Civil and Administrative Tribunal

New South Wales

Case Name:	Kaye v The Owners – SP 4350
Medium Neutral Citation:	[2022] NSWCATAP 173
Hearing Date(s):	29 March 2022
Date of Orders:	25 May 2022
Decision Date:	25 May 2022
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member E Bishop, Senior Member
Decision:	1. The orders of the Tribunal made on 29 November 2021 in matter SC 20/47052 are confirmed. 2. The parties are directed to file and serve submissions as to costs within 14 days setting out the relevant costs rule and the reasons why they say they are entitled to costs. 3. The parties may respond to the other's submissions within a further 14 days.
Catchwords:	LAND LAW – Strata schemes – Proposed common property rights by-law – Whether unreasonably refused
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – ss 80, 81 Strata Schemes Management Act 2015 (NSW) – ss 126, 149, 232
Cases Cited:	Capcelea v The Owners – Strata Plan No 48887 [2019] NSWCATCD 27 Drivas v Burrows [2014] NSWCATAP 87 Weal v Bathurst City Council [2000] NSWCA 88; (2000)

	111 LGERA 181
Category:	Principal judgment
Parties:	Adam Emery Kaye (First Appellant) Bella Rebecca Kaye (Second Appellant) Robert George Kaye (Third Appellant) The Owners – SP 4350 (Respondent)
Representation:	Counsel: D Knoll AM (Appellants) M Isaacs (Respondent) Solicitors: Strata Specialist Lawyers Appellants Kerin Benson Lawyers (Respondent)
File Number(s):	2021/00363291
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	[2021] NSWCATAD
Date of Decision:	29 November 2021
Before:	G Sarginson, Senior Member
File Number(s):	SC 20/47052

REASONS FOR DECISION

Summary

1 The appellants appeal from a decision of the Consumer and Commercial Division of the Tribunal (**Tribunal**) of 29 November 2021 in matter SC 20/47053 (the **Decision**).

2 In the Decision, the Tribunal:

(1) dismissed an application for an order under s 149(1) of the *Strata Schemes Management Act 2015* (NSW) (**SMAA**); and

(2) ordered the respondent to undertake certain work to the common property roof area above Lot 3 by 1 April 2022.

3 The appellants sought a stay of the Decision pending the hearing of this appeal. That application was refused on 21 January 2022.

4 For the following reasons, while we have decided that while there was an error of law in the Decision, we have decided to confirm the orders made by the Tribunal.

Background - Tribunal application

5 This appeal considers motions before three extraordinary general meetings (**EGMs**) of the respondent held on 20 March 2020 (**March EGM**), 20 July 2020 (**July EGM**) and 20 September 2020 (**September EGM**).

6 By application dated 10 November 2020, the appellants sought the following orders:

(1) an order under s 149 (a) of the SSMA that the common property rights by-law proposed at the September EGM was unreasonably refused, and an order of the Tribunal to the effect that this proposed by-law be registered;

(2) in the alternative to order 1, an order under s 126 (1) of the SSMA that the owners corporation consent to work proposed to be carried out by the appellants as detailed in the fourth motion considered by the respondent at the September EGM;

(3) in the alternative to orders 1 and 2, an order pursuant to ss 126 and 232 of the SSMA that the respondent "carry out repairs to the common property roof membrane above Lot 3";

(4) in the alternative to orders 1, 2, and 3, and order pursuant to s 149(1)(a) of the SSMA prescribing the addition of a by-law refused by the respondent at the March, July and September EGMs;

(5) in the alternative to orders 1,2,3, and 4, an order under s 126 (1) of the SSMA "for the respondent to consent to work proposed to be carried out by the applicant, as detailed in the motions considered by the respondent" at the March, July and September EGMs.

Tribunal Decision

7 For reasons appearing in the Decision published on 29 November 2021, the Tribunal made the following orders:

> 1. The application for an order under s 149 (1) (a) of the Strata Schemes Management Act 2015 (NSW) is dismissed.

2. The respondent, using suitably licensed and insured tradespersons, is to cause the undertaking of the following work to the common property roof area of the strata building above Lot 3 by 1 April 2022:

(a) Clear all debris from drain on roof to ensure adequate flow of water.

(b) Replace current steel grate with stainless steel grate.

(c) Remove remaining roof membrane.

(d) Use sand-cement screed to level the concrete slab. Ensure that all screed will be sloped towards the drain inlet. Recommend screed falls of 1.80 to drainage. Max screed thickness=40 mm.

(e) Apply waterproofing membrane to the roof in accordance with Australian Standard 4654. Use Sika Aqua Block PU-100 or similar product to be applied in accordance with manufacturers specifications.

3. Any party seeking to make a costs application is to write to the Tribunal and the other party giving notification of such an application by 14 days from the date of this decision.

4. If a costs application is made, the Tribunal will issue directions for the filing and serving of written submissions on the issue of costs.

5. If no such application is made each party shall bear its own costs in accordance with s 60(1) of the Civil and Administrative Tribunal Act 2013 (NSW).

Grounds of Appeal

8 The grounds of appeal are set out in an Amended Annexure to the Notice of Appeal dated filed 4 March 2022. There are two broad grounds of appeal which are particularised at some length.

First ground of appeal

9 The first ground of appeal is that the Tribunal failed to determine whether there was a reasonable refusal by the respondent of the First By-Law Version (see [23] below) at each of the March, July and September EGMs.

10 The appellants assert that the Tribunal erred as to a question of law and misdirected itself by failing to make a finding as to the following jurisdictional facts:

- what were the respondent's reasons for its refusal;
- whether the refusal was unreasonable within the meaning of ss 126(1) and 149(1)(a) of the SSMA;
- what were the rights and reasonable expectations of the appellants in the First By-Law Version being made;

- what was any countervailing interest of the other lot owners in the use and enjoyment of the common property to which the First By-Law Version related; and
- did those rights and reasonable expectations of the appellants exceed any such countervailing interest of the other lot owners in the use and enjoyment of the common property.

11 The appellants further submit that the Tribunal erred as to a question of law when it failed to actively and genuinely engage with the evidence for the reasons for the respondent refused to pass the First By-Law Version.

12 In the alternative, in so far as the Tribunal determined that the refusal of the First By-Law Version was not unreasonable because it did not include an offer of compensation, the appellants submit that the Tribunal erred as to a question of law because:

- under the First By-Law Version the appellants were to pay for remedial building works to the entire roof thereby relieving the respondent from having to pay in excess of $53,000, and were undertaking ongoing repair and maintenance obligations thereby relieving the Respondent of those obligations, in circumstances where the objective evidence was that the value of the exclusive area was around $38,000 inclusive of GST;
- the respondent was thus compensated in excess of the value of the exclusive use area under the First By-Law Version;
- in failing to hold that the respondent was compensated under the First By-Law Version the Tribunal erred as to a question of law; and
- in failing to hold that the respondent acted unreasonably in failing to recognise that it was thus compensated under the First By-Law Version.

13 The appellants further submit that the Tribunal erred as to a question of law when it failed to actively and genuinely engage with material submissions that, in the circumstances of this strata scheme, the reasons for refusing the First By-Law Version were unreasonable within the meaning of ss 126(1) and 149(1)(a) of the SSMA.

