



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners - Strata Plan No 33368 v Gittins

Medium Neutral Citation: [2022] NSWCATAP 130

Hearing Date(s): 13 December 2021

Date of Orders: 02 May 2022

Decision Date: 2 May 2022

Jurisdiction: Appeal Panel

Before: G Sarginson, Senior Member
E Bishop, Senior Member

Decision: (1) Leave to appeal refused.

(2) Appeal dismissed.

(3) The date of compliance with order 1 of the Tribunal in Matter SC 21/19940 dated 10 September 2021 is extended for 3 months from the date of this decision

Catchwords: LAND LAW - strata schemes - duty to repair common property - scope of duty - remedial orders - whether excessive

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Development Act 2015 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Regulation 2016 (NSW)

Cases Cited: Collins v Urban [2014] NSWCATAP 17
Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1
Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425
Italiano v Carbone & Ors [2005] NSWCA 177

Loneragan v The Owners-Strata Plan No 16519 [2020] NSWCATAP 177
Pholi v Wearne [2014] NSWCATAP 78
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Ridis v Strata Plan 10308 [2005] NSWCA 246
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Seiwa Australian Pty Ltd v Owners Strata Plan 25042 [2006] NSWSC 1157
Stolfa v Hempton [2010] NSWCA 218
Stolfa v Owners Strata Plan 4366 & Ors [2009] NSWSC 589
The Owners Strata Plan No 50276 v Thoo [2013] NSWCA 270
The Owners-Strata Plan SP 20211 v Rosenthal; Rosenthal v The Owners-Strata Plan No 20211 [2018] NSWCATAP 243

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners-Strata Plan No 33368 (Appellant)
Anthony Gittins (Respondent)

Representation: P Burns (Treasurer strata committee) (Appellant)
Respondent (self-represented)

File Number(s): AP 2021/00282603

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not Applicable

Date of Decision: 10 September 2021

Before: C. Campbell, General Member

File Number(s): SC 21/19940

REASONS FOR DECISION

- 1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal dated 10 September 2021 involving orders that an owners corporation conduct repairs to common property.
- 2 In this decision, any reference to “the owners corporation” is a reference to the appellant, and any reference to “the Lot owner” is a reference to the respondent.
- 3 The essence of the dispute is that the owners corporation asserts the Tribunal exceeded its remedial powers under ss 232 and/or s 241 of the *Strata Schemes Management Act 2015* (NSW) (‘the SSM Act’) by making an order that by reason of the owners corporation’s breach of its obligation under s 106 (1) of the SSM, the owners corporation should perform extensive works to the bathroom, toilet and laundry of the Lot, rather than limited works to the bathroom and toilet.
- 4 The owners corporation further asserts that it was denied procedural fairness because strata committee members did not appear at the Tribunal hearing due to Covid-19 restrictions and the owners corporation was represented solely by the strata manager at the hearing.
- 5 The respondent has been a Lot owner for approximately 20 years and resides in the Lot. The strata building is approximately 40 years old.
- 6 In September 2019, the Lot owner raised with the strata committee of the owners corporation that drummy and loose ceramic tiles required replacement in the bathroom, toilet and laundry areas of the Lot. “Drummy” tiles have a hollow drum like sound due to inadequate bonding.
- 7 From September 2019 onwards, there was a dispute between the Lot owner and the owners corporation as to the extent of any repairs required to common property. In essence, the position of the owners corporation was that the Lot owner was attempting to make the owners corporation responsible for a “complete renovation” of his bathroom, toilet and laundry. The owners corporation was prepared to conduct repairs to drummy and loose tiles in the

bathroom (with associated grouting and waterproofing membrane repairs) but asserted that further repairs were unnecessary.

