and 6 July 2020 for \$99.00 and \$308.00 respectively;
 - (6) tax invoice of Jim's Building Inspections dated 30 September 2020 for \$3,300.00.
- 8 On 2 July 2021, the Registrar sent a notice of a directions hearing by telephone on 29 September 2021 to the parties.
- 9 On 29 September 2021, the Tribunal at a directions hearing granted leave for legal representation to the parties, amended the name of the first and second respondents, joined The Owners - Strata Plan No 94140 as the third respondent, and made the following procedural direction (the 29 September 2021 orders):

“6. The applicant is to provide IN HARD COPY to each respondent and the Tribunal, either in person or by post, the applicant's points of claim (see note below) by 20 October 2021.

NOTE:

The applicant's points of claim must set out in sequentially numbered paragraphs the orders sought by the applicant against each respondent and the material facts and the legal basis including statutory provisions upon which the applicant contends that the Tribunal has jurisdiction, and there is an entitlement to those orders against each respondent including the amount of compensation claimed and how that amount has been calculated."

- 10 On 10 November 2021, the applicant filed a document in which he set out the following claim (the applicant's claim document):

"Quantum of claim

1. Maintenance costs: a. \$99+308, (2 times electrician call out fee and fans repair fee)
2. Jim's interim report \$300 + Jim's interim report \$3000
3. Leakage of the house caused the tenants to a usual request for reduction in rent: a. Reduce rent from \$550 to \$480 at 12/09/2020, $28 \times 70 = \$1,960$
4. Housing maintenance rental loss (from 13/04/2021 until 30/09/2021), $22 \times \$550/w = \$12,100$
5. Total amount of loss and expenses incurred by our client is \$17,767.

Reason

1. On 1 June 2020 the tenant found : cracks on bathroom ceiling. Switch of washing machine, the dryer, and all the lights tripped off, and few lights in the bathroom was not functioning; and few lights in the house were flickering.
2. On 9 June 2020, an electrician by me was called to investigate the problems in the above paragraph. \$99 was the call out fee. The electrician found water above ceiling caused the problems.
3. On 17 June 2020, your client and the strata expressed to our client that the above problems were caused by the exhaust fan
4. On 3 July 2020, an electrician re- installed exhaust fan. It caused \$308.
5. On 9 September 2020, the tenant asked rent reduction from \$550/w to \$480/w because of the problems. From 9 September 2020 to 13 April 2021, the total rent deduction is \$1,960).
6. On 16 September 2020, the strata sent an email to our client stated 'Unless you can provide me with a report, from a duly qualified professional, detailing how this is not condensation and is a strata maintenance issue, we will not be taking any further action on this matter until the moisture issue has been removed.'
7. On 30 September 2020, i ordered an interim report for \$300, and a final report for \$3,000 from Jim Building inspection. From the reports, the result from the report is 'We believe that the insufficient installation of the existing soffit board has created the condensation to the concrete soffits to Apartment 814 bathroom 1 and Ensuite.'
8. Because of the condition of the property caused by the problems, the tenant moved out from the property on 13 April 2021, and has been empty since then. The lost rent is $\$500/w \times 22 = \$12,100$.

9. On 21 January 2021, the second inspection report from integrated group states:

Cause 1 • The laundry cabinet exhaust fan was not operating and was left partially hanging from the ceiling. • This opening allowed for the highly humid exhaust air being expelled from the laundry cabinet clothes drier to go directly into the ceiling cavity. • This highly humid and warm air would then condense against cold surfaces such as the exposed areas of the roof slab and pipes for the fire sprinkler system and drip back down on to the upper side of the ceiling sheets giving the appearance of a roof water leak and resulting in the damages which included splitting of the sheet joints, water staining/dripping and mould growth.

Cause 2 • The initial repairs carried out by Parkview in respect of the foil backed insulation panel installation is considered to be defective. • The panels have not been fitted to provide a full monolithic cover to the concrete slab underside as is the requirement to ensure full protection. • There are gaps of up to 200mm visible between the panels. • I have not been provided with the manufacturer details for the specific panels, however from my own experience the installation requirements for each manufacturer are very similar. In short the sheets are to be fixed hard up under the slab, butted hard against each other and all joints/penetrations sealed with a specific self-adhesive tape. • Experience also tells me that the sprinkler pipes should also have been covered with insulated wrapping. • The gaps left between the foil backed insulation panels and the non-insulated fire sprinkler pipes have provided areas for the highly humid and warm air from the clothes drier to condense and start to drip down on to the ceiling sheets.

10. On 21 May 2021, Parkview Started to replace ceiling.”

11 On 10 November 2021, the Tribunal at a directions hearing relevantly made the following procedural directions (the 10 November 2021 orders):

“2. Time is extended for the applicant to comply with order 6 made on 5 29 September 2021 to 24 November 2021. The applicant's points of claim must plead the materials facts whereby it is alleged he has a cause of action against each of the respondents, and as against the respondent Parkview Constructions Pty Ltd the materials facts whereby it is alleged the Tribunal has jurisdiction.

3. Each respondent is to provide IN HARD COPY to the applicant, the other respondents and the Tribunal, either in person or by post, the respondent's points of defence and any application for dismissal of the proceedings against that respondent pursuant to s 55(1)(b) of the Civil and Administrative Tribunal Act 2013 (NSW) and an outline of submissions in support by 8 December 2021.

4. If any respondent makes an application for dismissal of the proceedings against that respondent pursuant to order 2 above, then the applicant is to provide IN HARD COPY to the respondents and the Tribunal, either in person or by post, any submissions in opposition by 15 December 2021.”

- 12 On 23 November 2021, the Registrar sent a notice of a hearing by telephone on 18 February 2022 to the parties.
- 13 On 2 December 2021, the second respondent filed an application seeking orders for the dismissal of the proceedings as against it and that the applicant pay its costs of the proceedings (the second respondent's dismissal application), and submissions in support of these orders.
- 14 On 8 December 2021, the third respondent filed an application seeking orders for the dismissal of the proceedings as against it and that the applicant pay its costs of the proceedings (the third respondent's dismissal application), and submissions in support of these orders.
- 15 On 9 December 2021, the first respondent filed an application seeking orders for the dismissal of the proceedings as against it and that the applicant pay its costs of the proceedings (the first respondent's dismissal application), and submissions in support of these orders.
- 16 On 17 December 2021, the Tribunal relevantly made the following procedural directions (the 17 December 2021 orders):

"The Tribunal notes that:

(a) The applicant has not complied with order 6 made on 29 September 2021, as varied on 10 November 2021 (the filing and service of points of claim in respect of the applicant's claim against each of the respondents);

(b) The applicant has not applied for an extension of time in which to do so;

(c) The respondents have applied for summary dismissal of the application.