Second ground of appeal

14 The second ground of appeal relates to an alleged failure “to apply” the power in s 149(3) of the SSMA. This is an alternative ground of appeal, which arises if the first ground of appeal fails, whereby the appellants submit that the Tribunal erred as to a question of law and misdirected itself by:

(1) failing to make a finding as to a jurisdictional fact under s 149(3) of the SSMA as to whether the appellants had stated that they were prepared to consent to an order prescribing a by-law namely the Second By-Law Version (see [34] below) proposed at the September EGM, but on the basis that they pay compensation of $38,000 (inclusive of GST) instead of $7,500;

(2) failing to determine, given that consent, that it had power to prescribe the Second By-Law Version (see under s 149(3) of the SSMA);

(3) failing to make a finding as to the following jurisdictional facts:

(a) what were the respondent's reasons (other than as to the amount of compensation) for its refusal to:

(i) make a common property rights by-law; and,

(ii) to approve alterations and addition to the common property,

being that which was proposed by way of Motion 4 at the September EGM;

(b) whether the refusal was unreasonable within the meaning of ss 126(1) and 149(1)(a) of the SSMA;

(c) what were the rights and reasonable expectations of the appellants in the Second By-Law Version being made;

(d) what was any countervailing interest of the other lot owners in the use and enjoyment of the Second By-Law Version related; and

(e) did those rights and reasonable expectations of the appellants exceed any such countervailing interest of the other lot owners in the use and enjoyment of the common property?

Reply to Appeal

15 In relation to the first ground of appeal, the respondent submits that:

- the Tribunal's decision should be viewed as a whole;
- the Tribunal considered the First By-Law Version as a distinct and separate aspect of the appellants' case;
- the Tribunal neither erroneously considered there to be only one proposed by-law in issue, nor did it conflate the First By-Law Version with the Second By-Law Version;
- the Tribunal "simply found that the offer of relieving the respondent of the waterproofing works, contained within the First By-Law Version, did not amount to compensation".

16 As to the appellants' argument that the First By-Law Version did offer compensation in the form of relieving the respondent from paying for the water proofing works, the respondent submits that this is not compensation, and that

carrying the burden of repairing the space over which an owner has exclusive use is to be expected; it is not compensatory in nature and is not offered as consideration for the right of exclusively using common property.

17 The respondent submits that it was appropriate for the Tribunal to concentrate on the September EGM, in particular the Second By-Law Version, as that proposed by-law contained a payment to the respondent of $7,500 compensation whereas the First By-Law Version put forward at the previous two EGMs did not.

18 In relation to the second ground of appeal, the respondent submits that s 149(3) of the SSMA has no relevance to the proceedings because:

- s 149(3) prohibits the Tribunal from prescribing a by-law on terms to which the applicant is not prepared to consent;
- the prohibition is to ensure that any common property rights by-law prescribed by the Tribunal is acceptable to the applicant;
- the prohibition is only engaged once the Tribunal has determined to prescribe the making or a by-law on the basis that an owners' corporation has unreasonably refused to make a common property rights by-law;
- accordingly, the sub-section has no application when the Tribunal has determined to refuse to prescribe a by-law; and
- s 149(3) does not go on to impose on the Tribunal the obligation to prescribe the terms of a by-law on any terms to which the applicant is prepared to consent. Such an obligation would impose on the Tribunal the task of reformulating the proposed by-law to a form that is reasonable.

Nature of an appeal

19 Section 80 of the Civil and Administrative Tribunal Act 2013 (NSW) (**NCAT Act**) sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

20 Clearly, by the terms of the Notice of Appeal and their submissions, the appellants raise questions of law.

First ground of appeal

Appellant's submissions

21 The appellants submitted, in summary, that the Tribunal failed to engage with or consider adequately the First By-Law Version put before each of the EGMs and the respondent's reasons to refuse to pass the First By-Law Version.

22 To understand this ground, it will be necessary to understand what occurred at each of the EGMs and to analyse the Decision.

March EGM

23 The minutes for the March EGM relevantly record that the following motions (which we will collectively refer to as the **First By-Law Version**), were "lost":

> 2.1 That the Owners Corporation by **SPECIAL RESOLUTION** approve and grant the Owner of Lot 4 a right of exclusive use and enjoyment of that part of the common property specified in Special By-Law No 4 and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> 2.2 That the Owners Corporation by **SPECIAL RESOLUTION** approve and grant the Owner of Lot 4 a special privilege in respect of part of the common property specified in Special By-Law No 4 and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> [3] That the Owners Corporation by **SPECIAL RESOLUTION** approve and authorise the proposed alterations to Lot 4 and the common property specified in Special By-Law No 4 that affect Lot 4 and the common property and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> The proposed alterations include the following:
>
> 1. Removal of existing metal balustrade and concrete hob around the perimeter of the Lot on the roof in accordance with the Plans;
>
> 2. Installation of a new waterproof membrane and tiling to the Lot and the Roof Level in accordance with the Plans;
>
> 3. Installation of new frameless glass balustrade fixed to the inside face of the existing concrete parapet around the perimeter of the Roof Level in accordance with the Plans.
>
> **SPECIAL BY-LAW NO. 4 - COMMON PROPERTY RIGHTS AND WORKS AUTHORISATION FOR LOT 4**
>
> **1. DEFINITIONS**
>
> 1.1 In this by-law:
>
> …
>
> (k) "Works" means the alterations and additions to the Lot and the Common Property and shown in the Plans and Schedule.

24 The minutes record that ballot papers were received from the owners of lots 1 (G L Pal company nominee Redeg Holdings ATF The Pal Family Trust Pty Ltd), 2 (H P Hager and E L Robson, 3 (L Carrol), 4 (AE Kaye, R G Kasye and B R Kaye), 6 (G Vernon, company nominee Nicavern Holdings Pty Ltd Trustee) 8 (H Gortmasn), 9 (E M Redelman) and 12 (P J Arnold).

25 In respect of each of the motions 2.1, 2.2 and 2.3, there were five votes in favour, three against and one abstention. Accordingly, as more than 25% of the unit entitlements were cast against each of the respective motions, they were specially resolved as lost.

26 The minutes of the March EGM do not contain any detail of the reasons why the persons who voted against any of the motions constituting First By-Law Version did so: Decision at [42]. We note that this meeting was a virtual one.

July EGM

27 The minutes for the July EGM record that the First By-Law Version which was put before the July EGM was also "lost".

28 The minutes record that the owners of lots 2 (E L Robson), 4 (A E and R G Kaye), 6 (Nicavern Holdings Pty Ltd Trustee The Nicole Vernon Family Trust – Company nominee G Vernon"), 9 (Mr E M Redelman) and 12 (P J Arnold) were present, and that ballot papers were received from the owners of lots 1 (G L Pal company nominee Redeg Holdings ATF The Pal Family Trust Pty Ltd), lot 7 (V A Blumenthal) and 11 (L V McDonald).

29 In respect of each of motions 3.1, 3.2 and 3.3 the minutes record that 50% of the unit entitlements were "for" each of the motions, and 50% were against. Accordingly, as more than 25% of the unit entitlements were cast against each of the respective motions, they were specially resolved as lost.

30 The minutes of the July EGM do not contain any detail of the reasons why the persons who voted against the First By-Law Version did so: Decision at [71].