- 8 The position of the Lot owner was that there were drummy tiles in most areas of the bathroom, toilet and laundry of the Lot due to the age of the tiles. The Lot owner sought replacement of the tiles in all such areas and associated works involving waterproofing as well as the replacement of fittings and fixtures that would be damaged by reason of removal and replacement of tiles.
- 9 It is unnecessary to detail all of the events between September 2019 and the decision of the Tribunal on 10 September 2021. Relevantly,
 - (1) Both parties had the bathroom, toilet and laundry area inspected by multiple experts and tradespersons.
 - (2) Members of the strata committee also inspected the area.
 - (3) On 28 July 2020, DLR Building Services conducted an inspection at the behest of the owners corporation.
 - (4) On 24 September 2020, DLR Building Services attended the Lot to perform work as set out in its quotation of 28 July 2020. Such work involved the removal of approximately 15 loose tiles in the bathroom; refitting the tiles; replacing 2 cracked tiles; and re-grouting. The quotation acknowledged that there were “drummy tiles in various areas” but asserted that they did not require replacement.
 - (5) Some grouting work on 24 September 2020 was incomplete. DLR Building Services was to return to complete the work, but this did not occur. There was a factual dispute about the reason why DLR Building Services did not return. The owners corporation asserted that the Lot owner unreasonably refused access. The Lot owner asserted that the quality of the work was poor and drummy tiles were not repaired.
- 10 On 24 December 2020 the Lot owner commenced Tribunal proceedings. In the application, the Lot owner stated that the reason he was seeking orders that the owners corporation conduct repairs was:

“After 40 years the majority of my tiles in the toilet, bathroom and laundry have lost their bond to the subfloor and are ‘drummy’.”
- 11 The proceedings were dismissed by way of the Lot owner’s failure to appear in March 2021, but the Lot owner successfully applied to have the proceedings re-instated under s 55 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘the NCAT Act’).

- 12 The proceedings were listed for hearing in the Tribunal on 9 September 2021. The hearing was conducted by telephone. The Lot owner appeared and the strata manager Ms Best appeared for the owners corporation.
- 13 The Tribunal reserved its decision and gave a decision on 10 September 2021 with written reasons.
- 14 On 5 October 2021, the owners corporation filed a Notice of Appeal with the Appeal Panel. The appeal was filed within the relevant 28 day period from the date the decision was received under Regulation 25 of the Civil and Administrative Tribunal Rules 2014 (NSW).
- 15 Despite the directions of the Appeal Panel on 27 October 2021, neither party provided a copy of the sound recording of the hearing or a transcript of hearing. The strata committee members who appeared for the owners corporation at the appeal hearing (Mr Burns and two other strata committee members) did not appear at the Tribunal hearing.

Decision of the tribunal

- 16 The Tribunal ordered that the owners corporation was to undertake works in accordance with the scope of works in the 3 page quotation of Mark Ezzy (Blaxland Tiles and Bathrooms) dated 1 February 2021, with such works to be completed by 31 January 2022.
- 17 Further, the Tribunal ordered that the works be performed by suitably licensed tradespersons and the Lot owner provide reasonable access so that the work could be performed.
- 18 The quotation of Mark Ezzy (of Blaxland Tiles and Bathrooms) dated 1 February 2020 that comprises the scope of works ordered by the Tribunal relevantly stated:

All wet areas (bathroom, laundry and toilet) have sustained extensive damage and we would only recommend a full renovation including waterproofing on each of these rooms as we would not be able to guarantee the works without this being done.
- 19 The quote involved works to the bathroom; laundry; and toilet. The scope of works involved removal of tiles; installation of waterproofing membrane; installation of plumbing fixtures; repositioning of plumbing in the toilet and

laundry; supply and installation of shower screen; and supply of installation of new architraves to bathroom.

