Civil and Administrative Tribunal

New South Wales

Case Name:	Coscuez International Pty Ltd v The Owners-Strata Plan No 46433
Medium Neutral Citation:	[2022] NSWCATAP 147
Hearing Date(s):	23 November 2021
Date of Orders:	09 May 2022
Decision Date:	9 May 2022
Jurisdiction:	Appeal Panel
Before:	The Hon D. Cowdroy AO QC ADCJ, Principal Member G. Sarginson, Senior Member
Decision:	(1) Appeal allowed. (2) Decision under appeal set aside in part. (3) Matter remitted to be determined according to law in respect of the issues identified in paragraphs [163]-[168] of the decision. (4) Costs decision and orders of the Tribunal dated 13 October 2021 set aside. (5) Whether any further evidence should be allowed in the remitted proceedings to be determined by the Tribunal.
Catchwords:	LAND LAW---Strata title---Whether common property rights by-law unreasonably refused----Whether Tribunal has power to make certain money orders under s 232 of the Strata Schemes Management Act 2015 (NSW)---Whether by-laws of strata scheme harsh, unconscionable or oppressive---Adequacy of reasons---Consideration of applicable principles

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW Civil and Administrative Tribunal Rules 2014 (NSW) Environmental Planning and Assessment Act 1979 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bruce v Knight [2021] NSWCATAP 224 Cooper v The Owners-Strata Plan No 58068 [2020] NSWCA 250 EB 9 & 10 Pty Ltd v The Owners Strata Plan 934 [2018] NSWCA 288 Edwards v State of New South Wales [2021] NSWSC 181 Endre v The Owners-Strata Plan No 17771 [2019] NSWCATAP 93 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 McCrohon v Harith [2010] NSWCA 67 Murray v Sheldon Commercial Interiors Pty Ltd [2016] NSWCA 77 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Pongrass v Small [2021] NSWCATAP 314 Sabouni v Revelop Building and Developments Pty Ltd [2021] NSWSC 31 Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289 Taylor v The Owners-SP No 61285 [2021] NSWCATAP 27 The Owners-Strata Plan 62713 v Liberant [2022] NSWCATAP 80 The Owners-Strata Plan No 37762 v Pham [2006] NSWSC 1287 The Owners-Strata Plan No 6373 v B & G Trading Pty Ltd [2020] NSWCATAP 202 The Owners-Strata Plan No 74698 v Jacinta Investments Pty Ltd [2021] NSWCATAP 387 The Owners-Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 Vickery v The Owners-Strata Plan No 80412 [2020]

	NSWCA 284
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Coscuez International Pty Ltd (Appellant) The Owners-Strata Plan No 46433 (Respondent)
Representation:	Solicitors: P. Tang, Director (Appellant) Kerin Benson Lawyers Pty Ltd (Respondent)
File Number(s):	2021/00262748
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	[2021] NSWCATCD
Date of Decision:	17 August 2021
Before:	M. Tibbey, Senior Member
File Number(s):	SC 21/017106; SC 20/53332

REASONS FOR DECISION

1 This appeal arises from a decision of the Tribunal dated 17 August 2021 involving the *Strata Schemes Management Act 2015* (NSW) ('the SSM Act').

2 There was also a subsequent costs decision of the Tribunal on 13 October 2021 that appellant pay the respondent 80% of its costs in the Tribunal proceedings on the basis that "special circumstances" under s 60 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act') were established and a proportionate costs order was appropriate.

3 The appellant is the owner of a ground floor commercial Lot (Lot 4). The strata scheme building comprises of 4 commercial Lots; 75 residential Lots; and

common property. The strata building is located in an inner-south eastern suburb of Sydney, NSW.

4 The appeal was filed on 13 September 2021 and is within the time period for the filing of appeals under Reg. 25 of the Civil and Administrative Tribunal Rules 2014 (NSW).

5 In this decision, any reference to 'the Lot owner' is a reference to the appellant; and any reference to 'the owners corporation' is a reference to the respondent.

6 The documents of the parties filed in respect of the appeal contained the documentary evidence and written submissions that were before the Tribunal and a transcript of the Tribunal hearing.

7 The factual background to the decision of the Tribunal on 17 August 2021 is extensive.

8 The appellant ('Coscuez') became the registered owner of Lot 4 in August 2015. Ms Tang is the director of the appellant.

9 At all relevant times prior to August 2015 Lot 4 was owned by Ms Tang's mother. During the relevant period prior to August 2015, Ms Tang was involved in dealing with the owners corporation on behalf of her mother.

10 The dispute arises from modifications to Lot 4 and proximate common property of the strata scheme in about 2010-2011 that had the effect of creating a sub-division of Lot 4 into two separate areas which are used as distinct commercial premises.

11 Those areas were referred to in the Tribunal's decision as 'Lot 4A' and 'Lot 4B'. It does not appear there was any amended strata plan registered creating a separate Lot 4A and Lot 4B. Rather, although the parties referred to 'Lot 4A' and 'Lot 4B' in submissions, they are distinct areas within Lot 4 with separate commercial premises operating in each of the areas. A more accurate description of the area is 'Shop 4A' and 'Shop 4B'.

12 The modifications to Lot 4 and proximate common property were the subject of a local Council Development Consent modification under s 96 (as it then was) of the *Environmental Planning and Assessment Act 1979* (NSW) on 19 April

2011 and a Complying Development Certificate issued by a Private Certifier on 27 April 2011.

13 Prior to the modifications, Lot 4 had been operated for a period of time as a computer store. After the modifications were complete, Shop 4A was operated as a 'Chatime' iced tea store; and Shop 4B was operated as a gift store known as 'Morning Glory'. Over subsequent years, Shop 4B has been operated as a convenience store; and then as a newsagency. Shop 4A has remained an iced tea store.

14 Included in the modifications was a change in the street facing façade of Lot 4. A "swinging door" was moved from its position to become the entrance door to Shop 4B; and bi-fold doors installed to Shop 4A. The Lot owner asserted to the Tribunal that the door had been moved by the computer shop tenant in about 2010; not as part of the modifications to divide Lot 4 into two shops. The owners corporation asserted to the Tribunal that the door had been moved or created as part of the modifications so that there was access to Shop 4B.

15 In any event, it is clear that prior to 2010 the 'swinging door' had been in a different position, and was part of the common property of the strata scheme rather than Lot property.

16 In the process of changing Lot 4 into Shop 4A and Shop 4B and in the period after the altered position of the 'swinging door', there were also changes made to the façade of Lot 4 and common property. Whether such changes were part of the Development Application is not a matter for consideration in this appeal.

17 When the Development Application for the modification to Lot 4 and proximate common property was lodged with the local Council in 2010, the owners corporation consented to the lodgement. However, the position of the owners corporation was that it had consented to the lodgement of the Development Application on the condition that:

(1) A separate water meter would be installed prior to the commencement of the 'Chatime' iced tea store in Shop 4A;

(2) The separate water meter would be installed at the cost of the owner of Lot 4; and

(3) The owner of Lot 4 would be responsible for the cost of water usage as determined by the meter.

18 From about 2011 onwards, the owners corporation and the owner of Lot 4 have been involved in disputation over a number of issues that included:

(1) Whether or not the Lot owner had installed an "unauthorised toilet" in addition to the existing toilet within Lot 4.

(2) Water usage in Shop 4A and whether the Lot owner was liable to pay for water usage (and if so, what was the cost).

(3) The alterations to the common property façade to the front of the Lot, including the installation of the "swinging door".

(4) Whether various Special By-laws of the owners corporation were harsh, unfair or unconscionable.

(5) Charges and expenses imposed by the owners corporation on the Lot owner which have been listed on the levy register for the Lot.

19 At Annual General Meetings of the owners corporation in 2014; 2015; and 2018 three (3) Special By-laws laws were passed and subsequently registered as Special By-laws 8; 9; and 10.

20 The substance of Special By-law 8 was that an owner, occupier, or lessee of a Lot:

(a) Must comply with "all laws that are applicable to the Lot" (including local Council Development Approvals);

(b) Must ensure the Lot is not used for any purpose or altered in any way that is prohibited by any law and is maintained in accordance with the law (including, if use of a Lot is only permissible with Development Consent, providing evidence that Development Consent has been obtained to the owners corporation);

(c) Must ensure that the Lot is not used for any purpose or altered in any way that is prohibited by the law and is maintained in accordance with the law;

(d) Must not engage in or permit on Lot or common property any activity, business or trade that is prohibited by law or requires legal consent or authorisation without such consent or authorisation;

(e) Must not, in the case of an owner, allow more than 2 occupiers above the age of 16 years per bedroom in their Lot.

21 Special By-law 8 provided that a Lot owner or occupier in breach of the by-law must "indemnify and keep indemnified" the owners corporation for "all legal and

other costs" arising out of taking legal proceedings against the Lot owner or occupier for breach of the by-law.

22 The substance of Special By-law 9 was that an owner or occupier of a Lot:

(a) Not damage common property or personal property of the owners corporation and restricted the bringing of heavy items onto the common property that may cause structural damage;

(b) Indemnify the owners corporation for any loss caused by damage to the common property;

(c) Is responsible for paying any fines or penalties imposed by a government agency due to the failure to comply with the By-law; and any costs of the owners corporation. The costs of the owners corporation were payable on demand.

(d) Is responsible for paying the owner's corporation's legal costs of bringing or defending a mediation, adjudication, Tribunal or other legal application.

(e) Allowed recovery of costs imposed under the provisions of Special By-law 9 by way of a levy on the Lot owner under s 80 (1) of the SSM Act.

23 At an Extraordinary General Meeting of the owners corporation on 29 March 2017, a Motion to repeal Special By-law 8 and Special By-law 9 was defeated.