September EGM

First By-Law Version

31 The minutes record that the owners of lots 2 (E L Robson), 4 (A E and R G Kaye), 6 ("company nominee G Vernon"), 7 (V A Blumenthal), 9 (E M

Redelman), 10 (N J Prochilio) and 12 (P J Arnold) were present, and that a proxy had been received from the owner of Lot 1 (G L Pal company nominee Redeg Holdings ATF The Pal Family Trust Pty Ltd), in favour of the Chairperson of the EGM, and a proxy from the owner of Lot 3 (L Carrol) to A Carrol.

32 The minutes record that the three motions constituting the First By-Law Version which was again put before an EGM was "lost", and that each of the three motions was that 51.42% of the unit entitlements were "for" the motion, and 48.58% were against. Accordingly, as more than 25% of the unit entitlements were cast against the motions, the First By-Law Version was specially resolved as lost.

33 The minutes do not contain any detail of the reasons why the persons who voted against the First By-Law Version did so: see Appeal Book p 328.

Second By-Law Version

34 There was however a second set of motions, (which we will refer to as the **Second By-Law Version**), which were apparently an alternative to the First By-Law Version). Relevantly the Second By-Law Version provided:

> 4.1 That the Owners Corporation by **SPECIAL RESOLUTION** approve and grant the Owner of Lot 4 a right of exclusive use and enjoyment of that part of the common property specified in Special By-Law No 4 and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> 4.2 That the Owners Corporation by **SPECIAL RESOLUTION** approve and grant the Owner of Lot 4 a special privilege in respect of part of the common property specified in Special By-Law No 4 and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> 4.3 That the Owners Corporation by **SPECIAL RESOLUTION** approve and authorise the proposed alterations to Lot 4 and the common property specified in Special By-Law No 4 that affect Lot 4 and the common property and make the Common Property Rights By-Law in the form of Special By-Law No 4. …
>
> The proposed alterations include the following:
>
> > 1. Removal of existing metal balustrade and concrete hob around the perimeter of the Lot on the roof in accordance with the Plans;
> >
> > 2. Following the installation of a new waterproof membrane by the Owners Corporation, the installation of new tiling to the Lot and the Roof Level in accordance with the Plans;
> >
> > 3. Installation of new frameless glass balustrade fixed to the inside face of the existing concrete parapet around the perimeter of the Roof Level in accordance with the Plans.

SPECIAL BY-LAW NO. 4 - COMMON PROPERTY RIGHTS AND WORKS AUTHORISATION FOR LOT 4

1. DEFINITIONS

1.1 In this by-law:

…

(k) "Works" means the alterations and additions to the Lot and the Common Property and shown in the Plans and Schedule, with the exception of the application of a new waterproofing membrane to the Roof Level (such works to be undertaken by the Owners Corporation at its own cost).

…

2.2 The Owners Corporation must, within 90 days of the passing of the special resolution making this by-law, install a new waterproofing membrane to the Roof Level in preparation for the fixing of tiles by the Owner, and as authorised in this by-law.

7. CONSIDERATION

The Owner will pay the Owners Corporation the amount of $7,500 as consideration for the granting by the Owners Corporation of the rights in this by-law, such amount to be paid within 5 business days of the Owners Corporation completing the works specified in Clause 2.2 of this by-law.

35 As Mr Knoll AM explained on behalf of the appellants, under the First By-Law Version, the appellants would undertake all works associated with the roof at their own expense; under the Second By-Law Version the appellants would undertake the works associated with the roof except for the installation of the water proofing membrane, which would be undertaken by the respondent, and in consideration for the granting by the respondent of the rights in the proposed by-law, the appellants would pay the respondent $7,500.

36 In respect of each of motions 4.1, 4.2 and 4.3, the minutes record that 51.42% of the unit entitlements were "for" each of the respective motions, and 48.58% were against. Accordingly, as more than 25% of the unit entitlements were cast against each of the respective motion, they were specially resolved as lost.

37 However, the minutes record an extensive summary of objections to the Second By-Law Version. These objections included but were not limited to:

- concerns about whether the building structure was able to hold a large number people on the roof;
- a preference to conserve the respondent's interest in the common property, even though the common property as not currently being used by the respondent;

- the feeling that there would be an intrusion on the privacy affecting the owner of Lot 8 rooftop given the size of the eastern area of the roof being sought and that the proposed use the common property airspace would allow a visual intrusion;
- concerns that the appellants should pay for the area they were interested in acquiring by way of subdivision;
- the preference that the waterproofing membrane be patched rather than replacing it in its entirety;
- one valuation not being sufficient to determine a fair value of the proposed exclusive use area and that there should be an opportunity for several valuations to be obtained;
- if the exclusive use rights by-law was to pass, the appellants should have their unit entitlements changed to reflect the greater use of the common property and for a greater contribution to ongoing building maintenance;
- the appellants should be responsible for any costs in satisfying a development application,

together with a range of other concerns (see pp 275 to 277 of the Appeal Book).

Analysis of Decision

38 We note the following:

(1) at [19] of the Decision, the Tribunal noted that it was clear that the relevant orders being sought were:

> (1) The Tribunal find that the common property rights by-law that was the subject of the general meetings on 20 March 2020; 20 July 2020; and 30 September 2020 had been unreasonably refused under s149 (a) of the SSMA; and the Tribunal order that the common property rights by-law be registered; or
>
> (2) In the alternative, if the Tribunal was not satisfied that the common property rights by-law had been unreasonably refused, order that the owner corporation conduct repairs to the waterproofing membrane in the common property of the roof of the strata building above Lot 3 by reason of the owner's corporation's breach of its duty under s 106 of the SSMA.

(2) at [35] to [42], the Tribunal summarised the proposed common property rights by-law requested by the appellants and set out the relevant events of the EGM of 20 March 2020. At [40] the Tribunal concluded that:

> The common property rights by-law proposed at the meeting of 20 March 2020 did not contain any payment of compensation to the owners corporation for the right to use the common property rooftop area above Lots 3 and 4.

(3) at [43] to [64], the Tribunal set out the "Relevant Circumstances Prior to the Extraordinary General Meeting on 20 March 2020". This included the evidence of Mr Emery Kaye (an owner of Lot 4), the evidence of Mr Redelman, the owner of Lot 6 and Chairperson of the respondent's strata committee, the evidence of Mr Gorman, the owner of Lot 8 (who did not agree with the proposed property rights by-law for a number of reasons), and the evidence of Mr Vernon, the owner of Lot 6;

(4) at [65] to [78], the Tribunal summarised the proposed common property rights by-law requested by the appellants and set out the relevant events of the July EGM. At [66] the Tribunal concluded that:

> The proposed common property rights by-law was in substance the same as that not passed at the meeting on 20 March 2020. The applicant did not offer any compensation to the owners corporation for obtaining the exclusive use of the common property rights rooftop area above Lots 3 and 4.

(5) at [79] to [83], the Tribunal set out the "Relevant Circumstances Prior to the Extraordinary General Meeting on 20 July 2020". This included further evidence of Mr Emery Kaye and Mr Vernon;

(6) at [84] to [86], the Tribunal set out relevant events between the July EGM and the September EGM;

(7) at [87] to [90], the Tribunal set out the events of the September EGM of. The Tribunal relevantly stated:

> 87. The applicant put forward a revised proposed common property rights by-law at the meeting on 30 September 2020.
>
> 88. The substance of the proposed common property rights by-law remained unchanged from the previous 2 occasions it had been considered, other than the addition of a clause that the applicant would pay the respondent consideration of $7,500.