- 20 The reasons of the Tribunal set out the evidence and submissions of the respective parties, which are summarised as follows:

Lot Owner

- 21 The Lot owner had provided expert evidence by way of quotations and reports from Mr Peter Hawkins of Hawkins Tiling and Design; and Mr Mark Ezzy. He also relied on a quote from Kernos Maintenance Services, who the owners corporation had engaged to perform an inspection.
- 22 All of the Lot owner's experts had stated that there were large areas of drummy tiles in the bathroom, toilet and laundry. Mr Hawkins estimated that 80% of the tiles were drummy; the area was too large to "patch"; and patching (rather than replacing all of the tiles) may compromise the existing waterproofing membrane.
- 23 As discussed previously, Mr Ezzy had stated that all areas in the bathroom, toilet and laundry had sustained extensive damage and a "full renovation" with new waterproofing membrane was appropriate.
- 24 The cost of the works identified in Mr Ezzy's quote was \$11,770 (inclusive of GST) for the bathroom and \$7,260 (inclusive of GST) for the toilet and laundry.
- 25 Kernos Maintenance Services had stated that there were large areas of drummy floor tiles, indicating the tiles had come loose from the substrate (underlying floor surface). The bathroom, toilet and laundry tiles needed to be resecured. However, due to the age of the tiles, it would be near impossible to reuse the existing tiles and new non-slip floor tiles needed to be installed.
- 26 The Lot owner's oral evidence was that many tiles in the bathroom, toilet and laundry were 'drummy' and some tiles were chipped and lifting. The Lot owner denied that he was unreasonably seeking to have the owners corporation pay for a full bathroom, toilet, and laundry renovation.

Respondent

- 27 The owners corporation relied on reports of DLR Building Services dated 28 July 2020, who asserted that there were some “drummy” tiles but they did not require replacement and the only tiles that required replacement were a few loose and cracked tiles in the bathroom.
- 28 The owners corporation also relied upon a report by AAA Plumbcare (Mr Nicholas Brown) dated 21 February 2021. Mr Brown performed an inspection with two strata committee members present. In his report, Mr Brown stated that tile beds were secure, the integrity of the floor was stable and that there were “a few tiles that are loose and broken” which required repair at a cost of \$650.
- 29 The Tribunal also noted that the owners corporation relied on the report of Keno Maintenance Services (which the Lot owner also relied upon).
- 30 The Tribunal stated that the owners corporation had also obtained 3 separate quotations dated 10 July 2020 from Accelerate Showers and Bathrooms. The first quote was to remove and replace first and second rows of shower wall tiles; first row of bathroom wall tiles; hob; shower and bathroom floor; install new waterproofing membrane; and replace vanity. The cost was \$7,876 (inclusive of GST). The second quote was to supply and install a new vanity with mixer tap and tile either side of vanity. The cost was \$1,584 (inclusive of GST). The third quote was to remove and replace first row of wall tiles and laundry wall tiles; install a new waterproofing membrane in the laundry; and re-install laundry tub and washing machine. The cost was \$7,678 (inclusive of GST).
- 31 The Tribunal stated that the owners corporation submitted that it should not be liable for “renovating” the Lot owner’s bathroom, toilet and laundry.
- 32 The Tribunal also stated that the owners corporation “*did not make any oral submissions in regard to the scope of remediation work*” and made “*no submission*” as to why the quotation and scope of works of Accelerate Shower and Bathrooms should be preferred to Blaxland Tiles and Bathrooms.

Findings of the Tribunal

- 33 The Tribunal referred to the duty of an owners corporation to keep and maintain in a state of good repair the common property of the strata scheme under s 106(1) of the SSM Act. The Tribunal also referred to the principles set out in *Glenquarry Park Investments Pty Ltd* [2019] NSWSC 425 at [100]-[114] in respect of the scope of the duty and the powers of the Tribunal to make remedial orders under s 232 of the SSM Act.
- 34 The Tribunal made the following findings:
- (1) There were loose and drummy tiles over an extensive area of the bathroom, toilet and laundry.
 - (2) The weight of evidence established that the common property flooring of the bathroom, toilet and laundry had deteriorated and the existing flooring needed to be replaced.
 - (3) The quotation of Mr Ezzy of Blaxland Tiles and Bathrooms contained an appropriately detailed scope of works for the repair of the common property floor of the bathroom, toilet and laundry.