The application for summary dismissal will be listed for hearing on 31 January 2022. The following directions are made accordingly:

1. The applicant is to provide to the respondents and the Tribunal any evidence and submissions in response to the application for summary dismissal by 10 January 2022.

2. The respondents are to provide to the applicant and the Tribunal any material in reply by 17 January 2022.

3. If the applicant proposes to seek a further extension of time in which to comply with order 6 made on 29 September 2021, that application must be provided to the Tribunal and the respondents supported by the proposed points of claim, evidence setting out the reason(s) for the failure to comply with the Tribunal's previous orders and submissions as to the basis on which the Tribunal should extend time, by 10 January 2022.

4. In the event that the applicant complies with order 3 above, by 17 January 2022 the respondents are to provide to the applicant and the Tribunal any

evidence and submissions in response to the extension of time application by 17 January 2022.

...

7. The parties are on notice that if the Tribunal does not summarily dismiss the proceedings, it will make all directions required for the matter to be set down for final hearing.”

The hearing

- 17 The hearing took place on 31 January 2022. The applicant represented himself. The first, second and third respondents were respectively represented by their solicitors Mr T Bacon, Ms S Saad and Mr C Jubb. The conversation at the hearing was translated by an interpreter in the Mandarin language.
- 18 None of the respondents adduced evidence in support of their applications.
- 19 The applicant relied on the following documents which had been provided by email to the Tribunal sent on 30 January 2022 at 6.26pm and to the other parties at the commencement of the hearing, and were admitted into evidence without objection other than the reservation by the second and third respondents that they were not making an admission of liability in relation to the 22 September 2021 at 5.00pm email:
 - (1) the applicant’s claim document (Ex A1);
 - (2) the applicant’s timeline document (Ex A2);
 - (3) the email of Lucy Thompson (Ms Thompson) sent on 22 September 2021 at 5.00pm to the applicant marked “without prejudice” and containing an offer of settlement on behalf of the second and third respondents (the 22 September 2021 at 5.00pm email) (Ex A3).
- 20 There was no oral evidence.
- 21 Each of the respondents relied on their written submissions:
 - (1) the first respondent’s submissions dated 7 December 2021 (the first respondent’s submissions);
 - (2) the second respondent’s submissions dated 2 December 2021 (the second respondent’s submissions);
 - (3) the third respondent’s submissions dated 7 December 2021 (the third respondent’s submissions).
- 22 The applicant and each of the respondents made oral submissions.
- 23 At the conclusion of the hearing, I reserved my decision.

The issues

- 24 The following issues arise for determination in the proceedings:
- (1) whether the Tribunal should dismiss the proceedings as against each of the respondents;
 - (2) whether the applicant should pay the costs of the proceedings as against each of the respondents;
 - (3) whether procedural directions should be made for the proceedings.
- 25 Before considering these issues it is appropriate to set out the applicable statutory provisions and legal principles, and to summarise the evidence of the applicant and the submissions of the parties.

The applicable statutory provisions

SSM Act

- 26 Part 6 Division 1 (ss 106-108) of the *Strata Schemes Management Act 2015* (NSW) (SSM Act) contains provisions dealing with the management of common property. Section 106 deals with the duty of an owners corporation to maintain and repair property, and relevantly provides:

106 Duty of owners corporation to maintain and repair property

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

...

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

...

- 27 Part 12 Division 3 (ss 226-228) contains provisions dealing with the procedures for the making of applications to the Tribunal. Section 226 specifies the category of “interested persons”, and relevantly provides:

226 Interested persons

(1) The following persons are interested persons for the purpose of making an application to the Tribunal under this Act—

...

(d) an owner of a lot in the scheme, a person having an estate or interest in a lot or an occupier of a lot,

...

- 28 Part 12 Division 4 (ss 229-238) contains provisions dealing with the orders that may be made by the Tribunal. Section 232 deals with orders that may be made to settle disputes or rectify complaints, and relevantly provides:

232 Orders to settle disputes or rectify complaints

(1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—

(a) the operation, administration or management of a strata scheme under this Act,

...

FT Act

- 29 Part 3 Division 2 (ss 27-32) of the *Fair Trading Act 1989* (NSW) (FT Act) provides for the application of the *Australian Consumer Law* (relevantly comprising Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) as in force from time to time as a law of New South Wales, its reference as the ACL (NSW), and its inclusion as part of the FT Act.

- 30 Part 6A Division 1 (ss 79B-79H) provides for preliminary matters with respect to the jurisdiction of the Tribunal in relation to consumer claims, and relevantly:

- (1) in s 79D, includes the following definitions of “consumer” and “supplier” for Part 6A:

79D Definitions (cf CC Act 1998, s 3 (1) and s 3 (3) (transferred to definition of “consumer”))

In this Part—

consumer means any of the following persons or bodies to whom or to which a supplier has supplied ... services (whether or not under a contract), ... —

(a) a natural person,

...

goods means any tangible thing that is or may be the subject of trade or commerce, but does not include money or an interest in land.

services—see section 79F.

...

supplier means a person who, in the course of carrying on (or purporting to carry on) a business, supplies goods or services.

- (2) in s 79E, includes the following definition of “consumer claim”:

79E Meaning of “consumer claim” (cf CC Act 1998, s 3A)

(1) For the purposes of this Part, a **consumer claim** means a claim by a consumer, for one or more of the following remedies, that arises from a supply of goods or services by a supplier to the consumer (whether or not under a contract) or that arises under a contract that is collateral to a contract for the supply of goods or services—

(a) the payment of a specified sum of money,

...

- (3) in s 79F, includes the following definition of “services”:

79F Meaning of “services” (cf CC Act 1998, s 3 (1), definition of “services”)

(1) For the purposes of this Part, a reference to services is a reference to any of the following—

(a) the performance of work (including work of a professional nature), whether with or without the supply of goods,

...

- (4) in s 79G, includes the following definition of “supply”:

79G Meaning of “supply” (cf CC Act 1998, s 3 (1) (definition of “supply”) and s 3 (2))

...

(2) For the purposes of this Part, a reference to the supply of services includes a reference to any of the following—

(a) providing, granting or rendering services for valuable consideration,

...