(8) at [92] to [93], the Tribunal set out relevant events that occurred after the September EGM, including the commencement of proceedings in the Tribunal on 20 November 2020.

39 The Tribunal's "Consideration" section commences at [112] and, after setting out the relevant law and authorities, the Tribunal stated:

> 123. In determining this matter, it is appropriate to focus upon the proposed common property rights by-law put forward at the meeting on 30 September 2020, as that proposed common property rights by-law contained a payment to the owners corporation of $7,500, whereas the proposed common property rights by-law put forward to the previous two meetings did not.
>
> 124. A relevant circumstance as of 30 September 2020 was not only whether the applicant was offering compensation to the owners corporation for consideration in the owners corporation giving exclusive use to the applicant of the rooftop area over Lot 3, but the amount of compensation offered.
>
> 125. As at the meeting of 30 September 2020, only the applicant had provided a valuation report. However, that report had only been obtained and provided

> approximately 6 weeks prior to the meeting, despite the applicant being well aware that one of the grounds of opposition to the proposed common property rights by-law was that no compensation had been offered.
>
> 126. Subsequent to the meeting of 30 September 2020, both parties have now obtained expert valuation evidence that values the area in question at approximately $38,000 inclusive of GST. The offer made by the applicant was significantly below that amount.
>
> 127. That, of itself, is in the view of the Tribunal a reasonable basis for the Lot owners of the owners corporation who voted against the proposed common property rights by-law on 30 September 2020.

Consideration

40 The appellants submit that the Tribunal failed to engage with the First By-Law Version at any of the three EGMs. On the other hand, the respondent submits that it is evident that the Tribunal "thoroughly considered" the First By-Law Version at the EGMs of 20 March 2020 and 20 July 2020. As to the EGM of 20 September 2020, the respondent's counsel agreed with the Appeal Panel's summary of his submission that while the reasons for decision were "unhappily expressed", it was clear that the Tribunal also had in mind the First By-Law Version (as well as the Second By-Law Version) when it considered the September EGM.

41 In our view, it is tolerably clear that the Tribunal considered the refusal of the respondent to pass the First By-Law Version at the March and July EGMs. As noted above, it did so at [40] and [66] respectively of the Decision. The Tribunal may not have taken the same approach as the Tribunal suggested in *Capcelea v The Owners – Strata Plan No 48887* [2019] NSWCATCD 27, but it would not be correct to find that the Tribunal did not consider whether or not the refusal to pass the First By-Law version at the March and July EGMs was unreasonable.

42 However, we do not accept that the Tribunal considered the refusal of the respondent to pass the First By-Law Version at the September EGM. We do not accept the respondent's submissions that "notwithstanding the Tribunal's decision to give greater attention to the Second By-Law Version, the Tribunal clearly considered the First By-Law Version as a distinct and separate aspect of the appellant's case" (in relation to September EGM). Nor do we accept its submission that, when "viewed as a whole", the Tribunal determined that the refusal of the First By-Law Version was reasonable, because it offered no compensation at all. This is clear from [123] of the Decision where the Tribunal

states that, in determining the matter, it was appropriate to focus upon the proposed common property rights by-law which contained a payment to the respondent of $7,500, whereas the proposed common property rights by-law put forward to the previous two meetings did not.

43 Regardless of whether or not the Tribunal adequately considered whether the refusal of the respondent at each of the EGMs was unreasonable, or at all, the appellants submit, and we accept, that in relation to the First By-Law Version, the Tribunal failed to follow the guidance of *Capcelea* where the Tribunal considered s 149(1) of the SSMA. The appellants submit that in *Capcelea* the Tribunal weighed an applicant's rights and expectations against the other owners' competing interests in an existing proprietary regime in deciding whether there was an unreasonable refusal under s 149(1). In particular, the appellants rely on [74] of *Capcelea* where the Tribunal referred to:

> … the presence of significant compensation to other owners in the assumption by the applicants, as part of the by-laws, of reconstructing the waterproof membrane and re-surfacing the terrace below the applicants' unit entitlement airspace, at significant costed expense that would otherwise be the cost of the OC and all owners, together with ongoing maintenance and indemnity obligations on such common property. This was in respect of an area to which no other apartment owner had any practical access (a position since the start of the strata scheme) so was effectively the only reasonable basis of compensation. …

44 In addition, the appellants rely on the other following passages:

> 93. The findings I have already made, for reasons already expressed, about compensation and precedent effect indicate no substantive impact in these respects on lot owners' interests. Indeed, the OC and, by extension, all owners through the alleviated financial impact will benefit from the works at the expense of the applicants, in obtaining a new waterproof membrane and an uncompromised new surface on the terrace in place of the current compromised membrane and surface. The applicants and their successors will also have the obligation under the by-laws to maintain the various matters: cf Milman v Owners SP 1389 cited earlier.
>
> …
>
> 100. When one has regard to the two elements in s 149(2), assessed objectively on the evidence as just described, it seems to me that the rights and expectations of the applicants, taken with the absence of objectively-established detrimental effect on the interests of the other lot owners, leads to a conclusion that the refusal of the retroactive and the prospective by-laws on 18 September 2018 was unreasonable.

45 The appellants submit that the appeal is on “all fours” with *Capcelea* as:

- their paying for common property waterproof membrane works constitutes compensation to the owners corporation;
- the remedial works were to an area to which no other apartment owner had any practical access, and so paying for the work was an effective and reasonable basis of compensation;
- there was no opposing objectively-based and properly-supported evidence that there was any defect in the works which the appellants as lot owners had proposed, and consequently an absence of objectively-established detrimental effect on the interests of the other lot owners;
- the lot owners proposed to be responsible for the future maintenance and repair of the waterproofed area, in circumstances where this would be the responsibility of the owners corporation.

46 The appellants submit that their rights and expectations, when taken with the absence of an objectively-established detrimental effect on the interests of the other lot owners, leads to a conclusion that the refusal of the First By-Law Version was unreasonable.

Relevant Law

47 Section 149 of the SSMA relevantly provides:

> **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. …

48 There are a number of matters to observe.

49 The first is that, notwithstanding the lengthy references to *Capalcea* by the appellants, one of the responsibilities of the Tribunal in considering applications under s 149 is that the Tribunal must consider the interests of all owners in the use and enjoyment of their lots and common property: s 149(2)(b). It is here that the appellants point to an additional error by the Tribunal. True it is the Tribunal stated at [129]:

> The rooftop area above Lot 3 is clearly valuable. The fact that it is not easily accessible does not mean that is valueless, or only valuable to the owner of Lot 4 who can most easily access the area. The fact that the owners corporation has not developed the roof into an area that persons often access also does not render it valueless. Further, the area can be accessed other than through Lot 4, such as through Lot 8.

50 However, that last sentence was not correct. See the Appeal Book at pp 76 and 77 (being the evidence of Mr Kaye), 372 (being the evidence of Mr Bensen) and 954 (at [11], being the respondent's submissions before the Tribunal). In addition, Mr Knoll AM submitted that it was common ground before the Tribunal that no other lot owner had access to that rea of the roof in question, a matter not disputed by the respondent's counsel.