24 The substance of Special By-law 10 was that a Lot owner and occupier of a Lot:

(a) Comply with the By-laws of the strata scheme;

(b) If there was a breach of a By-law of the strata scheme; the owners corporation may recover as a debt due various costs and expenses for the taking of action due to breach of the By-law, including legal costs; and administrative costs.

25 The dispute regarding the Lot owner's alterations to common property arising from the 2011 sub-division into Shop 4A and 4B including the position of the 'swinging door' led to the Lot owner putting forward a Motion to have a common property rights By-law approved to retrospectively authorise the works on a number of occasions.

26 The proposed common property rights by-laws were considered at general meetings of the owners corporation on 1 June 2011 (but this proposed common property rights by-law only related to the works in Shop 4A); 28 March 2017; 22 August 2017; and 25 July 2018.

27 The dispute involving payment of water usage for Shop 4A escalated in 2016 when the then Solicitors acting for the owners corporation (Pobi Lawyers) wrote to the Lot owner on 1 August 2016 demanding payment of $9,511.14 for water usage; and the Lot owner responded to that correspondence.

28 Prior to that correspondence, there had been disputation as to whether a water meter installed in Lot 4 was not adequately capturing water use by Shop 4A.

29 In about 2011 the owners corporation has installed a water meter that captured water use in Shop 4A and "two other commercial Lots" (affidavit of Mr Koh, strata committee member, dated 3 May 2021 para [15] (h)). The owners corporation had removed the water meter that had been installed by the Lot owner pursuant to the Development Consent because the owners corporation asserted that water meter "only captured water usage of the Shop 4A basin in the toilet and to avoid confusion when taking meter readings" (affidavit of Mr Koh dated 3 May 2021 para [15] (k)).

30 On 5 July 2017 at a general meeting of the owners corporation a resolution was passed that the Lot owner:

> "Pay for water consumption as per the water meter reading as per the condition agreed for Cha Time (sic) to submit their (sic) Development Application to Randwick City Council."

31 Over the years there has been a number of mediations at NSW Fair Trading between the parties; and previous proceedings in the Tribunal. It is unnecessary to detail each of the mediations and Tribunal proceedings, other than in respect of the following:

(a) On 25 May 2017 in Matter SCS 16/48266 the Tribunal ordered the Lot owner to remove all works *"to the common property front façade implemented on or since 2011…and to restore the common property façade to the condition it was in prior to the performance of the unapproved works…"* within 90 days of the Tribunal's orders. At the hearing in the Tribunal in these proceedings, the owners corporation submitted that the 2017 Tribunal proceedings did not include the 'swinging door' because that issue had not been part of the proceedings. The Tribunal accepted that the owners corporation had not sought restoration of the 'swinging door' in the 2016 proceedings brought by the owners corporation.

(b) On 26 September 2019 the parties had agreed in writing at a mediation conducted by NSW Fair Trading that the owners

corporation was prepared to consent retrospectively to the installation of the 'swinging door' provided the parties could agree on compensation to be paid to the owners corporation for the alteration of common property. The agreement noted the Lot owner was prepared to pay $17,000 to the owners corporation to "settle the matter of the door".

32 The Lot owner complied with the orders of the Tribunal dated 25 May 2017 in respect of restoration of the common property façade proximate to Shop 4A and Shop 4B. .

33 There was also a further dispute between the parties about purported increased insurance costs of the owners corporation by reason of the use of Shop 4B. However, that issue is not the subject of the appeal, and will only be referred to briefly in this decision.

CLAIMS BY THE PARTIES IN THE TRIBUNAL PROCEEDINGS

34 The owners corporation sought the following orders:

(1) The Lot owner remove the 'swinging door' to Shop 4B and a "second toilet" in Lot 4 and restore common property.

(2) The Lot owner pay the owners corporation $11,948.03 under s 232 (1) (a) or (d) of the SSM Act for water usage of Shop 4A. The order was sought on the purported "agreement" between the Lot owner's mother and the owners corporation which was a condition of the owners corporation consenting to the lodgement of the Development Application in 2010. The owners corporation did not claim the amount as an unpaid levy, but as an amount due under the "agreement".

(3) The Lot owner pay the owners corporation $2,516.98 as "outstanding one off-charges" under Special By-law 10. The purported "charges" involved "fire safety inspections"; "fire safety charges"; "debt recovery fees" and an "increased insurance premium" that had been calculated as set out in a resolution (Resolution 10) passed at the Annual General Meeting of the owners corporation on 17 December 2019. That resolution was in respect of the purported increased insurance costs the owners corporation had incurred because of the type of tenant in Shop 4B.

(4) Costs.

35 The Lot owner sought the following orders:

(1) The Tribunal declare invalid under s 23 (sic) of the SSM Act resolutions passed by the owners corporation at general meetings in respect of (a) toilet; (b) water consumption; and (c) insurance.

(2) The owners corporation refund under s 232 (1) (a) and (e) of the SSM Act $6,631.98 in respect of "all contributions…over and above Lot 4's unit entitlement, interest and expenses charged".

(3) The owners corporation remove under s 232 (1) (a) and (e) of the SSM Act from the levy register $13,077.51 "being incorrect expenses, strata levies and interest" levied against the Lot owner. Such expenses relevantly included the water usage for Shop 4A and various "one off charges" imposed by the owners corporation pursuant to Special By-laws 8, 9 and 10. Such expenses were lodged on the Lot owner's levy register under s 99 of the SSM Act.

(4) An order under s 150 (1) of the SSM Act that Special By-laws 8, 9, and 10 be declared invalid.

(5) An order under s 149 (1) of the SSM Act that the respondent register the common property rights By-law that was not passed at general meetings of the owners corporation in 2017 and 2018 retrospectively approving alterations to common property.

(6) An order under s 126 (2) of the SSM Act that the owners corporation "consent" to the installation of the swinging door and ancillary framing to the common property façade.

(7) Such further or other orders as the Tribunal regarded as "just".

THE DECISION OF THE TRIBUNAL DATED 17 AUGUST 2021

36 The decision of the Tribunal comprises of 24 pages. The reasons are summarised as follows:

Second Toilet

37 The Tribunal was not satisfied there had been a "second unauthorised toilet" constructed in Lot 4. The Tribunal held that if it was wrong in this conclusion, the Tribunal found the installation occurred "many years ago".

38 The Tribunal held that the resolution passed at a general meeting of the owners corporation that the Lot owner remove the "second toilet" and restore common property was "invalid" because "there was insufficient evidence to support it".

39 The Tribunal further stated as follows (at para [30]):

> In the interests of settling this dispute on a final basis, even if (contrary to the decision of the Tribunal) the toilet was wrongfully installed, the Tribunal hearby makes a works approval order that, pursuant to s 126 of the SSMA (sic), the "second toilet" a (sic) subject of these applications, is approved.

40 There are problematic aspects to the findings; comments; and order of the Tribunal at paragraphs [27]-[30] of the decision. The key finding was that there

had been no “second toilet” constructed in Lot 4. That finding was not appealed against by the owners corporation.

41 The ‘finding’ under s 126 of the SSM Act is expressed as an alternative. In substance, it is not a finding, it is obiter dicta. However, because the comments of the Tribunal raise issues of principle regarding the interactions between ss 108, 111, 126, 142, 143, 144, 149, and 232 of the SSM Act it is appropriate we refer to the applicable legal principles.

42 The Tribunal has no power under s 232 of the SSM Act to make remedial declarations (*Walsh v The Owners-Strata Plan No 10349* [2017] NSWCATAP 230 at [60]-[61]).

43 The Tribunal found in “in the alternative” to its finding that no “second toilet” had been constructed in Lot 4, that the owners corporation must consent to any such alteration of common property under s 126 (2) and (3) of the SSM Act in respect of the “second toilet” to ‘settle the dispute on a final basis’.

44 Section 126 of the SSM Act states as follows:

> **126 Orders relating to alterations and repairs to common property and other property**
>
> (1) **Order requiring owners corporation to carry out work on common property** The Tribunal may, on application by a lessor of a leasehold strata scheme or an owner of a lot in a strata scheme, order the owners corporation to consent to work proposed to be carried out by an owner of a lot if the Tribunal considers that the owners corporation has unreasonably refused its consent and the work relates to any of the following—
>
> (a) minor renovations or other alterations to common property directly affecting the owner’s lot,
>
> (b) carrying out repairs to common property or any other property of the owners corporation directly affecting the owner’s lot.
>
> (2) **Order consenting to owner’s work on owners corporation property** The Tribunal may, on application by a lessor of a leasehold strata scheme or an owner of a lot in a strata scheme, make an order (a ***work approval order***) approving of minor renovations or alterations or repairs already made by an owner to common property or any other property of the owners corporation directly affecting the owner’s lot if the Tribunal considers that the owners corporation unreasonably refused its consent to the minor renovations or alterations or repairs.
>
> (3) A work approval order is taken to be the consent of the owners corporation to the renovations, alterations or repairs and may provide that it has effect from a day specified in the order that occurred before the order was made.

(4) In deciding whether to grant a work approval order or to provide for the order to have effect from a day that occurred before the date of the order, the Tribunal may take into account the conduct of the parties in the proceedings, for example, if an owner did not first seek the consent of the owners corporation before carrying out the renovations, alterations or repairs.

(5) **Responsibility for ongoing repair and maintenance of affected property** The Tribunal may specify in an order under this section whether the owners corporation or the owner of the lot has the ongoing responsibility for the repair and maintenance of any additional property arising out of a minor renovation or alteration or repair to common property approved under the order.

(6) If an order provides for the owner of a lot to have the ongoing responsibility for the repair and maintenance of any such additional property, the order also has effect in relation to any subsequent owner of the lot.

45 A "work approval order" under s 126 (2) of the SSM Act does not circumvent the provisions of ss 108 and 111 of the SSM Act to the extent they apply.

46 Section 108 of the SSM Act states:

108 Changes to common property

(1) **Procedure for authorising changes to common property** An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.