- (5) in s 79H, includes the following presumption as to person who are consumers:

79H Persons presumed to be consumers (cf CC Act 1998, s 4)

For the purposes of this Part—

(a) a person or body claiming to be a consumer is to be presumed to be a consumer until the contrary is proved, and

(b) in any legal proceedings (including proceedings before the Tribunal), the onus of proving that a person or body claiming to be a consumer is not a consumer is on the party who seeks to establish that fact.

- 31 Part 6A Division 2 (ss 79I-79M) contains provisions dealing with applications to and the jurisdiction of the Tribunal, and relevantly provides:

- (1) in s 79I, that any consumer may apply to the Tribunal for determination of a consumer claim;

- (2) in s 79J, that the Tribunal has jurisdiction, except as otherwise provided by Division 2, to hear and determine a consumer claim the subject of an application under Division 2;
- (3) in s 79K, as to connexion required with New South Wales for the Tribunal has jurisdiction to hear and determine a consumer claim:

79K Supply or agreement made, or supply intended to be made, in New South Wales (cf CC Act 1998, s 7 (2) and (3))

(1) The Tribunal has jurisdiction to hear and determine a consumer claim only if—

(a) the goods or services to which the claim relates were supplied in New South Wales, or

(b) a contract or other agreement to which the claim relates contemplated that the goods or services would be supplied in New South Wales (whether or not they were so supplied), or

(c) a contract or other agreement to which the claim relates was made in New South Wales (whether or not the goods or services were supplied in New South Wales).

...

- (4) in s 79L, for a limitation period for a consumer claim:

79L Limitation periods (cf CC Act 1998, s 7 (4) and (4A))

(1) The Tribunal does not have jurisdiction to hear and determine a consumer claim if any of the following apply—

(a) the cause of action giving rise to the claim first accrued more than 3 years before the date on which the claim is lodged,

(b) the goods or services to which the claim relates were supplied (or, if made in instalments, were last supplied) to the claimant more than 10 years before the date on which the claim is lodged.

...

32 Part 6A Division 3 (ss 79N-79V) of the FT Act contains provisions dealing with orders of the Tribunal, and relevantly provides:

- (1) in s 79N(1), that in determining a consumer claim wholly or partly in favour of a claimant, the Tribunal may, subject to Division 3, make any one or more of the following orders that it considers appropriate:

79N Orders in favour of claimant (cf CC Act 1998, s 8 (1))

In determining a consumer claim wholly or partly in favour of a claimant, the Tribunal may, subject to this Division, make any one or more of the following orders that it considers appropriate—

(a) an order that requires a respondent to pay to the claimant a specified amount of money,

...

- (2) in s 79S(1) when read with ss 79S(2)(a) and 79S(7), that the Tribunal has no jurisdiction to make, in respect of a particular consumer claim, an order in favour of the claimant if the amount to be paid under or because of the order would exceed \$40,000.

NCAT Act

- 33 Part 3 (ss 28-34) contains provisions dealing with the jurisdiction of the Tribunal. Section 28 deals with the jurisdiction of the Tribunal generally, and relevantly provides:

28 Jurisdiction of Tribunal generally

- (1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.
- (2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction—
- (a) the general jurisdiction of the Tribunal,

...

- 34 Section 29 deals with the general jurisdiction of the Tribunal, and relevantly provides:

29 General jurisdiction

- (1) The Tribunal has general jurisdiction over a matter if—
- (a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and
- (b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

...

- 35 Part 4 Division 1 (ss 35-38) contains provisions dealing with introductory matters relating to the practice and procedure of the Tribunal. Section 36 specifies the guiding principle to be applied to practice and procedure, and relevantly provides:

36 Guiding principle to be applied to practice and procedure

- (1) The ***guiding principle*** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The Tribunal must seek to give effect to the guiding principle when it—
- (a) exercises any power given to it by this Act or the procedural rules, or
- (b) interprets any provision of this Act or the procedural rules.

(3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal—

(a) a party to proceedings in the Tribunal,

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

...

- 36 Section 38 deals with the procedure of the Tribunal generally, and relevantly provides:

“ ...

(5) The Tribunal is to take such measures as are reasonably practicable—

...

(c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

...

- 37 Part 4 Division 4 (ss 56-63) contains provisions dealing with the conduct of proceedings. Section 55 deals with the dismissal of proceedings, and relevantly provides:

55 Dismissal of proceedings

(1) The Tribunal may dismiss at any stage any proceedings before it in any of the following circumstances—

...

(b) if the Tribunal considers that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance,

...

(d) if the Tribunal considers that there has been a want of prosecution of the proceedings.

...

- 38 Part 4 Division 5 (ss 56-63) contains provisions dealing with determination of issues and proceedings. Section 60 deals with costs, and relevantly provides:

60 Costs

(1) Each party to proceedings in the Tribunal is to pay the party's own costs.

(2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36(3),

(g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section—

costs includes—

(a) the costs of, or incidental to, proceedings in the Tribunal, and

...

- 39 Schedule 4 contains provisions dealing with the Consumer and Commercial Division of the Tribunal (the CC Division). Clause 3 deals with the functions allocated to the CC Division, and relevantly provides:

3 Functions allocated to Division

(1) The functions of the Tribunal in relation to the following legislation are allocated to the Division—

...

Fair Trading Act 1987

...

Strata Schemes Management Act 2015

...

The applicable legal principles

The jurisdiction of the Tribunal under s 232 of the SSM Act

- 40 In *Vickery v The Owners Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 (*Vickery*) Basten JA said at [28]:

“[28] ... The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation’s functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.”

The jurisdiction of the Tribunal under Part 6A of the FT Act

- 41 Part 6A of the FT Act does not create a cause of action. Jurisdiction is conferred on the Tribunal by reference to the general type of claim made by the consumer. A cause of action is predicated upon the existence of causes of action that arise independently from Part 6A: *Flight Centre Travel Group Limited T/A Aunt Betty v Goel* [2021] NSWCATAP 44 (*Goel*) at [18]-[19]. In *Goel* at [19] the Appeal Panel quoted with approval the decision of the Appeal Panel in *Matumaini v Automobile Industries Pty Ltd* [2017] NSWCATAP 93 at [97]:

“[97] The cause of action may be founded upon contract, tort, debt, statute or any other sufficient basis in law. All that is required is that the cause of action is available under New South Wales law to the consumer at the relevant time and provides a legitimate legal basis for the consumer to make a claim of a type listed in s 3A (1) (a) to (e) of the CC Act, or the corresponding definition in Pt 6A, against the supplier. If there is such a claim and the other requirements in relation to jurisdiction are met, the Tribunal then has power to make orders of the types listed in s8 (now ss79N, 79O and 79P of the FT Act), having regard to the legal entitlements of the parties under the causes of action upon which the claims are based: *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186 at [164].”