51 We agree with the appellants that, in not setting out how it engaged with the First By-Law Version at the EGMs (other than to note that the First By-Law Version contained no offer of compensation), and in not exposing an active intellectual engagement with whether or not the First By-Law Version was unreasonably refused, the Tribunal failed to exercise its jurisdiction, and lacked a proper basis upon which to determine whether the refusal of the First By-Law version was relevantly unreasonable. We accept that the Tribunal was obliged to demonstrate in its reasons an understanding that it had to engage with the First By-Law Version and an explicit process of evaluation is required: *Weal v Bathurst City Council* [2000] NSWCA 88; (2000) 111 LGERA 181 at [80]–[95].

52 We find therefore that the Tribunal failed adequately to consider whether the respondent's refusal to pass the First By-Law Version at the March, July and September EGMs was unreasonable.

Further steps – s 81 of the NCAT Act

53 Section 81 of the NCAT Act provides:

> **81 Determination of internal appeals**
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
>
> (c) the decision under appeal to be quashed or set aside,
>
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
>
> (e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.
>
> (2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

54 The appellants submitted, and the respondent agreed, that if the appeal was allowed, the Appeal Panel should exercise its powers under s 81 of the NCAT Act and exercise all the functions that were conferred or imposed by the NCAT Act or other legislation on the Tribunal (including the SSMA) and make a decision in substitution for the decision under appeal. The appellants submit that as the other grounds set out in the minutes of the September EGM were objectively unreasonable, the Decision should be varied by the Tribunal pursuant to s 81 of the NCAT Act rather than the proceedings being remitted back to the Tribunal.

55 Neither party submitted that the Tribunal should determine the appeal by way of a new hearing and to permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance: NCAT Act, s 80.

56 Given that:

- the guiding principle for the NCAT Act and the associated Rules is to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
- we have the evidence before the Tribunal;
- we have the benefit of a transcript of the proceedings; and
- the joint position of the parties is that the Appeal Panel should not remit the matter,

we consider that it is appropriate to exercise the powers of the Tribunal under s 81 of the NCAT Act.

Summary of evidence

57 As noted above, s 149(2) of the SSMA provides that the Tribunal, when considering whether to make an order prescribing a change to a by-law, must consider (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.

58 To address those matters, it is appropriate to summarise the evidence before the Tribunal.

Lay evidence of the appellants

59 The only lay evidence of the appellants were the two statements of Mr Adam Kaye dated 1 January and 24 March 2021 (in reply).

60 In his statement of 1 January 2021, Mr Kaye states:

(1) Lot 4 is located on level 2 of the building, with access to the adjacent roof terrace through his lounge room;

(2) when he purchased the lot he noticed that there was a part of the roof terrace not forming part of Lot 4 that was not used and could only be accessed by the occupier of Lot 4;

(3) in October 2019 he gained the support of Mr Redelman for the works and grant of rights set out in the First By-Law Motion (a matter denied by Mr Redelman in his statement of 15 March 2021);

(4) the proposed First By-Law Version put before the March EGM granted the owners of Lot 4 a special privilege and the authorisation to undertake the following works to the roof area adjacent to Lot 4:

(a) removal of existing metal balustrade and concrete hob around the perimeter of the Lot on the roof in accordance with the Plans;

(b) installation of a new waterproof membrane and tiling to the Lot and the Roof Level in accordance with the Plans;

(c) installation of new frameless glass balustrade fixed to the inside face of the existing concrete parapet around the perimeter of the Roof Level in accordance with the Plans,

in accordance with the plans attached to the motion.

(5) the motion also proposed to grant the owners of lot 4 exclusive use of the common property specified in the First By-Law Version.

(6) the works in the First By-Law Version also required the owners of Lot 4 to assume responsibility for repairing the damaged membrane on the roof over lot 3, being part of the proposed exclusive use area, and to replace the structurally deficient existing balustrade separating the existing terrace of lot 4 on the roof level of the building;

(7) he attended the March EGM via teleconference, and no-one spoke against the First By-Law Version. Nevertheless, the motion was not especially resolved;

(8) he represented the First By-Law Version at the July EGM on advice from the strata manager that the respondent would also be considering the acceptance of an offer from a builder in relation to defective roof works. He states at [23] to [25]:

> 23. … My understanding from the strata manager was that the defective terrace area adjacent to my unit was not the subject of the claim against the builder. However, it was unclear to me as to why this was the case given the conversations and correspondence I previously had with the chairman of the owners corporation and the strata manager as referred to in paragraphs 6 and 13 above.
>
> 24. The owners corporation had attempted to recover money from the builders for several years and while the builder's insurer provided a settlement amount of $120,000, this was $40,000 less than the cheapest quote the owners corporation was able to obtain to perform the works, excluding the cost of any remediation works to the roof terrace adjacent to Lot 4. Accordingly, my proposal to replace the roof membrane, if accepted by the owners corporation, would have saved the owners corporation a significant amount of money. If I had not offered to cover the cost of these remedial works, the owners corporation would have to raise a special levy for this cost in addition to the shortfall by reason of acceptance of the builder's settlement proposal. At no stage has any lot owner explained the commercial justification for not availing the owners corporation of the benefit of my offer.
>
> 25. At this stage, and as at the date of the first and second motions (which were identical), no lot owner had ever suggested that the remedial works to the terrace adjacent to Lot 4 were not required to be performed.

(9) after the First By-Law Version was refused at the July EGM, he engaged an independent valuer to provide a valuation of the proposed exclusive use area;

(10) he then made an application to NSW Fair Trading for mediation in relation to "the unreasonable refusal" of the responds, but the respondent declined to mediate;

(11) at the September EGM, both the First and Second By-Law Versions were not specially resolved. He recalls that the owners of lots 2, 3, 5 and 10 all supported the motion (in addition to other lots), lot 3 being located directly below the roof area adjacent to Lot 4 and would have been mostly affected by the works. Both owners of lot 3 supported the proposed by-laws at each meeting and stated that if the works proposed to be undertaken were not undertaken, it would cause further significant damage to the building and a greater cost to all owners.

Lay evidence of the respondent

61 Ms Arnold, the owner of Lot 12:

(1) voted against the First Version By-Law at the March EGM as:

(a) she thought the roof was common property and not available for anyone's exclusive use;

(b) the information relied on by the appellants was "scant and not detailed enough";

(c) the proposal would not be agreeable to other owners and because the respondent had rejected a similar proposal from a previous owner of Lot 4;

(2) voted against the First Version By-Law at the July EGM as she did not think it necessary for the appellants to replace the roof above Lot 3 as the lot owners were aware that common property was a shared responsibility which "[they] all have to pay for";

(3) disagreed with the suggestion that the works would not disrupt anyone with noise from the use of the roof area and that the balustrade would not impede anyone's view – she did not agree "at all", as she thought that use of the larger balcony would impede views and the enjoyment of the space as it is, free from objects, structures and people; that passing the by-law might open a "[P]andora's box of other applications" with the result that there would be no common property left for anyone to enjoy;

(4) was not satisfied that a council development application was not required;

(5) however, the primary reason she voted against the motion "is the same reason I voted against it in March: the common property [was] just that, a shared area for all";

(6) voted against the First and Second Version By-Laws at the September EGM as the respondent had on two separate occasions previously voted against the appellants' proposal to obtain exclusive use.