(2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.

Note—

If the special resolution is a sustainability infrastructure resolution fewer votes may be needed to pass it. See section 5(1)(b).

(3) **Ongoing maintenance** A special resolution under this section that authorises action to be taken in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.

(4) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.

(5) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless—

(a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and

(b) the owners corporation makes the by-law.

(6) The by-law—

(a) may require, for the maintenance of the common property, the payment of money by the owner at specified times or as determined by the owners corporation, and

(b) must not be amended or repealed unless the owners corporation has obtained the written consent of the owner concerned.

(7) Sections 143 (2), 144 (2) and (3) and 145 apply to a by-law made for the purposes of this section in the same way as they apply to a common property rights by-law.

Note—

A new by-law or other changes to the by-laws for a strata scheme must be approved by a special resolution of the owners corporation (see section 141).

47 Section 111 of the SSM Act states:

111 Work by owners of lots affecting common property

An owner of a lot in a strata scheme must not carry out work on the common property unless the owner is authorised to do so—

(a) under this Part, or

(b) under a by-law made under this Part or a common property rights by-law, or

(c) by an approval of the owners corporation given by special resolution or in any other manner authorised by the by-laws.

48 Section 142 of the SSM Act states:

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.

49 Section 143 of the SSM Act states:

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.

50 Section 144 of the SSM Act states that a common property rights by-law must make provision for either the owners corporation or the Lot owner to bear responsibility for the maintenance or upkeep of the common property to which the common property rights by-law pertains.

51 If a proposed common property rights by-law is unreasonably refused at a general meeting of the owners corporation, a Lot owner may seek an order from the Tribunal that the proposed common property rights by law be registered under s 149 of the SSM Act. Section 149 of the SSM Act will be discussed in more detail later in this decision.

52 If a Lot owner alters or adds to common property for the purpose of improving or enhancing the common property; or in a manner that creates exclusive use or enjoyment over common property; or in a manner that creates special privileges in favour of the Lot owner over common property, then a common property rights by-law passed by special resolution under s 111 (b) of the SSM Act is required to authorise the works unless the works involve minor or cosmetic alterations, or repairs (*The Owners-Strata Plan No 6373 v B & G Trading Pty Ltd* [2020] NSWCATAP 202 at [100]-[118] and [137]-[141]).

53 In *Endre v The Owners-Strata Plan No 17771* [2019] NSWCATAP 93 ('*Endre*') the Appeal Panel described the legislative scheme under the SSM Act for approval of alterations to common property as follows (at [39]-[45]):

> Common property is held by an owners corporation as agent for all lot owners as tenants in common in shares proportional to the unit entitlements: s 28(1) of the Strata Schemes Development Act 2015 (NSW) (Development Act). However, an owners corporation is permitted to deal with the common property as provided in the Development Act and the Management Act: s 23 of the Development Act.

> Alterations to common property can, generally, only be made with the approval of an owners corporation. Part 6 Division 1 of the Management Act, particularly ss 108-110, regulates the type of works for which approval is required and whether such approval must be by way of special resolution and/or requires consent. Sections 109 (Cosmetic work by owners – which permits work without consent) and 110 (Minor renovations by owners – which permits a work with consent given by ordinary resolution) in the Management Act are new and additional provisions to those found in the 1996 Act. They ameliorate the strict requirement for a special resolution found in s 108.
>
> The definitions of permitted work in ss 109 and 110 are inclusive, there being the possibility of interpretive differences concerning what work is permitted without seeking approval, what work requires an ordinary resolution and what work requires a special resolution.
>
> The powers of an owners corporation to approve work to common property must also be read in the context of the power of an owners corporation to make a common property rights by-law (including the power to grant special or exclusive use rights to particular Lot owners) under Part 7 Division 3 of the Management Act and the power of the Tribunal to review any unreasonable refusal as provided in s 149 of the Management Act.
>
> Taken together, these provisions enable the approval of work and/or the granting to a Lot owner of exclusive use rights to common property, including on terms requiring the benefited lot owner to repair and maintain the common property to which the right relates. In respect of the granting of exclusive use by-laws, under s 149(2) (if the by-law has been unreasonably refused by an owners corporation) the Tribunal may approve the by-law. However the Tribunal is required to have regard to:
>
> (1) the interests of all owners in the use and enjoyment of their lots and common property; and
>
> (2) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.
>
> It seems clear from the above that the purpose of the powers given to an owners corporation (and the Tribunal in a permitted review of any refusal) is to enable the grant of rights over common property to individual Lot owners and to permit such Lot owners to carry out minor renovation or alterations or repairs. The power to do so is despite other Lot owners having an interest in the common property as tenants in common. That is, individual rights to object might be overridden, even if there is a loss of amenity suffered by an objector.
>
> It follows that the determination of whether a refusal is unreasonable must depend upon the conduct of the owners corporation and all the relevant circumstances.

54 As discussed previously, the key factual finding was that no "second unauthorised toilet" had been constructed in Lot 4 (paragraph [27]-[28] of the decision). If the Tribunal had found that common property had been altered by way of the construction of a "second toilet" in Lot 4, it would have had to determine whether the works were such that a common property rights by-law was required to authorise the works, rather than simply considering whether

there had been unreasonable refusal of consent under s 126 (2) of the SSM Act.

55 As the owners corporation did not file its own appeal against the orders of the Tribunal regarding the "second toilet" it is unnecessary to address whether there was any error of law; or error to which leave would be granted under cl 12 of Sch. 4 of the NCAT Act; in regard to the findings and orders of the Tribunal dealing with the "second toilet". The finding that there was no "second toilet" constructed remains unchallenged.

Swinging Door

56 The issue of the 'swinging door' is dealt with at paragraphs [31]-[53] of the decision. The Tribunal noted Ms Tang objected to the description "swinging door" and preferred "entrance door" but the Tribunal, quite correctly, stated that the manner of description was mere semantics.

57 The Tribunal held:

(1) The door was unauthorised work that the owners corporation had sought to be removed for a considerable period of time (para [44]);

(2) The door was moved "without any specific authorisation" from the owners corporation, and consent to the lodgement of the Development Application was not approval. The installation or relocation of the door was not a "minor renovation" under s 110 of the SSM Act (para [34]);

(3) The order sought by the owners corporation that the door be removed and the common property restored was not a matter that had been raised in the Tribunal proceedings determined on 25 May 2017; and the owners corporation was not prevented from seeking the order in the current proceedings (paras [42] and [48]);

(4) Adopting the written submissions of the owners corporation (paragraphs [9]-[19]) "the refusal in the past to pass a by-law authorising the works retrospectively was not unreasonable" because: (a) the location of the door was changed "with little or no admission by the then owner that this had occurred; (b) there was no "acceptance of any wrongful failure to obtain the permission of the Owners before moving the door or to require rectification as a condition of the ongoing occupancy of the shop"; and (c) the repositioning or installation of the door "would presumably have enhanced the amenity of the premises which would have increased their commercial value". It was "reasonable that some compensation be paid arising from the failure to seek approval of the Owners prior to moving the door" (paragraphs [52]-[55] of the Tribunal's reasons.

58 The Tribunal ordered that the door be removed and common property restored "within 90 days of these orders, unless agreement is reached within that time regarding compensation to be paid to the owners for the unauthorised works".

Water Usage Cost - Shop 4A

59 The issue of whether the Lot owner was responsible for payment of the water usage of Shop 4A and if so the amount payable was dealt with at paragraphs [56]-[77] of the decision.

60 The Tribunal held:

(1) There was an "agreement" between the owners corporation and the mother or the Lot owner (the predecessor Lot owner) in 2010 that (a) separate water meter would be installed into Shop 4A prior to the commencement of the 'Chatime' tea shop; (b) the separate water meter would be installed at the Lot owner's cost; and (c) the Lot owner would be liable for the cost of water as determined by the meter;

(2) The agreement was based on an email from Ms Tang dated 24 September 2010 attaching the proposed terms, and the owners corporation agreed to the terms as a condition to giving its approval for the lodging of the Development Application;

(3) The agreement bound not only the predecessor Lot owner but all subsequent owners of the Lot;

(4) There was no agreement for separate water meters for Shop 4A and Shop 4B as the Lot owner was "already responsible for water usage charges as part of the Owners Corporation water usage charges as part of their normal contributions" (paragraph [63]);

(5) From 2012 the Lot owner disputed that it was liable for water usage of Shop 4A and Shop 4B and asserted that it was only liable for water usage from Shop 4A to be offset and reduced by the water charges to Shop 4B.

(6) The owners corporation had removed the water meter that had been installed by the Lot owner into Shop 4A and installed a separate water meter (that dealt with all of the commercial Lots) because, based on inspections by "qualified tradespeople", the water meter installed by the Lot owner was not accurately capturing water usage by Shop 4A.

(7) The installation of a new water meter by the Owners Corporation "does not remove the liability for Coscuez to pay for all water used by Lot (sic) 4A as it was a condition of the Owners (sic) agreeing to the subdivision of the Lot, to the commercial benefit of Coscuez, that Coscuez pay the water usage of the new Lot (sic) 4A" (paragraph [71]);

(8) The Tribunal "accepts the calculation of the Owners (sic)" dated 12 July 2021 at paragraph [47] that the Lot owner had paid $3,370.40 for water

usage and there remained outstanding an amount of $11,948. This amount included the amount of $9,511.14 for the period between June 2011 and June 2016 that was referred to in the letter of the owners corporation's then Solicitors Pobi Lawyers dated 1 August 2016.

(9) The Tribunal rejected the argument of the Lot owner that (a) it was not liable for water usage prior to becoming owner of the Lot; and (b) that the owners corporation was precluded from recovering amounts more than 6 years prior to the date of commencing proceedings. The obligation to pay *"runs with the Lot even though there has been a change of ownership"* and *"the fact that the Owners (sic) have not taken action to recover the debt does not mean the debt is expunged*".