Scope and nature of appeals

- 35 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 NCAT Act.
- 36 Internal appeals involve consideration of whether there has been any error of law; or any error other than an error of law sufficient to grant leave to appeal under Cl. 12 of Sch. 4 of the NCAT Act.
- 37 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].
- 38 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.
- 39 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).
- 40 In *Collins v Urban* [2014] NSWCATAP 17 ("*Collins v Urban*"), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of Cl. 12(1) of Sch. 4 may have been suffered where:
- ... there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
- 41 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.
- 42 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.

- 43 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

- 44 The Notice of Appeal sets out the grounds of appeal.
- 45 The owners corporation asserts the orders of the Tribunal are “excessive and punitive” because they go beyond the duty of the owners corporation to repair and maintain common property.
- 46 The owners corporation further asserts it was denied “natural justice” as the strata manager appeared at the hearing for the owners corporation at her residence and because of Covid-19 restrictions strata committee members could not attend her residence. The owners corporation submits that strata committee members had “*significant knowledge*” of the issues, and were “*denied the right to provide oral argument at the hearing*”.
- 47 The owners corporation also seeks leave to appeal on the basis that the decision was (a) not fair and equitable; and (b) against the weight of evidence.
- 48 The owners corporation stated in its Notice of Appeal that it sought an order from the Appeal Panel that the owners corporation perform repairs involving the removal and replacement of bathroom floor tiles (excluding the shower recess); waterproof the area; and supply and install new architraves. In other word, the owners corporation’s position was that to comply with its duty under s 106 of the SSM Act, more limited works than ordered by the Tribunal were appropriate.

- 49 The owners corporation also stated that the Lot owner had “agreed to supply tiles at his own expense” and that the Lot owner would be responsible for any works to the toilet and laundry.
- 50 It was not clear at the appeal hearing whether the Lot owner’s offer to supply tiles remains extant but that issue is irrelevant to the issues for consideration in the appeal.
- 51 We comprehend the grounds of appeal raised by the owners corporation as:
- (1) Failure to apply correct legal principles in respect of the duty of the owners corporation under s 106 (1) of the SSM Act (error of law);
 - (2) Failure to provide procedural fairness (error of law);
 - (3) Decision not fair and equitable and/or against the weight of evidence (error to which leave to appeal is required).

Consideration

Duty of the Owners Corporation Under s 106 (1) of the SSM Act

- 52 We are not satisfied that the owners corporation has established an error of law in respect of the Tribunal’s consideration of the applicable legal principles under ss 106 and 232 of the SSM Act for the reasons set out below.
- 53 The documents provided by the parties in the appeal did not include a copy of the registered strata plan. However, by reason of the definition of the boundaries of a lot in s 6 (1) (ii) of the *Strata Schemes Development Act 2015* (NSW), the tiled floor and substrate of the floor of the applicant’s Lot is part of the common property. There was no evidence to indicate that the tiles were not the original tiles when the strata building was constructed and the strata plan registered. The tiles are fixtures that form part of the common property because they are permanently affixed to the substrate of the floor.
- 54 Neither the Appeal Panel nor the Tribunal at first instance was provided with a copy of the by-laws of the strata scheme. Under s 107 (1) of the SSM Act, the owners corporation may adopt in its by-laws a common property rights memorandum as prescribed in Reg. 27 of the *Strata Schemes Regulation 2016* (NSW) that sets out parts of the common property that a Lot owner is responsible to maintain and repair, such as flooring.

55 However, in the absence of such a common property rights memorandum or a common property rights by-law imposing on the Lot owner a responsibility to maintain and repair common property, the responsibility to maintain and repair common property lies with the owners corporation.