62 Mr Gorman, the owner of lot 8:

(1) voted against the First Version By-Law at the March EGM as:

(a) Mr Kaye could not describe the area he wanted access to, nor did he describe the materials or products that were going to be used, and did not seem to know whether a development consent was required;

(b) any person standing on the roof space above lot 3 would be able to see directly into his rooftop area and possibly into his living room;

(c) any noise coming from lot 4 using the rooftop would affect the enjoyment of Mr Gorman's lot;

(d) he thought the First By-Law Version was incomplete;

(e) as the respondent was about to undertake major works on the roof, it was not necessary for Mr Kaye to undertake waterproofing on another part of the roof; the proposal was audacious and Mr Kaye was trying to make "a quick buck" from his investment by reselling as soon as had acquired exclusive use access to the roof;

(2) voted against the First Version By-Law at the July EGM as he still did not have answers to the questions he had asked at the time of the March EGM;

(3) voted against the First Version By-Law at the September EGM as the proposals did not answer his question, and for the reasons set out in an email dated 30 September 2020 he sent to the strata manager which stated:

> The extent of the roof space intended to be used makes me very apprehensive. I measured out the area and placed a milk crate at the eastern boundary of the proposed space to be used. I found that the extensive eastern space being proposed would adversely affect my view not only the Balcony of Unit 8, but also form the roof top terrace which is on my title. My roof top would no longer be private.
>
> I also feel that there would be an intrusion on the privacy of my roof top given the size of the eastern area of the roof being sought. I feel that the proposed use of the common property air space would allow a visual intrusion and it follows that there may be a noise intrusion into my [unit] as well.
>
> The owners of Unit 4 have contacted me, however never consulted me as to the area being sought and what impact it might have on the peaceful enjoyment of my property.
>
> I also have not been supplied with evidence from an expert on how the owners intend on making the very extensive modifications to the roof

> membrane may compromised [sic] its integrity. My advice has been to place floating tilers which are easy to lift and move and do not damage the roof.
>
> There also appears to be no provisions in the proposal for and unforeseen problems. I am very concerned that when [the] membrane is removed there may be significant concrete cancer revealed that may need treatment.

63 Mr Redelman, the owner of Lot 9:

(1) voted in favour of the First By-Law Version at the March EGM;

(2) also voted in favour of the First By-Law Version at the July EGM. However, his statement suggests that he was having "second thoughts" at the July EGM as he states:

> "… I had come into the meeting prepared to vote in favour of the motion but I felt less certain after I heard from other lot owners. I began to form the view that the proposal may not be a fair exchange or a reasonable exchange and that it may also negatively impact other lot owners and occupiers. I believe if I had of had another five minutes also to consider my position after all the discussions I would've voted against the motion".

(3) voted against in favour of the First By-Law Version at the September EGM because of the reasons of the other lot owners and because:

(a) he was concerned about the noise impact of increased use of the roof by the appellants;

(b) of the "potential horrific privacy impact that the expansion of space would have on unit 8 particular but also [units] 7, 11 and 12", and despite the terms of the by-law granting exclusive use;

(c) there was "no reassurance that additional benefits would not be sought, such as extending the internal part of the lot onto the roof space";

(d) the appellants were obtaining a significant amount of space for "very little amount and at the expense of the Owners Corporation";

(e) and if he were ever to vote in favour of the motion, he would want an adjustment to unit entitlements.

64 Mr Vernon, the owner of Lot 6:

(1) voted against the First By-Law Version at the March EGM as he was not in favour of granting exclusive rights to any part of the common property and because no fair or reasonable compensation was offered to the respondent by the appellants and no development consent had been obtained; and because in his view the issue of exclusive use rights was being confused with the issue of potential roof repairs;

(2) voted against the First By-Law Version at the July EGM for the reasons set out in his letter to the respondent dated 6 July 2020, which included:

(a) he was no in favour of any lot owner being granted special rights of common property;

(b) the lack of independent valuation in order to determine whether the consideration offered in respect of the Second By-Law Version was reasonable;

(c) the lack of independent valuation of adjustments to lot owner entitlements;

(d) a development application would be required, necessitating a Fire Order on the strata scheme;

(3) does not separately set out why he voted against the First By-Law Version at the September EGM. We infer that he did so for the same reasons he voted against the First By-Law Version at the March and July EGMs.

65 Each of Mr Redelman, Mr Gorman and Mr Vernon were cross-examined at the first instance hearing.

66 Relevantly, Mr Redelman was cross-examined at some length about why he changed his mind between the July EGM and the September EGM. He agreed that he did not contact Mr Kaye at any time prior to the September EGM, but disagreed that he had "sprung" his concerns on Mr Kaye or had been "politically minded" in doing so. He said that he had a number of conversations with other lot owners in that time, and had received legal advice that those voting against the motions should make clear their objections at the September EGM. He said he did not think it was relevant to explain why he changed his mind from supporting the motions to not support in the motions. In cross-examination it was suggested to him that, save for the conversation set out in his statement, the other conversations he claimed took place did not occur. Mr Redelman rejected the suggestion.

67 Mr Vernon agreed that, as a general proposition, he was not in favour of granting exclusive use rights for any part of the common property. He also agreed that that would be a position he would hold irrespective of the nature of the application. He thought that a valuation of the $38,000 for the exclusive use of the entirety of the roof top adjacent to the Lot 4 rooftop was "a very low valuation". He agreed that he never met Mr Kaye to go through his concerns and in fact refused to meet him.

68 As for Mr Gorman, he thought the valuation of $38,000 was “way too low” and did not agree with the suggestion that anyone standing on the appellants’ rooftop terrace could see into his living area.

Lay evidence in reply of the appellants

69 Mr Kaye’s statement of 24 March 2021 contains his response to the statements of Ms Arnold, Ms Carol, Mr Gorman Mr Redelman and Mr Vernon. Relevantly, Mr Kaye states:

(1) in response to the statement of Ms Arnold:

(a) his proposal was not for the respondent to “just grant” exclusive use rights to the owners of Lot 4, but that he had offered to pay about $90,000 for the performance of remedial works to the proposed exclusive use roof area at his own expense, noting that no other lot owner can access the space to which the proposal relates;

(b) his proposal was simply one where he would attend to the urgent repairs of the roof, at his own expense, in order to assist the owners corporation and get the job done quickly before any further water penetration issues occurred;

(c) the exclusive use area cannot be viewed by any other lot owner or even passers by on the street, and there is no impact on view loss as the proposal is simply the removal of the current balustrade and the installation of a glass balustrade bordering the proposed exclusive use area. No other structure was ever intended to be erected on the proposed exclusive use area;

(d) the area to which the by-law relates cannot be accessed by any other lot owner;

(e) Ms Arnold said at a meeting of the lot owners on 20 July 2020 that “we don’t care what the valuation is, we would rather pay for the remedial works ourselves than let you have an inch of extra space”, a remark Mr Kaye considered to be “wholly unreasonable”

(2) in response to the statement of Mr Redelman:

(a) says that “at various times” during the meeting on 20 July 2020 Ms Arnold and Mr Vernon said “we would rather raise a special levy for the works and be out of pocket than let you obtain exclusive rights to the space”, a position me Kaye found to be “wholly unreasonable”, as neither Ms Arnold not Mr Vernon lived in the building;

(b) there was an unwillingness to repair the roof and also objection to Mr Kaye offering to do the works himself.