61 The Lot owner was ordered to pay the owners corporation $11,948 by 24 September 2021 "pursuant to s 86 of the SSMA (sic)" (paragraphs [77] and [107]).

Increased Insurance Cost

62 The owners corporation had passed a resolution at the Annual General Meeting on 17 December 2019 that the owners corporation could recover increased insurance costs because its previous insurer had declined to quote to reinsure the property due to Shop 4B being used as a newsagency/lottery commercial occupant selling tobacco products.

63 The Tribunal found there was no basis for the purported increased cost of insurance to the strata building being levied on the Lot owner, with the owners corporation having no power under s 82 of the SSM Act to impose such a levy. The only way such a levy could be imposed was either (a) by consent; or (b) by order of the Tribunal. The owners corporation had not made an application under s 82 (2) of the SSM Act that the Tribunal order such a levy be imposed on the basis the Lot owner had unreasonably refused consent under s 82 (1) of the SSM Act.

64 The findings and orders of the Tribunal regarding the purported increased cost of insurance have not been appealed by the owners corporation and it unnecessary to discuss this issue further.

'One off Charges' Levied on the Lot owner and the Validity of Special By-Laws 8, 9, and 10

65 The issue of whether the Lot owner was liable to pay "one off charges" under Special By-laws 8; 9; and 10; and whether the By-laws should be set aside as

being harsh, unfair or unconscionable is dealt with at paragraphs [88]-[103] of the decision.

66 Paragraphs [88]-[101] deal with whether or not Special By-laws 8, 9 and 10 are harsh, unfair or unconscionable. The Tribunal found the Special By-laws were not harsh, unfair or unconscionable.

67 Paragraph [101] is the finding that the amount of $2,167.79 was "due and payable and no contribution is to be refunded to Coscuez". The reasons do not identify what specific matters the charges relate to, other than by a passing reference to the written submissions of the owners corporation dated 20 July 2021. Those submissions referred to charges for "fire safety related issues" (some of which the Lot owner had paid); "meeting fees" (which had been paid by the Lot owner); and "one off charges for debt recovery fees".

68 However, despite finding that the amount of $2,167.79 was "due and payable" in respect of such "one off charges" that had been issued by the owners corporation pursuant to Special By-laws 8, 9 and/or 10; the Tribunal failed to make an order that the Lot owner pay the owners corporation the amount of $2,167.79.

69 The Tribunal excluded the levied "charge" for the purported "increased insurance premium". However, in its Orders (at paragraph [108]) the Tribunal made the following order:

> The Tribunal declares that the present charge on the levy register of Lot 4 reflecting an increase in insurance premium, and interest accruing on such sum, is invalid and no such charge is payable by the owner of Lot 4, Coscuez.

70 There is no other reference in the orders of the Tribunal in respect of the 'one off charges' under the Special By-laws, such as any order for payment of levy contributions of a different amount under s 87 (2) (a) of the SSM Act.

71 The Tribunal noted at paragraph [89] that the "substance" of Special By-laws 8, 9 and 10 sought to pass on "any costs incurred" by the owners corporation in "enforcing by-laws, planning laws (sic), arising from damage to property" that incurred "costs" for the owners corporation, and "enables costs recovery" by the owners corporation. The Tribunal referred briefly to the NSW Court of Appeal decision in *Cooper v The Owners-Strata Plan No 58068* [2020]

NSWCA 250 as setting out the applicable legal test for whether a By-law is harsh, unconscionable or oppressive (without setting out the applicable test) and that both parties had made written submissions on whether the said By-laws were harsh, unconscionable, or oppressive.

72 The Tribunal stated at paragraph [90]:

> These by-laws may have the beneficial effects of ensuring that if lot owners ignore by-laws, flaunt planning laws, or "turn a blind eye" to unauthorised works undertaken by their tenants they will be held liable for the same. There will be a "price to pay". Thus, engaging in such behaviour is not without cost. This may discourage poor behaviour by Lot owners. Such a (sic) by-law is directly beneficial to other lot owners, in that instead of legal and other costs being shared between all lot owners they can become the liability of the lot owner whose failure to adhere to planning laws and by-laws led to the expense being incurred. Thus they are of very direct benefit to other lot owners.

73 The Tribunal then referred to Special By-law 10 and noted that Clause 1 (c) contained a provision that "If there is any direct inconsistency between this by-law and an Order or a Court of Tribunal, that Order shall prevail to the extent of any inconsistency". The Tribunal stated that this was a "protection" to the Lot owner against "cost recovery" by the owners corporation, because the Lot owner could make an application to NCAT "for orders" (including an order that it not be levied costs under Special By-law 10).

74 The Tribunal found (at paragraph [94]) that "if not for Clause 1 (c) of Special By-law 10, it "may" have considered "the by-laws harsh, unconscionable or oppressive".

75 At paragraphs [96]-[98] the Tribunal referred to the submission of the Lot owner that it was harsh, unconscionable or oppressive for the said By-laws to make the Lot owner responsible for costs and expenses arising from breaches by the occupant of the Lot. The Tribunal rejected the submission of the Lot owner.

76 At paragraphs [99]-[100] the Tribunal also rejected the submission of the Lot owner that the By-laws were harsh, unconscionable or oppressive because they involved expenses and contributions to levies being imposed unevenly upon Lot owners.

SCOPE AND NATURE OF APPEALS

77 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").

78 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 Sch. 4 Cl. 12 of the NCAT Act.

79 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].

80 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 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.

81 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).

82 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 Schedule 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.

83 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.

84 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.

85 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]).

GROUNDS OF APPEAL

86 The grounds of appeal referred to in the appellant's written submissions of 22 October 2021 contain a degree of repetition. However, excluding repetition and prolixity, the substance of the grounds of appeal are:

(1) Failure to give adequate reasons (error of law);

(2) Application of incorrect legal principles (error of law);

(3) Significant new evidence has arisen that was not in evidence before the Tribunal (an error that requires leave to appeal being granted).

CONSIDERATION

Swinging Door-Unauthorised Alteration to Common Property and Unreasonable Refusal to Pass Common Property Rights By-law

87 The principles applicable to adequacy of reasons were dealt with by the NSW Court of Appeal in *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 at [65]-[77]. The quality (or detail) of reasons does not have to be optimal, but it must meet the minimum acceptable standard or "minimum characteristics" to be able to understand:

(1) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,

(2) the Tribunal's understanding of the applicable law, and

(3) the reasoning processes that lead the Tribunal to the conclusions it made.

88 In respect of the "swinging door", it is unnecessary to consider in detail the proposed common property rights by-laws that were defeated at general meetings of the owners corporation on 1 June 2011; 22 August 2017 and 25 July 2018 other than how they affected the decision at the meeting on 25 July 2018. The most recent refusal of the proposed common property rights by-law is that of 25 July 2018.

89 The Minutes of the Extraordinary General Meeting on 22 August 2017 contain some detail about the debate that occurred at the meeting. However, the Minutes do not set out the reasons why Lot owners voted against the Motion to pass a common property rights by-law, or what was the percentage of unit entitlements who voted for and against the Motion. In summary, the Minutes record the debate as follows:

(1) The Lot owner accused said the strata committee had been involved in "character assassination" and she had been "misled" about approval for the works being given.

(2) The Secretary of the strata committee reminded the meeting that the swing door of the newsagency (sic) is not to be confused with the bi-fold doors of Shop 4A.

(3) The Secretary presented his views and documents that the owners corporation had only consented to the lodging of the Development Application, not the proposes changes to common property.

(4) Various Lot owners present stated that “approval to sub-divide the shop” (sic) was not approval of the owners corporation to “have another door installed”.

(5) The building manager was not aware when the door was installed.

(6) Members of the strata committee told the Lot owner she “had to take responsibility of the changes to common property in her lot and not to push the blame onto the tenant or anyone else”.

(7) The Lot owner was asked to “show proof the swing door had been approved” and could not provide evidence.

(8) The Lot owner had “recently carried out works on the Chatime shop to comply with an NCAT order however the entrance door to the Kingsford Newsagency still remains”.

90 Importantly, the Minutes of the general meeting of the owners corporation dated 22 August 2017 make no mention of the Lot owner’s failure to offer compensation to the owners corporation for the alteration of common property as a reason for voting against the proposed common property rights by-law. The Minutes do not state that any Lot owner raised any issue that the works may be unsafe, structurally unsound, or non-compliant with any building standard or local Council requirements. The Minutes do not refer to any issue being raised that the Lot owner had not provided expert evidence that the works were structurally sound; or that further evidence was required.

91 The Minutes of the Annual General Meeting of the owners corporation on 25 July 2018 relevantly state that the proposed common property rights by-law was again defeated (Motion 76). The Minutes contain no detail of what was discussed at the meeting regarding the reasons why Lot owners voted against the Motion; nor what was the proportion of unit entitlements voting for and against the Motion.

92 The Minutes of the 25 July 2018 meeting contain a Motion to “correct” the Minutes of the Extraordinary General Meeting on 22 August 2017 in respect of what was said about the proposed common property rights by-law of the Lot owner (Motion 16). That Motion was defeated. It is not clear from the Minutes who proposed the Motion. From the contents of the Motion, it appears the Lot owner proposed the Motion. However, the contents of the Motion do not add

any additional reasons for refusing to pass the proposed common property rights by-law.

93 The evidence of the owners corporation before the Tribunal relevantly comprised of two affidavits from a strata committee member, Mr Koh, and documentation attached to those affidavits. However, neither affidavit contained any detailed sworn or affirmed evidence of Mr Koh about why he, or any other Lot owner, voted against the proposed common property rights by-law of the appellant at the meetings on 22 August 2017 or 25 July 2018.