Summary dismissal under s 55(1)(b) of the NCAT Act

- 42 In *BDK v Department of Education and Communities* [2015] NSWCATAP 129 (*BDK*), in which the appellant was self-represented as she had been in the decision below, the Appeal Panel at [62]-[66] said in relation to s 55(1)(b) of the NCAT Act:

“[62] It will be seen that this Tribunal’s power is somewhat differently expressed. The Tribunal’s power refers not only applies to proceedings that are “frivolous” or “vexatious”, but then applies to proceedings that are “misconceived” or “lacking in substance”. Section 55(1)(b) does not have a

generic catch-all category of “abuse of process” to pick up conduct in relation to the issuance and pursuit of proceedings that might, arguably, fall outside the four specific categories set out there.

[63] In *Alchin v Rail Corporation NSW* [2012] NSWADT 142 Judicial Member Wright SC (as he then was) examined the meaning of the predecessor provision to s 55(1)(b) – s 73(5)(g)(ii) of the Administrative Decisions Tribunal Act 1977. As to the meaning of “misconceived” and “lacking in substance”, he said:

25 The expressions used in s 92(1)(a)(i) of the ADA, namely “misconceived” and “lacking in substance” are found not only in the ADA but also in s 73(5)(g) of the ADT Act and similar legislation in other states. With respect to a similar provision found in the Equal Opportunity Act 1984 (Vic), Ormiston JA in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at [14] said:

“misconceived” and “lacking in substance” have not, so far as I am aware, been used in this context before though each expression is commonly used by lawyers, the one connoting a misunderstanding of legal principle and the other connoting an untenable proposition of law or fact. If one may discern, in these provisions, an attempt to express the powers of tribunals in non-technical language, then “misconceived” would represent a claim which did “not disclose a cause of action” ..., whereas “lacking in substance” might be seen to represent a claim where the defendant could obtain summary judgment ...

26 This approach of construing “misconceived” as including a misunderstanding of legal principle and “lacking in substance” as encompassing an untenable proposition of fact or law has been applied by the Tribunal in many decisions including, for example, *Keene v Director-General, Dept of Justice and Attorney-General* [2011] NSWADT 59 at [14], *McDonald v Central Coast Community Legal Centre* [2008] NSWADT 96 at [22] and *Stanborough v Woolworths Ltd* [2005] NSWADT 203 at [50].

[64] In the present case, the Tribunal referred to the frequently-cited explanation of this term by Roden J in *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

[65] It will be seen that Roden J’s first category covers conduct that falls within the meaning of “frivolous”, while his third category embraces the kind of cases to which the expressions “misconceived” and “lacking in substance” are directed (or, in the case of the UCPR categories, cases not disclosing a reasonable cause of action).

[66] In our view a reasonably broad connotation should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While “misconceived” and “lacking in substance” may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are “frivolous” or “vexatious”, conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings.”

Summary dismissal under s 55(1)(d) of the NCAT Act

43 In *Murabito v Commissioner for Fair Trading* [2020] NSWCATAP 63 (*Murabito*) at [31]-[34] an Appeal Panel made the following observations with respect to s 55(1)(d) of the NCAT Act:

“[31] The principles applicable to an application for summary dismissal under s 55(1)(d) have been previously considered by the Appeal Panel in *Bousgas v HD Constructions (Aust) Pty Ltd* [2017] NSWCATAP 122 and *K & J Vision Pty Ltd v Jows Construction Pty Ltd* [2019] NSWCATAP 139.

[32] Those decisions refer to the earlier authorities, including *Birkett v James* [1978] AC 297, which established the principle that a court should be reluctant to dismiss proceedings unless there has been either intentional or contumelious default on the part of the plaintiff or inordinate or inexcusable delay giving rise to a substantial risk that a fair trial would not be possible, and note that that approach has been diminished with the enactment of the provisions in ss 56 to 60 of the *Civil Procedure Act* 2005. The overriding purpose as stated in s 56 of that Act is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. In *New South Wales v Plaintiff A* [2012] NSWCA 248 Basten JA held:

17. Although there is authority for the proposition that a court should be reluctant to exercise the power of summary dismissal without a hearing on the merits absent intentional and contumelious default on the part of the plaintiff, or inordinate or inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible - see *Birkett v James* [1978] AC 297 at 318 - the stringency of that principle has been diminished by the enactment of ss 56-60 of the Civil Procedure Act. Further, a proceeding will involve an abuse of process in circumstances where the objective effect of the lapse of time since the cause of action arose is to render a fair trial impossible, despite the absence of any moral delinquency, oppressive conduct or misconduct on the part of the plaintiff: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 at [69]-[70].

18. Despite the fact that misconduct on the part of a plaintiff is not a precondition to a finding of abuse of process, the reasons for any delay are relevant considerations. Thus, it would be a rare case in which a defendant could complain of unfairness where the delay was in large part due to the defendant's own behaviour. By parity of reasoning, a court is likely more readily to find an abuse of process where there is culpable misconduct on the part of a plaintiff.

[33] As held by Basten JA, determination of an application to dismiss proceedings for want of prosecution requires consideration of a variety of factors, including the length of any delay and associated costs, any explanation for the delay, and prejudice to other parties in the proceedings. While decided before the introduction of s 56, the identification by Simpson J in *Hoser v Hartcher* [1999] NSWSC 527 of relevant factors to be taken into consideration remains a useful summary:

19 It seems to me that the following principles are relevant to the exercise of the discretion to strike out for want of prosecution. The list is not intended to be exhaustive:

(1.) the ultimate question is whether, on balancing the prejudice to the respective parties by making or not making an order, justice demands that the action be dismissed: *Stollznov v Calvert* (1980) 2 NSWLR 749 at 751F (Court of Appeal); *Razvan v Berechet*, unreported Court of Appeal, 23 February 1990; *Vilo v John Fairfax and Sons Limited*, unreported, 19 November 1995, per Sperling J;

(2.) the discretion should be exercised only in a clear case where it is manifestly warranted; *Razvan*, per Kirby P; as is generally the case with discretionary decisions, each case depends upon its own facts. Rigid formulae should not be applied to the exercise of the discretion: *Stollznov v Calvert* at 751D;

(3.) any explanation offered by the plaintiff for the delay in proceeding must be considered: *Burke v TCN Channel Nine Pty Limited*, unreported, 16 December 1994, per Levine J;

(4.) personal blamelessness on the part of a plaintiff (as distinct from any tardiness or other fault on the part of his/her/its legal representative) is relevant: *Stollznov*, p73.