Expert evidence of the Appellants

70 The appellants relied on the following expert evidence.

Dr Ha Nguyen

71 Dr Ha Nguyen of Halina Engineers Pty Ltd, provided a report dated 22 January 2021. Dr Nguyen is a structural engineer. He stated that the waterproofing membrane needed to be replaced in its entirety and could not be "patch repaired". He concluded:

> 1. The waterproofing membrane to the concrete roof slab adjacent to unit 4 has reached the end of its serviceable life.
>
> 2. While the membrane could possibly be repaired by undertaking localised patch repairs, given that the slab also suffers from inadequate falls to the drain resulting in water ponding and bubbling on the roof, I do not recommend such repairs are undertaken, but rather that the entire membrane is replaced after works are completed to ensure adequate falls to the drain.
>
> 3. There are also existing cracks in the membrane which will inevitably result in water penetrating the roof slab into the unit below within a matter of weeks or months, similar to what has been experienced by unit 8 to date.
>
> 4. Regardless of whether the waterproofing membrane is repaired or replaced, the drainage to the roof needs to be cleared of all debris, as it is currently blocked and not operating. In addition, the steel grate to the drain needs to be replaced.

72 In answer to the question whether the roof terrace was structurally sound, Dr Nguyen said that he did not have the benefit of the structural design drawings for the building. Nevertheless, he estimated (assuming that the slab was designed and was capable of holding up to 75kg/m2), that this would equate to about 25 people on the roof, not including the existing enclosed terrace area on the appellants' title.

Mr Bensen

73 Mr Bensen, architect, of Bensen Partners, provided a report dated 24 March 2021 and a letter of 6 April 2021 'qualifying' the opinion expressed in his opinion of 24 March 2021.

74 In his report of 24 March 2021 Mr Bensen stated his responses to the following questions as follows:

> **Question 1:** *With the exception of the enclosed roof terrace to Lot 8, is any other lot visible from the terrace area adjacent to Lot 4 (being the subject of the exclusive use proposal)?*

It is evident from my observations that no other lot (with the exception of a small portion of the external roof terrace area adjacent to Lot 8) is visible from the subject terrace area adjacent to Lot 4.

Question 2(a): *Is any part of the proposed exclusive use area visible from Lot 8? If so, what is the extent of that visibility?*

The following photomontage is a filtered view from the Lot 8 terrace (through the existing balustrading), of the proposed exclusive use area (shown hatched in red).

This photo montage demonstrates the only limited portion of the proposed exclusive use that is visible from the perspective of a person standing on the extreme east corner of the lot 8 terrace. In fact, as one moves westwards, even the small area (hatched in red) is not visible.

As is also evident from this photomontage, the concrete structure obstructs any visibility of the lot 4 terrace below.

…

Question 2(b): *Is any part of Lot 8 visible from Lot 4?*

When standing adjacent to the existing south-eastern balustrade of the Lot 4 terrace, at present an observer, looking back towards the south-west, can only see a small corner of the Lot 8 terrace (circled in red), being its eastern extremity and no more than 5% of the terrace area of Lot 8.

The balance of the Lot 8 terrace is completely hidden from view by the bulk of the Lot 4 access stair enclosure which consists of a large concrete structure. In addition, there is no ability to view the internal area of the living space of Lot 8 or any other Lot from the proposed exclusive use area of Lot 4.

…

Question 3: *To the extent that the answer 1 or 2 is yes, will there nby any adverse privacy impact upon those Lots?*

In light of the photographs and commentary above, it is my opinion that there can be no adverse privacy impact on any Lot.

Question 4: *If the answer to 3 ids yes, what is the extent of such at this privacy impact?*

Nil.

75 In his letter of 6 April 2021, Mr Bensen stated:

I refer to my report dated 24 March 2021 and would like to qualify my response to one of the questions posed by you, as follows:

Question 1: With the exception of the enclosed roof terrace to Lot 8, is any other lot visible from the terrace area adjacent to Lot 4 (being the subject of the exclusive use proposal)?

Response: It is evident from my observations that no other lot (with the exception of a small portion of the external roof terrace area adjacent to Lot 8) is visible from the subject terrace area adjacent to Lot 4.

Qualification: Upon further consideration it is my opinion that the balconies of Lots 9, 10, 11 and 12 would be visible at a far distance of at least 24 metres

when standing at the extreme easterly edge of the proposed exclusive use area.

Notwithstanding the above qualification, my response to Question 3 remains unaltered, in that my opinion remains that there would be no adverse privacy impact resulting from such visibility.

In addition to the above, the progression of photos on pages 6 and 7 reflect movement in a 'westerly direction, rather than an 'easterly' direction as stated in the last paragraph on page 7. 1 believe these photos clearly indicate that there is no impact resulting from extending the existing terrace of Lot 4 towards the north (the road).

Although there is no practical loss of view, privacy, or amenity of lot 8 in relation to proposed exclusive use area, I have prepared the attached drawing AO1 to provide for a reduced exclusive use area to remove any possibility of visibility of Lot 8, or any other Lot, from the proposed exclusive use area].

Mr Woodham

76 Mr Woodham, a valuer, of Augmen Consulting prepared a report dated 29 July 2020. He assessed the fair market value of the common property the exclusive use of which was sought to be acquired by the appellants at $7,500.

Mr Field

77 Mr Jason Field of National Property Valuers Pty Ltd, prepared a valuation report dated 18 June 2021. He assessed the market value of the exclusive use rights of the common property sought to be acquired by the appellants at $35,000. However, while he agreed with Mr Casemore (for the respondent) that the market value of the roof space was in the order of $35,000, he thought that “the question which appears to be in dispute and required clarification relates to who is responsible for the repairs and maintenance of the common property”. Mr Field stated:

13.32 This issue is not made clear and is ambiguous in Mr Casemore's valuation report.

13.33 In my opinion, this cost would be required to be borne by the owners corporation, whether or not the registered proprietors of Lot 4 were to acquire the space.

13.34 It is irrelevant whether the registered proprietors of Lot 4 acquire the space, because if they do not, then this cost would be borne by the owner's corporation regardless.

13.35 Therefore, if the registered proprietors of Lot 4 do acquire the space, I assume that the same responsibility applies, and should make no difference.

13.36 This would appear to be the most significant point of contention, and I would suggest that this is a legal issue, rather than a valuation issue. I revert this matter back to the legal practitioners to resolve.

Expert evidence of the Respondent

Mr Bevolai

78 The respondent relied on the report of Mr Belovai, engineer, of Costin Roe Consulting Pty Ltd dated 15 March 2021. His views are adequately summarised in Joint Report of Dr Nguyen and Mr Bevolai dated 1 April 2021 referred to above.

Mr Casemore

79 The respondent also relied on a report of Mr Casemore of Clisdells dated 3 March 2021. Mr Casemore stated that the value of the roof top area sought to be exclusively used by the appellants was:

- on the basis of a "Before and After" approach, $38,000 including construction costs; and
- on the basis of a "check valuation approach", $43,500.

80 Mr Casemore noted that the "Before and After" approach was the "prime calculation approach", and the "check valuation approach" was a "broad reference check only".