56 Section 106 of the SSM Act states:

106 Duty of owners corporation to maintain and repair property

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

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that—

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

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

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

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

57 The scope of the duty of an owners corporation to maintain and keep in a state of good repair common property has been the subject of extensive judicial consideration (e.g. *Seiwa Australian Pty Ltd v Owners Strata Plan 25042* [2006] NSWSC 1157; *Ridis v Strata Plan 10308* [2005] NSWCA 246;

Stolfa v Owners Strata Plan 4366 & Ors [2009] NSWSC 589; *Stolfa v Hempton* [2010] NSWCA 218; *The Owners Strata Plan No 50276 v Thoo* [2013] NSWCA 270; and *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 (*'Hegyesi'*).

58 In *The Owners-Strata Plan SP 20211 v Rosenthal*; *Rosenthal v The Owners-Strata Plan No 20211* [2018] NSWCATAP 243 (*"Rosenthal"*) and *Loneragan v The Owners-Strata Plan No 16519* [2020] NSWCATAP 177 (*"Loneragan"*), the Appeal Panel summarised the principles applicable to the duty of an owners corporation under s 106 (1) and (2) of the SSM Act as follows (*Rosenthal* at [35]-[36]; *Loneragan* at [29]-[41]). The pertinent principles (excluding authority references) are:

- (1) The owners corporation has a strict duty under s 106 (1) of the SSM Act to maintain and keep in a state of good and serviceable repair the common property. That duty is not merely to take reasonable steps or use best endeavours.
- (2) The duty under s 106 (1) of the SSM Act includes keeping common property in order by acts of maintenance before it falls out of condition. The duty includes taking preventative measures to ensure there is not a malfunction. The duty also includes remediation of defects in the original construction of the common property.
- (3) As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 106 (1) duty.
- (4) Breach of the duty under s 106 (1) of the SSM Act gives each Lot owner a statutory cause of action.
- (5) Repairs to common property (including renewal or replacement of common property) that does not involve alteration or addition for the purpose of improving or enhancing the common property does not require a special resolution of the owners corporation under s 108 of the SSM Act.
- (6) Renewal or replacement of common property under s 106 (2) of the SSM Act is only engaged when the item of common property is no longer operating effectively, or at all, or has fallen into a state of disrepair.
- (7) Renewal or replacement of common property under s 106 (2) of the SSM Act is limited by a concept of reasonable necessity.

59 Further, in *Hegyesi*, Parker J referred to the scope of the remedial powers of the Tribunal under s 232 of the SSM Act. In the context of remedial work orders for breach of s 106 of the SSM Act, Parker J held:

- (1) Orders must be focussed upon the minimum necessary for the owners corporation to comply with its duty to maintain and keep in a state of good repair the common property (paras [111]-[112]).
- (2) Orders for repairs must be sufficiently specific so that the owners corporation understands what needs to be done to comply with the orders, and not vague or indeterminate (paras [104]; [113]-[114]).

60 In this matter, the Tribunal referred to *Hegyési*. Although the reasons are economical, they are sufficient to demonstrate that the Tribunal considered the principles in *Hegyési*.

61 The expert evidence of the Lot owner in addition to the Lot owner's oral and photographic evidence was sufficient for the Tribunal to be satisfied that the tiles of the bathroom, toilet and laundry were sufficiently loose and drummy that they were no longer operating effectively and it was reasonably necessary to replace all the tiles because replacing sections of the tiles would be insufficient to achieve compliance with the owners corporations duty under s 106 of the SSM Act.

62 In the context of replacing the tiles, the evidence was also sufficient for the Tribunal to be satisfied that such a course of action was reasonably necessary.

63 The owners corporation submits that the scope of the remedial orders are too broad. However, it is clear from the evidence that was before the Tribunal that removal of the tiles of the bathroom would involve consequential damage to the areas including the waterproofing membrane and items attached to the floor, such as the shower screen. In those circumstances, the scope of the remedial orders of the Tribunal does not extend beyond the permissible scope of what is the minimum necessary for the owners corporation to achieve compliance with its duty under s 106 of the SSM Act.