(5.) a defendant who takes no steps to secure progress in the proceedings, or to activate an apparently inactive plaintiff or who stands by in the hope that the passage of time will ensure the quiet death of the proceedings or that the longer delay will strengthen the case for striking out, runs the risk that that very behaviour will operate to his/her/its disadvantage. A defendant has two choices: to attempt to prod the plaintiff into action, or to stand by, doing nothing, trusting that time will bring about the slow death of the action. Either choice represents something of a gamble, dependent upon future events that the defendant is unable with any degree of confidence to predict. If the defendant opts for the former course, of prodding the plaintiff into action, it may succeed in doing so, precluding an application to strike out. On the other hand, if the plaintiff remains inert, the defendant's case for striking out strengthens with passing time. If the defendant chooses the latter option and takes no action, the plaintiff may take no further steps, or may take no further steps until such irremediable prejudice is caused to the defendant that the application to strike out will succeed; if, however, some other event galvanises the plaintiff into action the defendant, having done nothing to progress the matter, can hardly be heard to complain of the plaintiff's earlier

inactivity: *Calvert v Stollznow*, 1 April 1980, Ritchie's Supreme Court Procedure, (NSW) Vol 2, para 13, 022, per Cross J (at first instance); and in the Court of Appeal per Moffitt J, p 753; Vilo, p 10; *McBride v Australian Broadcasting Corporation*, unreported 6 November 1998, per Levine J; *Bass v TCN Channel Nine Limited*, unreported 25 July 1997, per Levine J; *Hart v Herron*, unreported, 3 June 1993, Court of Appeal per Priestley JA;

(6.) delay between the date the cause of action arose and the commencement of the proceedings may be a relevant factor: *Calvert v Stollznow*, per Cross J; *Burke v TCN*. But in my view, this circumstance must be treated with some caution. The weight that can be accorded to that delay is limited. Where an action is commenced within the period provided for by an applicable statute of limitations, it would not ordinarily be appropriate to take that period into account. However, if a plaintiff has delayed significantly in the commencement of the proceedings, and that delay is followed by further lethargy in the advancement of the proceedings, the effect of the initial (but permissible) delay is compounded. The real question is not the length of the delay, but the impact that delay has upon the defendant's capacity properly to defend the plaintiff's claim. That will be a question of fact in each case. While there may be some prejudice presumed by reason of the passage of time, much will depend upon the nature of the proceedings, and the identification of the issues involved in the litigation. Where, for example, at the close of pleadings it can be seen that there are disputed questions of fact dependent upon the oral evidence of witnesses, or their recollections, the prejudice will plainly be greater than in cases that depend essentially upon the application of legal principle to largely undisputed facts, or upon disputed questions of fact that will be resolved by reference to documentary or other objective evidence not likely to be affected by the effluxion of time;

(7) the onus lies on the defendant to establish any prejudice upon which reliance is placed. The disappearance or death of witnesses, the fading of their recollections, or the destruction of records, are some obvious examples of the kind of prejudice that might arise;

(8) prejudice to a defendant caused by delay has to be balanced against prejudice to a plaintiff deprived of an otherwise valid claim; delay in the commencement of proceedings by a plaintiff is sometimes taken as evidence contra-indicating prejudice to the plaintiff in the sense that he/she/it has evinced no interest in his/her/its own case: *Burke*, supra. Such an inference may be contra indicated by explanatory evidence; in this regard the plaintiff's personal responsibility for the delay is an important factor as is any explanation provided for the delay;

(9) what the defendant has (or has not) done by way of preparation for trial may be a factor. This is a distinct question from that concerning any steps taken (or not taken) by the

defendant in prompting the plaintiff to action. A defendant who has not interviewed witnesses, taken statements or collected documents, after being served with the claim, has a less meritorious complaint about the effect of prejudice caused or presumed by reason of delay: *McBride v ABC*, unreported, 6 November 1998, per Levine J;

(10) the plaintiff's prospects of success is a relevant factor. If it appears that the prospects are minimal, the discretion is more likely to be exercised in favour of the defendant. Conversely, where the plaintiff's case is strong (absent the kind of prejudice to the defendant to which I have referred) it is less likely that justice will be done by striking the action out: *Razvan*, per Kirby P;

(11) the exercise of the discretion to strike out should not incorporate any element of punishing a tardy plaintiff, or of excluding one who may appear to have some unworthy characteristics: *Razvan*, per Kirby P. The ultimate aim of a court is the attainment of justice: *The State of Queensland v J L Holdings Pty Limited* (1997) 189 CLR 146. To adapt the words of the High Court in that case, discretions such as that presently invoked ought not to be used to supplant the overall aim of the attainment of justice.

[34] As noted in *Bousgas* and *K & J Vision*, the guiding principle in s 36(1) of the NCAT Act is in the same terms as s 56 of the *Civil Procedure Act*. The guiding principle for the NCAT Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. The scope of the Tribunal's power in s 55(1)(d) must be determined in accordance with that principle and the general legislative context: *Owners Corporation Strata Plan 4521 v Zouk* [2007] NSWCA 23 at [41]. The obligations imposed on the Tribunal and the parties and their representatives by s 36(1), (3) and (4), and s 38(5)(c) of the NCAT Act are relevant factors to be taken into account in considering whether to make an order to dismiss proceedings for want of prosecution under s 55(1)(d) of the NCAT Act."

Costs under s 60(2) of the NCAT Act."

44 "Special circumstances" in s 60(2) of the NCAT Act are circumstances that are out of the ordinary; they do not have to be extraordinary or exceptional circumstances: *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [32].

45 In considering whether special circumstances exist for the purposes of s 60(2) of the NCAT Act:

- (1) each case will depend upon on its own particular facts and circumstances: *Brunstrop Pty Ltd v Joanne Hay & Wes Davies* [2015] NSWCATAP 152 at [27];

- (2) the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs: *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48];
- (3) mere success (or failure) of an application does not give rise to special circumstances: *The Owners – Strata Plan 5319 v Price* [2020] NSWCATAP 245 at [46];
- (4) where special circumstances are found to exist, the Tribunal has a discretion to exercise in deciding what, if any, order should be made. Relevant to the exercise of that discretion are those facts upon which the finding of special circumstances was based. However, those findings do not constitute the whole of the relevant matters to be considered in deciding what, if any, order for costs should be made. Rather, the principles applicable to awarding costs generally must also be taken into account: *Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2)* [2016] NSWCATAP 224 at [24].