94 Section 149 of the SSM Act states as follows:

> **149 Order with respect to common property rights by-laws**
>
> (1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—
>
> (a) on application made by an owner of a lot in a strata scheme, that the owners corporation has unreasonably refused to make a common property rights by-law, or
>
> (b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or
>
> (c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.
>
> (2) In considering whether to make an order, the Tribunal must have regard to—
>
> (a) the interests of all owners in the use and enjoyment of their lots and common property, and
>
> (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.
>
> (3) The Tribunal must not determine an application by an owner on the ground that the owners corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.
>
> (4) The Tribunal may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.
>
> (5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).
>
> (6) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

95 In *Bruce v Knight* [2021] NSWCATAP 224 the Appeal Panel summarised the principles enunciated in the main authorities dealing with s 149 of the SSM Act as follows (at [42]-[53]):

> Section 149 and its equivalents has been considered in many decisions of the Tribunal, the Appeal Panel and the Supreme Court. We summarise below the more important and useful statements of principle.
>
> The starting point, chronologically, is Drewe, a decision of the Supreme Court, and referred to in several of the decisions referred to below. On appeal to the Court, the plaintiff owners corporation submitted that the Tribunal had misapplied s 140 of the Strata Schemes Management Act 1996 (NSW) (1996 SSMA) (since repealed) in finding that a refusal to make a special by-law at a general meeting was unreasonable. Section 140 of the 1996 SSMA was the equivalent of s 149 of the SSMA.
>
> Relevantly, the Court found:
>
> > 27 Subsection 2 [of s 140 of the 1996 SSMA] required the Adjudicator to approach the first defendant's application by determining whether the plaintiff unreasonably refused consent to the installation of the wooden bi-fold doors that the first defendant had already installed? [sic] without prior approval. Further, that question fell to be determined having regard to the circumstances at the time of the refusal of consent, namely at the AGM on 17 February 2015.
> >
> > …
> >
> > 41 … The question to be asked and answered was whether the Owners Corporation's refusal of consent at the AGM, based on the material then available, was unreasonable, not whether the grounds were objectively reasonable …
>
> (emphasis added)
>
> We note that the Court refers to "circumstances" in [27] but to "material" in [41]. However, as the Appeal Panel noted in Donaldson at [105], her Honour's statement is best understood as a reference to the circumstances at the time, rather than evidence which may prove, disprove or objectively colour those circumstances; see too Endre at [45] below.
>
> Capcelea was a decision of the Tribunal which relevantly stated:
>
> > 36. In determining what the owners corporation or particular owners had in mind at the relevant time as the grounds for their decision, there may be the evidence in the minutes of the relevant meeting if they record debate and reasons, but such a record raises questions as to adequacy and completeness if it is anything less than an approved transcript of relevant deliberations prior to the taking of the decision.
> >
> > 37. In addition to that source, individual owners can provide evidence of their reasons and, on the view expressed in Milman v Owners SP 1389 [2005] NSWCTTT 196, should do so, in order to assist in the type of inquiry in these proceedings.
>
> …

56. The fundamental assessment, on which the challenging owners bear the onus of proof as further discussed below, is whether or not, taking into account those interests, rights and expectations, the decision to refuse the proposed by-law was unreasonable.

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

> 45 … the determination of whether a refusal is unreasonable must depend upon the conduct of the owners corporation and all the relevant circumstances.
>
> 52 … what the Tribunal is required to do is determine whether, in all the circumstances, the refusal of the respondent to approve the work was unreasonable.

53 That is not to suggest that individual lot owner's views are not relevant to determining whether the refusal by an owners corporation was unreasonable. Rather, it is one of the factors to be taken into account when determining whether the refusal to approve works was unreasonable in all the circumstances.

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

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

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

> 99 We disagree that the Tribunal is confined to examination of the material before the appellant at its meeting.
>
> 100 Section 149 poses the question whether a refusal was unreasonable. It does not contain any express limitation to the effect that in judging unreasonableness, a Tribunal's consideration is limited to the material before an owners corporation meeting.
>
> 101 Drewe is authority for the proposition that the question of unreasonable refusal is to be determined having regard to the circumstances at the time of refusal (see at [27]).
>
> 102 So much may be accepted. But "circumstances" is different to "material". Subsequent evidence or "material" which goes to the circumstances existing at the time of the meeting is, in our opinion, admissible.
>
> 103 This would seem to us to be common sensical. For example, if a meeting was informed that an important fact existed, when in truth it did not, there seems no sensible reason to exclude subsequent proof of the incorrectness of that fact. The incorrect fact may have been

> innocently put forward, or perhaps dishonestly put forward, but on either case the decision of the meeting would have been based upon an incorrect fact

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

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

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

(emphasis added)

Analysis of the principle

We summarise the principles to be applied as follows:

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

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

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

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

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

96 Assessment of whether the refusal of the proposed common property rights by-law was unreasonable is based upon an objective assessment of the relevant circumstances known at or prior to the general meeting of the owners corporation that refused to pass the common property rights by-law, having regard to (a) the interests of all lot owners in the use and enjoyment of their lots and the common property; and (b) the rights and expectations of any owner deriving a benefit under a common property rights by-law.

97 Subjective views of lot owners about matters that fall outside the ambit of s 149 (2) (a) and (b) of the SSM Act or are driven by emotions such as antipathy, distrust, jealousy or anger are of limited, if any, relevance. If anything, such matters may tend to indicate that the refusal of a proposed common property rights by-law is objectively unreasonable because the motivation of Lot owners who vote against the proposal common property rights-by law are not based upon the matters in s 149 (2) (a) and (b) of the SSM Act.

98 The reasons of the Tribunal at paragraphs [53]-[55] for finding that the refusal of the appellant's proposed common property rights by-law was not unreasonable do not refer to the authorities that set out the applicable legal principles pertaining to s 149 of the SSM Act. There is no reference to the evidence at the hearing, including the Minutes of the general meetings that considered the proposed common property rights by-law. There is also no reference to the evidence of Mr Koh or the appellant in respect of what occurred at the meetings and why Lot owners voted against the proposed common property rights by-law.

99 At paragraph [52] of its reasons, the Tribunal refers to accepting the submissions of the owners corporation, who had provided written submissions to the Tribunal hearing. However, the reasons do not sufficiently indicate why the Tribunal accepted those submissions, or that the Tribunal grappled with the evidence in the sense of adequately evaluating competing evidence in the course of factual findings rather than stating without analysis that one body of evidence was preferred over another (*Murray v Sheldon Commercial Interiors Pty Ltd* [2016] NSWCA 77 at [60]).

100 At paragraph [54]-[55] of its reasons the Tribunal refers to the failure of the Lot owner to offer adequate compensation for the alteration of common property. However, there was no finding that failure to offer compensation by the Lot owner was a reason that Lot owners voted against the proposed common property rights by-law at the most recent (or any) of the general meetings that considered the proposed common property rights by-law, rather than an issue that arose after the Annual General Meeting of the owners corporation on 25 July 2018.

101 The written submissions of the owners corporation dated 8 July 2021 to which the Tribunal referred to as 'accepting' refer at para [25] to the Lot owner not offering compensation, but there is no reference to any evidence that this was a consideration of Lot owners who voted against the proposed common property rights by-laws. The submissions of the owners corporation's legal representative is not a substitute for oral or documentary evidence as to why persons at the meeting on 25 July 2018 voted the way they did.

102 There is a reference in the submissions of 8 July 2021 to the owners corporation having obtained a valuation report valuing the altered common property at $22,683, but the submissions state the report was "not in evidence" and it is unclear whether that report was obtained prior or subsequent to the Annual General Meeting on 25 July 2018.

103 In 2019 there were negotiations between the parties and an agreement that the Lot owner would make an offer to the owners corporation to "settle the matter of the door", presumably on the basis that the strata committee of the owners corporation would indicate its support for any further proposed common property rights by-law if the strata committee found the amount of compensation offered "satisfactory".

104 However, such events occurred after the Annual General Meeting on 25 July 2018, and do not retrospectively confer a basis for Lot owners voting against the proposed common property rights by-law if, in fact, failure to offer compensation was not a matter taken into account by Lot owners who voted on 25 July 2018.

105 We accept that if common property is altered, or proposed to be altered, by a Lot owner it is often appropriate that the owners corporation be paid compensation for the loss of use or amenity over the altered common property. However, each matter depends on its own facts, and there is no absolute rule that the failure to offer compensation, or a dispute about what amount of compensation is appropriate, is always a reasonable basis for voting against a common property rights by-law. As discussed previously, the reasons of the Tribunal do not address the evidence as to why Lot owners voted against the proposed common property rights by-law on 25 July 2018.

106 We are satisfied an error of law has been established in respect of failure to give adequate reasons; and a failure to consider and apply the relevant legal principles under s 149 of the SSM Act.

107 Neither party raised before the Tribunal at first instance or the Appeal Panel whether there was any applicable limitation period for bringing proceedings in the Tribunal under s 149 of the SSM Act by a Lot owner in respect of the refusal of a proposed common property rights by-law; or under s 232 or 241 of the SSM Act by an owners corporation for a Lot owner to restore common property that had been altered without the passing of a common property rights by-law.

108 As this issue has not been raised or argued, it is inappropriate for us to make findings on this issue. However, Regulation 23 (3) of the Civil and Administrative Rules 2014 (NSW) ('the NCAT Rules') states:

> **23 General applications**
>
> …
>
> (3) Unless the Tribunal grants an extension under section 41 of the Act, an application must be made—
>
> > (a) in the case where enabling legislation specifies the period within which the application is to be made—within the period specified, or
> >
> > (b) in any other case—within 28 days from the day on which the applicant became entitled under the enabling legislation to make the application.
>
> …

109 Our preliminary view is that for applications where there is no limitation period identified in the SSM Act (which relevantly is the "enabling legislation") and the

application involves a type of matter where the application cannot be accepted by the Registrar of the Tribunal without evidence that mediation with NSW Fair Trading occurred or was attempted under s 227 (1) (a) or (b) of the SSM Act; or the Registrar considered that mediation was unnecessary or inappropriate in the circumstances under s 227 (1) (c) of the SSM Act (and noting that matters under s 227 (1) of the SSM Act do not include the types of disputes under s 227 (4) of the SSM Act), then the 28 day period would run from the date that either of the matters in s 227 (1) (a); (b); or (c) of the SSM Act occurred.