81 The basis of the calculation set out at p 9 of the Report was as follows:

Value **"After"** with roof space works complete		$1,880,000
Value "**Before**" as is		$1,700,000
Subtotal		$180,000
Less pro rata construction costs	$72,776	
Less nominal legal [etc] costs	$15,000	
Less 10% profit and risk contingency	$18,000	
Less 20% discount for by law tenure	$36,000	

	$38,224	
Say	**$38,000**	
	(as is / unimproved)	

(bolding as in original)

82 In addition, the respondent also relied upon the Joint Expert Reports that had been prepared in the proceedings.

Reports of Joint Experts

Engineer

83 The appellant's engineer Dr Nguyen and the respondent's expert engineer Mr Belovai, prepared a Joint Expert Report dated 1 April 2021. In summary, Mr Bevolai agreed with Dr Nguyen's conclusions that the top layer of the membrane had deteriorated and reached the end of its serviceable life, was no longer functioning as intended and it should it was likely that the second membrane/coating had similarly reached the end of its serviceable life. He also agreed that the current falls on the roof area were not in accordance with the National Construction Code requirements thus causing ponding.

84 However, Mr Bevolai disagreed that the existing roof structure was capable of supporting additional loading. He said that further information was required.

Joint experts - valuation

85 Mr Woodham and Mr Casemore (the respondent's expert) prepared a joint expert valuation.

86 Mr Woodham prepared a valuation dated 29 July 2020. He was instructed to give a fair market value of part of the common property for exclusive use purposes on an "as is" basis. The part of the common property he valued was the roof area surrounding the terrace of lot 4 recognising that the owner of Lot 4 already enjoyed the use of the part of the rooftop that forms part of Lot 4. He assessed the fair market of the common rooftop space at $7,500.

87 The Woodham/Casemore joint report is dated 26 March 2021. While the experts agreed on numerous principles to apply to the assessment of value (including that exclusive use title is inferior to strata title and as such a 20% discount should be applied and that the "before and after" improvement valuation approach was required), they disagreed on the whether the entire surface area of the roof required remediation which affected their respective opinions. Mr Woodham considered the entire roof required repair and replacement and that the costs to do so should be borne by the respondent, whereas Mr Casemore was of the opinion that the roof terrace construction costs should be pro-rated between the existing roof terrace and the subject common property roof space area. Mr Casemore ultimately agreed that existing access to the terrace area the subject of the proposed by-law was only available from lot 4, but ultimately maintained that his valuation of $34,545 (excluding GST) was appropriate, and that Mr Woodham's valuation of $7,500 was too low and was unrepresentative of a reasonable value for roof space that had district and harbour views.

Conclusion

88 In summary, the matters raised by lot owners (other than the appellants) included that:

(1) the roof was common property and therefore not available for exclusive use and never should be;

(2) the information presented with the motion was scant and not detailed enough;

(3) the works would disrupt others with noise;

(4) the use of the area after the completion of works would disrupt others with noise;

(5) if the proposal is approved, it might open a “pandora's box” of other applications and approvals;

(6) changing the balcony terrace requires development consent which could trigger a fire order;

(7) no compensation was provided;

(8) the potential loss of privacy, including any person standing on the proposed exclusive use area will be able to see directly into the lot 8 rooftop area, into the stairwell of lot 8 and possibly into the living area of the lot;

(9) Mr Adam Kaye was looking to make "a quick buck" from his investment and he would likely sell lot 4 once he had exclusive use over the roof terrace;

(10) there was no reassurance that additional common property benefits would not be sought.

89 Views will differ about the reasonableness of these matters, either individually or cumulatively, being the reasons for the respondent refusing to pass the First By-Law Version at any of the EGMs. In our view, the First By-Law Version did not include an element of compensation for the loss of exclusive use of the roof area adjacent to Lot 4. The existence of compensation was a key element in the Tribunal in *Capalcea* finding that the refusal to pass the relevant motion was unreasonable. Furthermore, we consider that, at least, in relation to the matters identified in sub-paragraphs (1), (3), (4) and (8) of [88] when considered collectively, and in particular with (7), provide the basis on which to find the refusal of the respondent to pass the First By-Law Version at any of the EGMs was not unreasonable.

90 As to the rights and reasonable expectations of the appellants in the First By-Law Version being made, we can understand their feeling and expectation that as the only access to the relevant area of the roof was through their lot, it would be unreasonable not to allow them exclusive use, particular in circumstances where they were offering compensation. However, the "compensation" being offered by them was not compensation to the respondent for loss of use of the roof space, rather, the compensation, was for the undertaking of repairs and ongoing maintenance obligations.

91 We have summarised the interests of the lot owners (other than the appellants) in the use and enjoyment of their lots and common property (s 149(2)(a)) and the rights and reasonable expectations of the appellants in deriving or anticipating a benefit under a common property rights by-law (s 149(2)(b)).

92 In our view, when the interests of all owners in the use and enjoyment of their lots and common property (on the one hand) and the appellants (on the other hand) are evaluated, the refusal of the respondent to pass the First By-Law Version at any of the EGMs was not unreasonable. It appears to us that the concerns of the lot owners outweigh the expectations of the appellants.

93 It follows we reject the submission of the appellants that there was no objectively reasonable basis to refuse the First Version By-Law.

Alternative ground of appeal

94 In the alternative, the appellants submit that The Tribunal did not consider the construction of s 149(3) of the SSMA. That section provides:

> 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.

95 The appellants' submissions on this matter are summarised at [13], and the respondent's at [17].

96 We consider there is substance in the respondent's position. The simple point is that neither the Tribunal at first instance, or the Appeal Panel re-exercising the Tribunal's powers, has prescribed or will be prescribing the making of a by-law. If we were, then the sub-section would have work to do, but we are not, and therefore it does not. The sub-section states that 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 is not prepared to consent.

97 As the respondent correctly submits, s 149(3) prohibits the Tribunal from prescribing a by-law on terms to which the applicant is not prepared to consent; thus the prohibition is to ensure that any common property rights by-law prescribed by the Tribunal is acceptable to the applicant. The prohibition is only engaged once the Tribunal has determined to prescribe the making or a by-law on the basis that an owners corporation has unreasonably refused to make a common property rights by-law. Accordingly, the sub-section has no application when the Tribunal has determined to refuse to prescribe a by-law.

98 The appellants submit the closing words of s 149(3) are drafted in the future tense, thus opening the possibility that an applicant for a common property rights by-law has not yet consented, but would be prepared to consent, in the circumstances where the Tribunal is going to prescribe the making of the by-

law. They submit that if the Appeal Panel upholds the appeal in relation to the First By-Law Version, it should uphold this ground of appeal and prescribe the Second By-Law Version.

99 We disagree, and reject that submission.

Conclusion

100 While we have decided that there was an error of law in the Decision, we have decided to otherwise confirm the orders made by the Tribunal.

Costs

101 The parties are directed to file and serve submissions within 14 days setting out the relevant costs rule and the reasons why they say they are entitled to costs. The parties may respond to each other's submission within a further 14 days.

102 We propose to determine any application for costs on the papers, and without a hearing. If either party disagrees, they should address that issue in their submissions.

103 Each set of submissions is to be limited to five pages in length.

Orders

104 The Appeal Panel orders:

(1) The orders of the Tribunal made on 29 November 2021 in matter SC 20/47052 are confirmed.

(2) The parties are directed to file and serve submissions as to costs within 14 days setting out the relevant costs rule and the reasons why they say they are entitled to costs.

(3) The parties may respond to the other's submissions within a further 14 days.

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