46 As to the factor in s 60(3)(c) of the NCAT Act, in *Zucker v Burbank Montague Pty Ltd* [2018] NSWCATAP 135 (*Zucker*) at [44] the Appeal Panel made the following observations:

“[44] A finding that a claim is “not proved on the balance of probabilities” is not the same as a finding that a claim is “not tenable in fact or law”. They are different concepts. The expression “no tenable basis in fact or law” relates to the common law tests developed and applied in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. For a claim to have no tenable basis in fact or law it must be so obviously untenable that it cannot possibly succeed: *General Steel* at 130. “Manifestly groundless” or “clearly untenable” are equivalent expressions. In our view, for the purpose of s 60(3)(c), it matters not whether a conclusion that a claim has no tenable basis in fact or law is reached in connection with an application for summary dismissal or after a full hearing on the merits.”

47 As to the factor in s 60(3)(e) of the NCAT Act, in *EJE v Western Sydney Local Health District* [2021] NSWCATAP 247 at [30] the Appeal Panel made the following observations:

“[30] The terms “lacking in substance” and “misconceived” are also not defined by the NCAT Act. The former has been taken to mean “not reasonably arguable” (*Owners Corporation of Strata Plan 4521 v Zouk* [2007] NSWCA 23 at [45]), the latter, a “misunderstanding of legal principle” (*Alchin v Rail Corporation NSW* [2012] NSWADT 142 at [26]). We adopt those meanings.”

48 As to the factor in s 60(3)(f) of the NCAT Act, in *The Owners – Strata Plan No. 76929 v Baldwin* [2021] NSWCATAP 420 (*Baldwin*) at [34] the Appeal Panel made the following observations:

“[34] We agree with the Tribunal below that a failure and even more than one failure to comply with directions of the Tribunal does not have the necessary consequence that there has been a breach of s 36(3) which thereby satisfies s 60(3)(f). ...”

The evidence of the applicant

- 49 The applicant's claim document is set out in full in [10] above.
- 50 The applicant's timeline document is an abbreviated version of the applicant's claim document.
- 51 The 22 September 2021 at 5.00pm email contains an offer of settlement on behalf of the second and third respondents in respect of the applicant's loss of rent and the cost of obtaining reports.

The submissions of the parties

The first respondent

- 52 In the first respondent's submissions the first respondent makes the following submissions:
- (1) the claim against it must be dismissed, as:
 - (a) there is no legislative power in the SSM Act that permits the Tribunal to hear and determine a claim brought by a lot owner against a strata managing agent;
 - (b) the Tribunal has provided multiple opportunities to the applicant to amend the claim and/or to seek advice and the applicant has not done so in accordance with the timetable directions and the practice management guidelines;
 - (c) putting to one side that the applicant is self-represented, and that the Tribunal ought to act with as little formality as possible, the fact remains that it is obvious that the applicant's claim is bound to fail, and has no tenable basis in fact and law;
 - (d) the applicant has also failed to pursue these proceedings in a timely manner, having failed to plead a proper cause of action when making his application, failed to consent to its removal despite having been given the opportunity to do so and having no case against it, and failed to comply with the orders of the Tribunal on two occasions, resulting in substantial delays in the proceedings and its extended involvement in the proceedings that do not and could not disclose a cause of action against it;
 - (2) the Tribunal ought to be satisfied that special circumstances exist, such that a decision to make an order under s 60 of the NCAT Act is enlivened for the following reasons:

- (a) as to s 60(3)(a) of the NCAT Act, the applicant's failure to properly disclose his claim has caused its involvement in these proceedings to be unnecessarily extended, and has necessitated its appearance at two directions hearings;
- (b) as to s 60(3)(b) of the NCAT Act, the applicant's application has, despite the attendance of the parties at two directions hearings and the passage of nearly six months' time, not progressed at all since the time of filing;
- (c) as to s 60(3)(c) and (e) of the NCAT Act, no proper cause of action has been disclosed as against it;
- (d) as to s 60(3)(f) of the NCAT Act, by ignoring the Tribunal's orders in these proceedings not once but twice, the applicant has made no effort to assist the Tribunal and the parties to determine the real issues in the proceedings, let alone take steps to resolve those matters.

The second respondent

53 In the second respondent's submissions the second respondent makes the following submissions:

- (1) the Tribunal should be minded to dismiss the proceedings against it as:
 - (a) the proceedings are frivolous or vexatious as the applicant has failed to identify any cause of action against it and, despite repeated opportunities to do so, he has failed to properly plead his case;
 - (b) the proceedings are misconceived or lacking in substance as the applicant has failed to properly plead his case and identify any cause of action against it;
 - (c) there has been a want of prosecution of these proceedings. The applicant has failed to comply with the Tribunal's orders on two occasions and the parties are incurring further and unnecessary costs. There has been no progression in the matter since it was commenced in June 2021;
- (2) there are special circumstances in this matter warranting an order for costs in its favour and in the sum of \$3,590 plus GST for the following reasons:
 - (a) as to s 60(3)(a) of the NCAT Act, the applicant's delay and non-compliance with the Tribunal's orders has resulted in it incurring costs in defending these proceedings;
 - (b) as to s 60(3)(b) of the NCAT Act, despite all reasonable extensions, the applicant has not complied with the orders of the Tribunal and has further delayed the proceedings;
 - (c) as to s 60(3)(c) of the NCAT Act, in circumstances where the applicant has not provided a points of claim and properly pleaded

its case against it despite numerous opportunities to do so, it is left with no choice but to assume that he has made a claim against it that has no basis in fact or law;

- (d) as to s 60(3)(e) of the NCAT Act, the applicant has demonstrated vexatious behaviour where the parties have had to attend two directions hearing over the course of four months with no progression of the matter;
- (e) as to s 60(3)(f) of the NCAT Act, the applicant has been afforded multiple opportunities to comply with the directions and orders of the Tribunal and has not co-operated as required. This failure is in clear contravention of s 36(3) of the NCAT Act.