110 Even if proceedings had been taken in the Tribunal outside the period in Regulation 23 (3) (b) of the NCAT Rules, time could be extended under s 41 of the NCAT, applying the principles set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 at [22].

111 However, we reiterate that Regulation 23 (3) of the NCAT Rules only applies to circumstances where there is no limitation period under a particular provision of the SSM Act to bring Tribunal proceedings, such as s 106 (6) of the SSM Act (for discussion of applicable principles, see: *The Owners-Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98; and *The Owners-Strata Plan No 62713 v Liberant* [2022] NSWCATAP 80 at [80] and [84]); or no applicable limitation period under the *Limitation Act 1969* (NSW).

The Order that the Lot Owner Pay Water Usage for Shop 4A and Other Charges in the Amount of $11,948.

112 The submissions of the owners corporation before the Tribunal (which were also repeated in the appeal submissions) relevantly stated:

(1) There was an "agreement" between Ms Tang's mother and the owners corporation that the Lot owner would exclusively pay the cost of water usage of Shop 4A based on the readings of a water meter that assessed water usage of Shop 4A.

(2) The water usage charges "are payable as per the agreement" (respondent's submissions 12 November 2021 p 12 para [44]".

(3) The "water charges and other one off charges" were not levy "*contributions in the relevant sense under ss 81 or 83 of the SSM Act. These amounts were charges specific to Lot 4 arising under either the water agreement, under a separate agreement to pay (we refer to charges for holding a meeting, which have been paid) or under Special By-laws 8, 9, or 10…"* (respondent's submissions dated 12 November 2021 p 14 para [54]).

(4) Even though the "charges" were not levies under ss 81 and 83 of the SSM Act, the owners corporation was entitled to place the "charges" on the Lot owner's levy register under s 99 of the SSM Act, because s 99 of the SSM Act *"does not provide an exhaustive list of what may be kept on the levy register of a Lot only what records must be kept…an owners corporation may place charges or expenses owed by a Lot owner on the levy register for their Lot.*" (respondent's submissions 12 November 2021 pp 14-15 paras [52]-[57).

113 The Tribunal clearly accepted such submissions, but did not discuss in detail why it accepted the submissions.

114 However, what the submissions of the owners corporation and the reasons of the Tribunal are silent about is whether the Tribunal (as opposed to a Court) has jurisdiction to make a money order in favour of the owners corporation under s 232 of the SSM Act in respect of:

(1) Breach of an "agreement" to pay monies; and/or

(2) A "charge" calculated by the owners corporation as being imposed by a by-law.

115 In essence, the claim by the owners corporation was one of debt recovery, other than in the context of recovery of unpaid levies under s 86 of the SSM Act. The owners corporation accepted that the amount claimed for water usage for Shop 4A was not a levy for a contribution to the administrative fund or capital works fund of the strata scheme under s 81 of the SSM Act, which would be payable in accordance with the procedure under s 83 of the SSM Act and in respect of which the Tribunal may have jurisdiction to make an order for payment under s 86 of the SSM Act.

116 The only applicable provision of the SSM Act for the Tribunal to make an award of payment of money in respect of breach of the "agreement" and/or failure to make a payment of a charge or expense imposed by a by-law is s 232 of the SSM Act.

117 Section 232 of the SSM Act states as follows:

> **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,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) **Other proceedings and remedies** A person is not entitled—

(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

(4) **Disputes involving management of part strata parcels** The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if—

(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or

(b) any of the parties to the dispute fail to consent to its determination by the Tribunal.

(5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

(6) **Disputes relating to consent to development applications** The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the *Environme ntal Planning and Assessment Act 1979* relating to common property of the scheme.

> (7) **Excluded complaints and disputes** This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.

118 In *Vickery v The Owners-Strata Plan No 80412* [2020] NSWCA 284 ('*Vickery*'), the NSW Court of Appeal held by majority (Basten JA and White JA; Leeming JA dissenting) that:

(1) Section 106 of the SSM Act creates a statutory right to recovery rather than reflecting a general law cause of action; and

(2) Section 232 of the SSM Act confers jurisdiction and power to hear and determine a claim for damages under s 106 (5) of the SSM Act.

119 The dispute in this matter does not involve s 106 (5) of the SSM Act. However, in the context of whether the Tribunal had the power to award damages for breach of the duty of an owners corporation to keep and maintain common property in a reasonable state of repair under s 106 (1) of the SSM Act, the Court of Appeal discussed the ambit of the remedial powers under s 232 of the SSM Act.

120 In *Vickery*, both Basten JA and White JA referred to the ambit of the Tribunal's powers to settle complaints or disputes about the matters in s 232 (1) (a)-(f) of the SSM Act.

121 Basten JA stated at para [26] that the powers conferred in s 232 of the SSM Act were "broad". At paras [50]-[51] Basten JA stated:

> It does not matter for present purposes why it was thought inappropriate for adjudicators under the 1996 Act to award damages; however, it is unsurprising that when the functions of the adjudicators were transferred to the Tribunal, the prohibition on ordering payment of damages was discontinued.
>
> In short, the legislative history demonstrates that the language found in the chapeau to s 232(1) has at all stages been understood as sufficiently broad to encompass an order for the payment of damages. In the absence of an express prohibition in s 232 in relation to the powers of the Tribunal, it would be wrong in principle to construe the unchanged language as subject to an implied limitation which has not existed in its past emanations.

122 At paras [53]-[58], Basten JA set out "*other features of the current legislative scheme which support the conclusion that the Tribunal has power to order payments by way of damages*". At para [58], Basten JA concluded that the

Tribunal had power to award damages for a contravention of s 106 (1) of the SSM Act.

123 However, there is nothing in the reasoning of Basten JA to suggest that the Tribunal's power to award damages involving a cause of action that arises due to a "complaint" or "dispute" about the matters in s 232 (1) (a)-(f) of the SSM Act is limited to the failure to keep and maintain common property in a state of good repair under s 106 (1) of the SSM Act.

124 White JA stated that he agreed with Basten JA's analysis that the legislative history of the SSM Act supported the conclusion that the Tribunal had the power to award damages if there was a "complaint" or "dispute" about the matters in s 232 (1) (a)-(f) of the SSM Act; and that the fact that some provisions of the SSM Act gave the Tribunal a specific power to award the payment of monies did not limit conferral of the general remedial power under s 232 (1) of the SSM Act (paras [167] and [170]). White JA stated at [163]-[166]:

> It was critical to the decision in *Thoo* that a lot owner was not entitled to sue (in a court) for damages for breach of statutory duty, that an adjudicator could not award damages. This was because it was only the statutory remedies provided for by the 1996 Act that were available to enforce the duty imposed by s 62 of that Act (*Thoo* at [208]-[221]; *McElwaine* at [11]).
>
> The current Act removes adjudicators as a level of decision-making. By s 106(5) it reverses *Thoo* by providing that a lot owner can recover damages from an owner's corporation for breach of statutory duty. The current Act does not contain any express restriction, as was formerly applicable to an adjudicator, against the Tribunal's making an order for the payment of damages. These considerations, when combined with the width of the words in s 232 (which should be understood as conferring a power on the Tribunal to resolve a complaint or dispute), indicate that the Tribunal's authority under s 232(1) extends to making an order that the owners corporation pay damages for breach of its statutory duty under s 106(1) and (2).
>
> I accept, as Leeming JA says (at [149]), that it would also follow that the Tribunal would have jurisdiction to hear and determine a claim for nuisance brought by a lot owner based on an owners corporation's failure to take reasonable care to maintain the common property. That would follow if resolution of such a claim were necessary to resolve the complaint or dispute.
>
> In other words, I see no reason to read down the amplitude of the authority conferred on the Tribunal by s 232(1).

125 As with the decision of Basten JA, although White JA refers to the remedial powers of the Tribunal under s 232 (1) of the SSM Act in the context of a power to award damages for breach of the owners corporation's duty under s 106 (1)

of the SSM Act, there is no reason to confine the principles expressed in the judgment to a breach of duty under s 106 (1) of the SSM Act.

126 The authorities dealing with the breadth of the Tribunal's remedial powers under s 232 of the SSM Act do not delineate in a simple way the ambit of the Tribunal's powers. However, what is clear is that the power to make a remedial order to "settle a complaint or dispute" is limited to "complaints" or "disputes" that fall within s 232 (1) (a)-(f) of the SSM Act.

127 The breadth of the Tribunal's remedial power under s 232 of the SSM Act was referred to in *The Owners-Strata Plan No 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387 (*'Jacinta'*) and *The Owners-Strata Plan 62713 v Liberant* [2022] NSWCATAP 80 (*'Liberant'*) in the context of the Appeal Panel holding that the Tribunal has the power under s 232 of the SSM Act to make an order the equivalent to the power a Court has under s 90 of the SSM Act to order that monies ordered to be paid by the owners corporation not be levied against a Lot owner who was successful against the owners corporation in the proceedings (*Jacinta* at [183]-[202]; *Liberant* at [115]-[132]).

128 The remedial powers of the Tribunal under s 232 of the SSM Act are not unlimited. The owners corporation's responsibilities and functions are set out in ss 9 and 10 of the SSM Act that relevantly involve management and control of common property; administration of the strata scheme; the finances for the strata scheme; and functions conferred upon it by legislation.