64 In any event, consideration and findings as to what remedial work is the minimum necessary for the owners corporation to achieve compliance with its duty under s 106 of the SSM Act involve findings of fact based on the evidence, and are matters for consideration under Cl. 12 of Sch. 4 of the NCAT Act.

65 The owners corporation now asserts that a scope of works for only the bathroom based upon the quotation of Accelerate Showers and Bathroom

(excluding replacement of the vanity) dated 10 July 2020 should be ordered, rather than the scope of works in the quotation of Mr Ezzy for the bathroom, toilet and vanity.

66 However, the evidence that the Tribunal accepted was that tiles were drummy in most areas of the bathroom, toilet and laundry rather than just the bathroom.

67 Further, the Tribunal found that the owners corporation at the hearing had not made a submission that the quotations of Accelerate Showers and Bathrooms should be accepted as containing an appropriate scope of works for the repair of common property rather than the quotation of Mr Ezzy. A party is bound by the case they ran at first instance and cannot raise matters on appeal (either deliberately or by inadvertence) that were not raised at the hearing unless there are “most exceptional circumstances” (*Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at [9]).

68 The owners corporation did not provide a sound recording of the hearing or a transcript of the hearing. Accordingly, there is nothing to indicate the Tribunal was incorrect in its reference at para [29] of the reasons that no submission was made as to why the scope of works in the quotes of Accelerate Showers and Bathrooms should be preferred over the scope of works contained in the quotation of Mr Ezzy.

69 Consequently, this ground of appeal fails.

Denial of Procedural Fairness

70 There was no denial of procedural fairness or contravention of s 38 (5) of the NCAT Act by reason of the owners corporation being represented by the strata manager at the hearing and strata committee members not appearing at the hearing or giving evidence.

71 To establish denial of procedural fairness, the owners corporation must show that it lost an opportunity to put information or argument before the decision maker, or otherwise suffered any detriment (*Italiano v Carbone & Ors* [2005] NSWCA 177 at [88]).

72 Irrespective of not attending the strata manager’s office due to Covid-19 restrictions, members of the strata committee could have telephoned the

Tribunal at the hearing and participated in the hearing (either by presenting the case for the owners corporation or giving evidence as witnesses). There is nothing unusual in a strata manager appearing at a Tribunal hearing and presenting the case for the owners corporation.

- 73 If the strata committee did not want the strata manager to present its case, members of the strata committee could have instructed the strata manager that a member of the strata committee present the case for the owners corporation or, in the alternative, have the strata manager present the case and telephoned the Tribunal to either observe the hearing or seek to give evidence as lay witnesses.
- 74 The fact that members of the strata committee in hindsight believe the case for the owners corporation would have been argued differently or more thoroughly if a strata committee member had appeared at the hearing is not a denial of procedural fairness.

Leave to Appeal

- 75 We are not satisfied that leave appeal should be granted for an error other than an error of law under Cl. 12 of Sch. 4 the NCAT Act applying the principles in *Collins v Urban*. The decision was logical and the reasoning orthodox. The factual findings were supported by evidence. The evidence did not in its totality preponderate so strongly against the conclusion found by the Tribunal that it can be said that the conclusion was not one that a reasonable Tribunal member could reach (*Collins v Urban* at [77]).

Conclusion

- 76 The appeal is dismissed.
- 77 No stay of the Tribunal's orders was granted by the Appeal Panel on 27 October 2021 as the application for a stay was withdrawn. The issue of lifting a stay does not arise.
- 78 However, we note that the period of time for the owners corporation to comply with the Tribunal's order has now expired. Pursuant to s 81 (1) (b) of the NCAT Act, it is appropriate for the date of compliance with the Tribunal's order be

extended. We regard 3 months from the date of this decision as an appropriate extension.

ORDERS

- (1) Leave to appeal refused.
- (2) Appeal dismissed.
- (3) The date of compliance with order 1 of the Tribunal in Matter SC 21/19940 dated 10 September 2021 is extended for 3 months from the date of this decision.

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

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