The third respondent

54 In the third respondent's submissions the third respondent makes the following submissions:

- (1) the Tribunal should dismiss these proceedings against it as:
 - (a) the proceedings are frivolous or vexatious, with the applicant having failed to identify his cause of action against it despite more time being allowed to do so;
 - (b) the proceedings are misconceived or lacking in substance;
 - (c) there has been a want of prosecution of these proceedings, with the applicant having failed to comply with the Tribunal's orders on two occasions, resulting in the parties incurring unnecessary costs and, despite the proceedings having commenced six months ago, with his cause of action against the parties still being unknown;
- (2) there are special circumstances in this matter warranting an order for costs in its favour for the following reasons:
 - (a) as to s 60(3)(a) of the NCAT Act, the applicant's failure to comply with the Tribunal's orders and serve its points of claim has resulted in it incurring costs in defending these proceedings. It has been disadvantaged in not knowing the applicant's cause of action against it;
 - (b) as to s 60(3)(b) of the NCAT Act, the applicant has had more than sufficient time to provide its points of claim and in spite of orders made by the Tribunal and a further extension of time has still failed to do so. As such, despite these proceedings being commenced six months ago they have still not been progressed;
 - (c) as to s 60(3)(c) of the NCAT Act, with no points of claim having been served by the applicant, the inference should be drawn that his claim against it has no basis in fact or law;
 - (d) as to s 60(3)(e) of the NCAT Act, the applicant has failed to properly plead his case or otherwise identify any cause of action

against it. The applicant has engaged in vexatious behaviour having issued proceedings six months ago but has then failed to progress the proceedings;

- (e) as to s 60(3)(f) of the NCAT Act, in circumstances where the applicant has failed to properly plead his case and comply with the orders of the Tribunal, he has exhausted both the Tribunal's and the parties' time, failing to comply with s 36 of the NCAT Act.

The applicant

- 55 The applicant submitted that the proceedings as against the first respondent should not be dismissed because it had some responsibility in circumstances where he informed Ms Thompson about the water leakage, and she recommended having repairs done, which is what he did.
- 56 The applicant submitted that the proceedings as against the second respondent should not be dismissed because it had some responsibility in circumstances where lot 8 is an apartment, and he could not negotiate with it as he was unable to locate it.
- 57 I indicated to the applicant that I did not need to hear any submissions as to whether the proceedings as against the third respondent should be dismissed.

Whether the Tribunal should dismiss the proceedings as against each of the respondents

Introduction

- 58 In *Cominos v Di Rico* [2016] NSWCATAP 5 (*Cominos*), the Appeal Panel at [13] stated that it may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal.
- 59 I am satisfied that the principles in *Cominos* at [13] as appropriately adapted should be applied in determining whether the proceedings as against each of the respondents are misconceived or lacking in substance within s 55(1)(b) of the NCAT Act.

The proceedings as against the first respondent

- 60 I accept the submissions of the first respondent that there is no cause of action under the SSM Act by a lot owner against a strata managing agent in respect of the repair or maintenance of the common property.
- 61 Having regard to the principles in *Cominos* at [13] as appropriately adapted and *Goel* at [18]-[19], I have been unable to discern in the application accompanying documents or the evidence of the applicant any cause of action under the FT Act founded upon contract, tort, debt, statute or any other sufficient basis in law that the applicant has against the first respondent arising out of water damage to lot 8. The assertion of the applicant that he informed Ms Thompson about the water leakage, she recommended having repairs done, and that he had repairs done, does not on its own disclose any such cause of action against the first respondent. There is no assertion of the applicant that Ms Thompson was negligent in making her recommendation or that he suffered any loss by relying on her recommendation.
- 62 I am satisfied that the proceedings as against the first respondent should be dismissed for the following reasons:
- (1) the applicant has not identified any matter in respect of which the SSM Act or the FT Act enables the Tribunal to make decisions and which is picked by ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act. It follows that the functions of the Tribunal in relation to the SSM Act or the FT Act have not been allocated to the CC Division pursuant to Sch 4 cl 3(1) of the NCAT Act;
 - (2) it follows that, having regard to the principles in *BDK* at [62]-[66], the proceedings as against the first respondent are misconceived within s 55(1)(b) of the NCAT Act.
- 63 In view of my finding in [62(2)], above the proceedings as against the first respondent are misconceived within s 55(1)(b) of the NCAT Act, it is unnecessary to decide whether the proceedings as against the first respondent are lacking in substance within s 55(1)(b) of the NCAT Act or that there has been a want of prosecution of the proceedings as against the first respondent within s 55(1)(d) of the NCAT Act.

The proceedings as against the second respondent

64 In the Kavanagh report Mr Kavanagh has identified two causes of damage to the bathroom and ensuite ceilings of lot 8, one being:

“The initial repairs carried out by Parkview in respect of the foil backed insulation panel installation is considered to be defective.”

65 I infer that the second respondent was retained to undertake remedial works by the third respondent.

66 Having regard to the principles in *Cominos* at [13] as appropriately adapted and *Goel* at [18]-[19], I am not satisfied that in these circumstances the second respondent has established that the applicant does not have a cause of action against it. It is arguable that the second respondent owed a duty of care to the applicant in undertaking remedial works under the general law, breached that duty of care, and caused damage to the applicant. It is also arguable that such a cause of action founded in tort would be a consumer claim within Pt 6A of the FT Act which is picked by ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act, and thereby is one which the Tribunal has jurisdiction to hear and determine.

67 Having regard to the principles in *Murabito* at [31]-[34] including ss 36(1), (3) and (4) and 38(5)(c) of the NCAT Act, I am not satisfied that there has been a want of prosecution of the proceedings as against the second respondent within s 55(1)(d) of the NCAT Act. Justice does not demand that the proceedings as against the second respondent be dismissed. The delay of the applicant of which complaint is made has not been lengthy. The second respondent has not identified any prejudice it has suffered by reason of the delay of the applicant.

68 It follows that the second respondent’s dismissal application should be dismissed.

The proceedings as against the third respondent

69 The third respondent owed the duty to the applicant under s 106(1) of the SSM Act to properly maintain and keep in a state of good and serviceable repair the common property.

70 Having regard to the principles in *Cominos* at [13] as appropriately adapted and *Vickery* at [28], I am not satisfied that in these circumstances the third

respondent has established that the applicant does not have a cause of action against it. On the contrary, It is arguable that the third respondent breached its duty under s 106(1) of the SSM Act, and caused damage to the applicant. In these circumstances, it is arguable that the applicant has a cause of action against the third respondent under s 106(5) of the SSM Act, and the proceedings were commenced as against the third respondent within the period specified in s 106(6) of the SSM Act. The applicant as the owner of a lot in SP94140 is an interested person within the meaning of s 226(1)(d) of the SSM Act and as such has the right to make the strata schemes application containing this cause of action as against the third respondent. Such a cause of action under ss 106 and 232 of the SSM Act is picked by ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act, and thereby is one which the Tribunal has jurisdiction to hear and determine.