129 In the context of the remedial powers under s 138 of the *Strata Schemes Management Act 1996* (NSW) (which did not include the power to award damages for the reasons discussed by the NSW Court of Appeal in *Vickery*), Rothman J stated in *The Owners-Strata Plan No 37762 v Pham* [2006] NSWSC 1287 at [62]-[65] that:

(1) The Tribunal does not have power to settle any dispute of complaint in a strata scheme;

(2) The words in paras (a) and (b) of s 138 of the *Strata Schemes Management Act 1996* (NSW) confine the subject matter of the dispute and are words of limitation.

(3) For there to be jurisdiction under s 138 (1) (a) of the *Strata Schemes Management Act 1996* (NSW) (the equivalent of s 232 (1) (e) of the

SSM Act); it is necessary to identify a function conferred by the Act or under the by-laws of the strata scheme.

130 The approach of Rothman J in *Pham* to the jurisdiction of the Tribunal to make remedial orders has been considered and applied by the NSW Court of Appeal (*EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288 at [50]); and the Appeal Panel (*Walsh* at [32]-[33]).

131 In *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425, Parker J stated at [111] that the Tribunal *"is not entitled to order an owners corporation to do things just because it considers it desirable to do so"*. That comment was in the context of considering the ambit of the Tribunal's power to order an owners corporation to take measures to comply with its duty to keep and maintain common property in a state of good repair. Parker J held that the Tribunal's remedial orders "*could go no further than the minimum necessary to comply with that obligation*".

132 However, in *Jacinta*, the Appeal Panel stated in the context of the Tribunal's powers under s 232 of the SSM Act at [183]-[185]:

> The types of orders that can be made are not specified, other than for the requirement that the order be one "to settle a complaint or dispute". There is no reason to construe such a grant in a limited way: Shin Kobe (above); Vickery per Basten JA at [26]-[28] and White JA at [167].
>
> Such an approach when construing a general order making power was also adopted by White J (as he then was) in construing the general order making power in s 21(1)(a) of the Agricultural Tenancies Act 1990 (NSW) which permits the Tribunal to make "an order giving effect to a determination that may be made by the Tribunal under this Act": Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289 at [79] and following.
>
> The question is whether there is a relevant dispute which would attract jurisdiction and enliven the order making power and whether the SSMA otherwise specifies which lot owners are to be levied in funding any liability of an owners corporation to a lot owner in respect of such disputes.

133 In the context of the Tribunal's general power to award damages under s 232 (1) of the SSM Act, the principles arising from the above authorities are distilled as follows:

(1) The party bring the application must be an "interested person" (as defined by s 226 of the SSM Act); original owner or building manager.

(2) There must be a "complaint" or "dispute" about a matter that falls within the provisions of s 232 (1) (a)-(f) of the SSM Act.

(3) The application must be brought within any applicable limitation period.

(4) The "complaint" or "dispute" must give rise to a cause of action of a type that an award of damages is appropriate to "settle" the dispute. Such a cause of action may be a common law cause of action (e.g. contract; tort) or the type of causes of action that exist under the SSM Act identified by the Court of Appeal in *Vickery*. The Tribunal has no jurisdiction to consider purely equitable causes of action (*Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 at [67]-[76]; *Pongrass v Small* [2021] NSWCATAP 314 at [81]).

(5) The cause of action must be sufficiently proximate to the matters in s 232 (1) (a)-(f) that an award of damages is the appropriate remedy. The "complaint" or "dispute" cannot be "about" a matter that falls within s 232 (1) (a)-(f) of the SSM Act unless there is such proximity. There must be a causal nexus between the identified breach and the damage sustained.

(6) If there is to be an award of damages, then the applicant must sufficiently prove loss caused by the breach of the identified cause of action. If no loss is sufficiently established, the Tribunal may award nominal damages or no damages at all (*McCrohon v Harith* [2010] NSWCA 67 at [118]-[126]; *Sabouni v Revelop Building and Developments Pty Ltd* [2021] NSWSC 31 at [41]-[42]; *Edwards v State of New South Wales* [2021] NSWSC 181 at [523]-[525])

(7) The "complaint" or "dispute" must not be an excluded matter under s 232 (7) of the SSM Act.

134 In our view, "complaints" or "disputes" involving causes of action that have only a tenuous or extraneous link to the matters in s 232 (1) (a)-(f) of the SSM Act are insufficient to invest the Tribunal with jurisdiction to make an award of damages. For example, it is difficult to envisage how a claim for personal injury damages in tort by a Lot owner claiming they were assaulted by a member of a strata committee in the course of an ongoing dispute about alternation of common property would be a type of matter to which the Tribunal has jurisdiction to award damages under s 232 (1) of the SSM Act.

135 The Tribunal's finding that the "agreement" entered into between the predecessor owner of Lot 4 regarding water usage gave rise to an award of damages in favour of the owners' corporation for unpaid water usage did not deal with the applicable principles for determining whether an award of damages could, as a matter of jurisdiction, be made. The Appeal Panel fails to see how such a claim falls within any of the powers of the Tribunal to settle disputes or rectify complaints as referred to in section 232 of the SSMA .The

Tribunal was not assisted by the submissions of the legal representative for the owners' corporation that did not explore the issue in any detail and worked on the assumption that the Tribunal did have jurisdiction.

136 There are a plethora of difficulties in the Tribunal's findings regarding the "agreement" and the purported cause of action giving rise to an award of damages. Such difficulties include the finding that the "agreement" bound a successor in title to the Lot; and how such an application by the owners corporation was within the applicable limitation period.

137 However, it is unnecessary for us to deal with those issues in detail. The unpaid water charges of $9,511.14 arose prior to July 2016. The *Strata Schemes Management Act 2015* (NSW) did not commence until 30 November 2016. There was no power under the *Strata Schemes Management Act 1996* (NSW) for the Tribunal to award damages, and any cause of action to award damages under the SSM Act must arise from 30 November 2016 onwards (*The Owners-Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 at [40]-[47]).

138 Accordingly, either in respect of the purported agreement or the claim by the owners corporation that the water usage charges are payable under Special By-laws 8,9, and/or 10, the Tribunal had no power to make an award of damages for the period prior to 30 November 2016.

139 In respect of the claim by the owners corporation that there were unpaid water charges in respect of Shop 4A after 30 November 2016 under the agreement, the reasons of the Tribunal do not explain how, as a matter of legal principle, that an agreement entered into by a predecessor of a Lot owner can bind a subsequent Lot owner; or which of the matters in s 232 (1) (a)-(f) the cause of action falls within. The reasons do not meet the minimum standard as set out in Orr, and we are satisfied an error of law had occurred.

140 The inadequacy of reasons also applies to the alternative claim by the owners corporation that the charges or expenses are recoverable as a debt due to Special By-laws 8, 9 and 10.

141 We accept that because an owners corporation has the power to make by-laws for the strata scheme that bind Lot owners and occupants under Division 7 of the SSM Act it is theoretically possible that (a) the By-law may impose a charge or expense; and (b) the Tribunal may have jurisdiction under s 232 (1) of the SSM Act to make a money order in favour of the owners corporation if the By-law is breached by the Lot owner failing to pay the charge or expense.

142 If the claim by the owners corporation is that the charge or expense imposed by the By-law is a dispute "about" the exercise, or failure to exercise, a function conferred or imposed under the By-laws of the strata scheme under s 232 (1) (e) of the SSM Act, then it is difficult to envisage how the failure to pay by the Lot owner is a "function" imposed on the Lot owner.

143 However, the claim by the owners corporation for payment of the charges or expenses purportedly imposed by the By-laws is further dependent upon a number of matters, being:

(1) The By-law complies with s 136 of the SSM Act and does not contravene the restrictions in s 139 of the SSM Act.

(2) The By-law is not the subject of an application in the proceedings to declare it invalid on the basis it was made without power or is harsh, unconscionable or oppressive under s 150 of the SSM Act. If there is a s 150 application (as there was in this matter) then determination of whether the By-law is to be declared invalid is the first step. Only if the By-law is not declared invalid does consideration of whether the Tribunal had jurisdiction under s 232 of the SSM Act to make a money order and whether in the exercise of its discretion a money order should be made.

144 Depending upon when the By-law was enacted and when proceedings were taken in the Tribunal, it may also be necessary to consider what limitation period is applicable. This depends on whether the cause of action falls within the *Limitation Act 1969* (NSW); or outside of it (*Taylor v The Owners-SP No 61285* [2021] NSWCATAP 270 at [57]-[58]). In our view, if the cause of action falls outside the causes of action identified in the *Limitation Act 1969* (NSW), then the limitation period in Regulation 23 of the NCAT Rules applies.

The Application By the Lot Owner to Have Special By-laws 8, 9 and 10 Declared Invalid.

145 Section 139 of the SSM Act states as follows:

139 Restrictions on by-laws

(1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.

Note—

Any such by-law may be invalidated by the Tribunal (see section 150).

(2) **By-law cannot prevent dealing relating to lot** No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

(3) **By-law resulting from order cannot be changed** If an order made by the Tribunal under this Act has effect as if its terms were a by-law, that by-law is not capable of being amended or repealed except by a by-law made in accordance with a unanimous resolution of the owners corporation and, in the case of a leasehold strata scheme, with the consent of the lessor of the scheme.

(4) **By-law cannot restrict children** A by-law for a residential strata scheme has no force or effect to the extent to which it purports to prohibit or restrict persons under 18 years of age occupying a lot. This subsection does not apply to a by-law for a strata scheme for a retirement village or housing exclusively for aged persons.

(5) **By-law cannot prevent keeping of assistance animal** A by-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of an assistance animal (as referred to in section 9 of the *Disability Discrimin ation Act 1992* of the Commonwealth) used by an owner or occupier of the lot as an assistance animal or the use of an assistance animal for that purpose by a person on a lot or common property.

(6) A by-law may require a person who keeps an assistance animal on a lot to produce evidence to the owners corporation that the animal is an assistance animal as referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.