71 Having regard to the principles in *Murabito* at [31]-[34] including ss 36(1), (3) and (4) and 38(5)(c) of the NCAT Act, I am not satisfied that there has been a want of prosecution of the proceedings as against the third respondent within s 55(1)(d) of the NCAT Act. Justice does not demand that the proceedings as against the third respondent be dismissed. The delay of the applicant of which complaint is made has not been lengthy. The third respondent has not identified any prejudice it has suffered by reason of the delay of the applicant.

72 It follows that the third respondent's dismissal application should be dismissed.

Whether the applicant should pay the costs of the proceedings as against each of the respondents

The proceedings as against the first respondent

Introduction

73 The first respondent's application for its costs of the proceedings is pursuant to s 60(2) of the NCAT Act. The determination of this issue involves answering the following two questions:

- (1) whether there are special circumstances warranting an award of costs in favour of the first respondent;
- (2) if so, whether the discretion should be exercised to award costs.

Whether there are special circumstances warranting an award of costs in favour of the respondent

Section 60(3)(a) of the NCAT Act

- 74 I am not satisfied that the applicant conducted the proceedings in a way that unnecessarily disadvantaged the first respondent. The applicant attempted to comply with order 6 of the 29 September 2021 orders by the applicant's claim document. The failure of the applicant to comply with order 2 of the 10 November 2021 orders did not cause disadvantage to the first respondent. On the contrary, it meant the first respondent did not have to provide points of defence to the points of claim of the applicant.

Section 60(3)(b) of the NCAT Act

- 75 I am not satisfied that the applicant has been responsible for prolonging unreasonably the time taken to complete the proceedings. There was no delay prior to the first directions hearing on 29 September 2021 which was fixed by the Registrar on 2 July 2021. The delay between 20 October 2021, the date for the filing of the points of claim of the applicant, and 10 November 2021, the date of the filing of the applicant's claim document, was 21 days, which is not an unreasonable delay.

Section 60(3)(c) of the NCAT Act

- 76 I accept that the applicant made a claim against the first respondent that has no tenable basis in fact or law.

Section 60(3)(e) of the NCAT Act

- 77 I accept that the proceedings as against the first respondent are misconceived.

Section 60(3)(f) of the NCAT Act

- 78 Having regard to the principles in *Baldwin* at [34], I am not satisfied that failure of the applicant to comply with order 6 of the 29 September 2021 orders and order 2 of the 10 November 2021 orders has the necessary consequence that there has been a breach of s 36(3), which thereby satisfies s 60(3)(f), of the NCAT Act.

Conclusion

- 79 Having regard to all the circumstances, I am satisfied that there are special circumstances warranting an award of costs in favour of the first respondent within s 60(2) of the NCAT Act.

If so, whether the discretion should be exercised to award costs

- 80 As the applicant is self-represented, and does not have a strong command of the English language, and the proceedings as against the first respondent were pending for a relatively short period and only involved two directions hearings before first respondent made the first respondent's dismissal application, I have decided in the exercise of the discretion under s 60(2) of the NCAT Act that the applicant should not pay the costs of the proceedings as against the first respondent.

The proceedings as against the second respondent

- 81 In view of my finding at [68] above that the second respondent's dismissal application should be dismissed, this issue does not arise for determination.

The proceedings as against the third respondent

- 82 In view of my finding at [72] above that the third respondent's dismissal application should be dismissed, this issue does not arise for determination.

Whether procedural directions should be made for the proceedings

- 83 During the course of the hearing the applicant advised me that he had filed his evidence. I informed the applicant that his evidence is unlikely to be accepted as being sufficient to establish his claims against the second and third respondents. The third respondent informed me that it was considering making a cross application against the second respondent.
- 84 In these circumstances I am satisfied that it is appropriate to vacate the hearing fixed for 18 February 2022, and make procedural directions for the filing of evidence by the parties and any cross-application by the second and third respondents, and for the fixing of a further directions hearing.

Orders

- 85 I make the following orders:
- (1) the proceedings as against the first respondent are dismissed;

- (2) the first respondent's dismissal application is otherwise dismissed;
- (3) the second respondent's dismissal application is dismissed;
- (4) the third respondent's dismissal application is dismissed;
- (5) the hearing fixed for 18 February 2022 is vacated;
- (6) the applicant is to provide in hard copy to the second and third respondents and the Tribunal, either in person or by post, all documents (see note 3 below) on which the applicant seeks to rely at the hearing, and a statement of the orders that the applicant is seeking, by 2 March 2022;
- (7) each of the second and third respondents is to provide in hard copy to the applicant, each other and the Tribunal, either in person or by post, by 30 March 2022:
 - (a) the respondent's points of defence (see note 2 below), and any cross application and points of cross claim (see note 1 below);
 - (b) all documents (see note 3 below) on which the respondent seeks to rely at the hearing in response to the claim of the applicant;
- (8) the proceedings are adjourned for directions to a date after 30 March 2022 to be fixed by the Registrar.

NOTE 1:

The respondent's points of cross claim must set out in sequentially numbered paragraphs the orders sought by respondent and the material facts and the legal basis including statutory provisions upon which the respondent contends that the Tribunal has jurisdiction, and there is an entitlement to those orders against the cross respondent(s) including the amount of compensation claimed and how that amount has been calculated.

NOTE 2:

The respondent's points of defence must set out in sequentially numbered paragraphs the material facts and the legal basis including statutory provisions upon which the respondent contends that the Tribunal does not have jurisdiction and/or the applicant is not entitled to the orders sought.

NOTE 3:

For the purpose of these directions "document" means:

- witness statements, statutory declarations or affidavits;

- expert reports prepared in accordance with NCAT Procedural Direction 3 for Expert Witnesses;
- invoices;
- quotations;
- accounting records;
- correspondence;
- photographs;
- any other document to be relied upon.

All documents must be legible and in colour if the original is in colour.

The evidence of any party or witness is to be by signed witness statement, statutory declaration, affidavit or expert report. Each such party or witness is to be available to give evidence at the hearing unless advised that they are not required for cross-examination.

All witness statements, statutory declarations or affidavits must be divided into numbered paragraphs and each page must be numbered. All annexed written documents must be legible and in colour if the original is in colour. Any annexed photographs must be in colour if the original is in colour, and must identify the structure or other object depicted, the date and the person by whom it was taken.

The documents provided by each party must be placed in a folder, and each page must be numbered to provide easy identification by all concerned at the hearing. Folders provided to the Tribunal and to the other party(ies) must be identical and in the same order. The folder(s) should be marked with the name of the party and include:

- an index;
- a chronology of significant events;
- all documents required by these directions.



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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.