(7) **Community management and precinct management statements prevail over by-laws** A community management statement or a precinct management statement prevails to the extent of any inconsistency with a by-law for a strata scheme that is also part of a community scheme or precinct scheme.

146 Section 150 of the SSM Act states as follows:

150 Order invalidating by-law

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).

(3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

147 The leading decision on s 150 of the SSM Act is *Cooper v The Owners-Strata Plan No 58068* [2020] NSWCA 250; (2020); 103 NSWLR 160 ('*Cooper*'). Cooper involved a by-law that prohibited the keeping of certain pets. Basten JA wrote the leading judgment. Macfarlan JA agreed with the orders of Basten JA, but added his own reasons which were "consistent" with the reasons of Basten JA and Fagan JA (para [75]). Fagan JA agreed with the orders of Basten JA, but gave his own reasons "briefly" (para [83]), which diverted from Basten JA on one issue.

148 Relevantly, the NSW Court of Appeal held:

(1) A By-law that limits the property rights of Lot owners is only valid if it protects from adverse affection the use and enjoyment by other occupants of their own Lots, or the common property (paras [46], [81]).

(2) Administrative convenience does not determine the validity of a By-law (paras [46]; [51]; [82]; [96]).

(3) The regulation of activities and behaviour of persons living in close proximity under a strata scheme will involve evaluative judgements (paras [46]; [51]; [82]; [96]).

149 Basten JA held (at para [26]) that the phrase "harsh, unconscionable or oppressive":

> …is better understood as a triune, three words conveying a single criterion. It is towards the other end of a scale from the hendiadys "just and equitable". It invokes the application of values, the content of which derives no elucidation from reference to synonyms, nor from a supposed differentiation from other similar words such as "unjust".

150 Basten JA further held that:

(1) The "single criterion" of harsh, unconscionable or oppressive" is to be given its context within the provisions of the SSM Act; and requires consideration of contemporary community standards (at paras [25], [28]-[29);

(2) Section 139 of the SSM Act focusses upon the character of the particular by-law rather than the actual or constructive knowledge of any particular Lot owner (para [45]);

(3) The power to make By-laws is not unconstrained. The power may only be exercised for proper purposes. The function and purpose of by-laws must be derived from the language of s 136 of the SSM Act and the structure of the SSM Act. A By-law that restricts the lawful use of a Lot on a basis that lacks a rational connection with the enjoyment of other Lots and common property is beyond the power to make by-laws under

s 136. A by-law is to be "for the benefit of lot owners" within the terms of s 9 (2) of the SSM Act (paras [56]-[57]; [59]; [61]; [63]).

151 Fagan JA disagreed with Basten JA that "harsh, unconscionable or oppressive" was a "single criterion". Rather, Fagan JA was of the view that each of the words are to be considered separately and none disregarded (at para [90]).

152 Fagan JA did not regard the relevant by-law as "harsh" or "unconscionable". His Honour did not believe it was necessary to explore in detail the meaning of "harsh" or "unconscionable" under ss 139 or 150 of the SSM Act generally. However, Fagan JA found the by-law was "oppressive" because the "inherent qualities of the by-law and the way it impacts on owners" forbid "a common incident of property ownership without providing benefit to others". The number of Lot owners who voted for the adoption of the by-law is immaterial (at paras [90]-[94]).

153 The reasons of the Tribunal briefly refer to *Cooper* (at [89]). However, the reasons do not explain in a sufficiently detailed way how the Tribunal applied the principles in *Cooper* to Special By-laws 8, 9 and 10.

154 The reasons of the Tribunal at para [90] refer to the by-laws "may" have a benefit to Lot owners because they "pass on the costs" in circumstances where a Lot owner "ignore by-laws, flout planning laws, or "turn a blind eye" to unauthorised works undertaken by their tenants, they will be liable for the same". However, the reasons then, in the same paragraph, go on to state that "such a by-law" (without clearly referring to which of Special By-laws 8, 9 and 10 is being considered) is "directly beneficial to other lot owners" because they can recover the cost of a lot owner "failing to adhere to planning laws and by-laws" rather than "sharing" the cost as a contribution to levies.

155 It is unclear from the reasons in para [90] whether the Tribunal was finding that Special By-laws 8, 9, and 10 "may" be beneficial to Lot owners, or were beneficial. There is also no clear articulation of how this falls within the principles expressed in *Cooper*.

156 At paragraphs [91]-[94] the Tribunal specifically referred to Special By-law 10, and found that it may have considered it "harsh, unconscionable or oppressive" but for the fact that the By-law provided that a Lot owner had the "safeguard" in

the By-law of being able to take action in a Court or Tribunal to obtain an order that the Lot owner not have to pay the expense, and the order would "prevail to the extent of any inconsistency".

157 The Tribunal's reasons do not explain how the mere fact that a Lot owner can take Tribunal or court proceedings leading to an order that is inconsistent with a By-law imposing a charge falls within the principles in *Cooper*. Any Lot owner can take Court or Tribunal proceedings if they have the legal right to do so.

158 Special By-laws 8, 9, and 10 are expressed in broad terms, and were relied upon by the owners corporation to demand payment for water consumption in Shop 4A; and various other "one off charges and expenses". The owners corporation not only demanded payment, but placed such amounts on the Lot owner's levy register under s 99 of the SSM Act, which, if the amounts were unpaid, raises the possibility that the owners corporation could assert that the Lot owner was in levy arrears and was not able to vote at general meetings whilst in arrears.

159 To place the onus upon the Lot owner taking legal proceedings to obtain an order "inconsistent" with Special By-laws 8, 9, and 10 is not obviously a "safeguard" for the Lot owner, and there is no clear explanation in the reasons as to how such a purported "safeguard" falls within the principles in *Cooper*.

160 Paragraphs [96]-[100] of the reasons refer to Special By-laws 8, 9 and 10 making the Lot owner liable for the actions of their tenants; and authorities dealing with imposition of legal costs on Lot owners and the issue of levies in an uneven amount on Lot owners. The reasons do not clearly explain how such issues relate to the principles expressed in Cooper.

161 The reasons of the Tribunal in respect of whether Special By-laws 8, 9 and 10 do not satisfy the "minimum standard" test *Orr*, and also do not apply the relevant principles in *Cooper*.

CONCLUSION

162 The appeal succeeds. We are not satisfied that we can fairly determine the dispute on the basis of the appeal materials in accordance with s 81 (1) (d) of

the NCAT Act and it is necessary to remit the proceedings back to the Tribunal to be determined in accordance with law.

163 As the appeal has succeeded, it follows that the costs order of the Tribunal dated 13 October 2021 is set aside.

164 In its appeal submissions, the owners corporation asserted the Appeal Panel should make an order under s 63 of the NCAT Act to clarify the orders and reasons of the Tribunal. Pursuant to s 63 (1) of the NCAT Act, only the Member who made the decision, or the President of the Tribunal, has the power to make such an order. In any event, as the appeal has succeeded, the application is otiose.

165 Part of the application by the Lot owner in the Tribunal was that the Tribunal order the Lot owner be (a) reimbursed monies she had paid the owners corporation pursuant to the water usage 'agreement' and the "one off charges" imposed under Special By-laws 8, 9 and 10; and (b) the owners corporation amend the levy register under s 99 of the SSM Act.

166 As discussed previously, any award of damages or compensation under s 232 of the SSM Act would only arise in respect of the period from 30 November 2016. Further, in respect of the charges imposed under Special By-laws 8, 9, and 10, whether the Lot owner had a cause of action to recover monies paid would be dependent upon (a) the By-laws upon which the charge was imposed being declared invalid under s 150 (1) of the SSM Act; and (b) the date upon which the order operates under s 150 (3) of the SSM Act.

167 Any remedial order under ss 232 and/or 241 of the SSM Act that the owners corporation amend the levy register would also be dependent upon the findings made under s 150 of the SSM Act.

168 Finally, for the sake of completeness, we note that at the appeal hearing the Lot owner sought leave to rely on fresh evidence that related to the 2010-2011 period. We refused leave on the basis that the evidence was not significant new evidence which was not reasonably available at the time of the hearing.

169 Whether the parties are granted leave for any evidence in addition to the evidence that was before the Tribunal at first instance is a matter for the Tribunal to determine when the proceedings are remitted.

ISSUES TO BE DETERMINED ON REMITTAL

170 Pursuant to s 81 (1) (e) of the NCAT Act, the following parts of the proceedings are remitted to be determined according to law:

(a) Whether the proposed common property rights by-laws of the Lot owner pertaining to the 'swinging door' were unreasonably refused under s 149 of the SSM Act.

(b) If not, whether an order should be made that the Lot owner restores common property; and the terms of such order.

(c) Whether Special By-laws 8, 9, and 10 of the strata scheme are made without power or are harsh, unconscionable or oppressive under s 150 of the SSM Act.

(d) Whether the Tribunal should make an order that the Lot owner is liable to pay water consumption charges and other "one off" charges imposed by the owners corporation that are unpaid in the period from 30 November 2016 to the date of commencement of the Tribunal proceedings under s 232 of the SSM Act.

(e) Whether the Tribunal should make a money order in favour of the Lot owner for water consumption charges and other "one off charges" that were paid from 30 November 2016 to the date of commencement of the Tribunal proceedings under s 232 of the SSM Act.

(f) Whether the Tribunal should direct the owners corporation to amend the levy register kept under s 99 of the SSM Act in respect of Lot 4.

(g) Any applicable limitation issues that pertain to the jurisdiction of the Tribunal.

ORDERS

(1) Appeal allowed.

(2) Decision under appeal set aside in part.

(3) Matter remitted to be determined according to law in respect of the issues identified in paragraphs [163]-[168] of the decision.

(4) Costs decision and orders of the Tribunal dated 13 October 2021 set aside.

(5) Whether any further evidence should be allowed in the remitted proceedings to be determined by the Tribunal.

****

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