Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners-Strata Plan No 79633 v Graorovska
Medium Neutral Citation:	[2022] NSWCATAP 152
Hearing Date(s):	28 February 2022
Date of Orders:	11 May 2022
Decision Date:	11 May 2022
Jurisdiction:	Appeal Panel
Before:	G Sarginson, Senior Member D Ziegler, Senior Member
Decision:	1. Leave to appeal is refused. 2. The appeals are dismissed. 3. Stay orders of the Appeal Panel dated 17 December 2021 and 27 January 2022 are lifted. 4. Order 2 of the Tribunal dated 29 October 2021 in Matter SC 21/19101 is varied to extend the time for compliance to 3 months from the date of this decision. 5. If there is a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of this decision. 6. The costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of this decision. 7. The costs applicant is to file and serve costs submissions in reply from 35 days from the date of this decision.

8. The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).

9. The Appeal Panel may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.

10. Either party may apply to the Appeal Panel in writing to vary or extend the timetable for costs submissions.

11. If no application for costs is made in accordance with these orders, there is no order as to costs with the intention that each party pay its own costs of the Appeal.

Catchwords:	LAND LAW---Strata title---Conduct of hearing---Excessive judicial intervention---Denial of procedural fairness---Applicable principles
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW). Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Ah Sam v Mortimer [2021] NSWCA 327 Australian Securities and Investments Commission v GetSwift Pty Ltd [2020] FCA 504 Fabcot Pty Ltd v Glen Eira CC [2020] VCAT 957 Galea v Galea (1990) 19 NSWLR 263 Gambaro v Mobycom Mobile Pty Ltd [2019] FCAFC 144 Garofali v Moshkovich [2021] NSWCATAP Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 42 Italiano v Carbone & Ors [2005] NSWCA 177 Macionis v Franklin [2021] NSWCATAP 367 Manly Fast Ferry Pty Ltd v Wehbe [2021] NSWCA 67 Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597 Paraiso v CBS Build Pty Ltd [2020] NSWSC 190 Royal Guardian Mortgage Management Pty Ltd v

	Nguyen [2016] NSWCA 88 Sanson v Sanson [2021] NSWSC 417 Seiwa Pty Ltd v The Owners-Strata Plan 35042 [2006] NSWSC 115 Sullivan v Department of Transport [1978] FCA 48; (1978) 20 ALR 323 Wootten v Godfrey [2019] NSWCATAP 255 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Collins v Urban [2014] NSWCATAP 17 Pholi v Wearne [2014] NSWCATAP 78 Charisteas v Charisteas [2021] HCA 29 LMA Contractors Limited v Changizi [2017] NSWCATAP 145
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners-Strata Plan No 79633 (Appellant) Violeta Graorovska (Respondent)
Representation:	Solicitors: Bannermans Lawyers (Appellant) PBL Law Group (Respondent)
File Number(s):	2021/00338769; 2021/00365972
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	29 October 2021
Before:	G. Ellis SC, Senior Member
File Number(s):	SC 21/15634; SC 21/19101

REASONS FOR DECISION

1 This appeal arises from a decision of the Tribunal dated 29 October 2021 in a dispute under the *Strata Schemes Management Act 2015* (NSW) ('the SSM Act') involving repairs to common property.

2 There was a subsequent costs decision of the Tribunal dated 6 December 2021.

3 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.

4 The owners corporation appeals from both the decision in the substantive proceedings and the costs decision.

5 The appeal documents relied upon by both parties contain a written transcript of the Tribunal hearing.

6 The central issue in the appeal is the manner in which the Tribunal hearing was conducted.

7 The proceedings involved a long standing dispute between the Lot owner and the owners corporation regarding repairs to common property. The strata scheme was registered on 19 October 2007 and is located in an inner-west suburb of Sydney, NSW. The strata building comprises of 3 buildings; each of 4 levels; containing 46 residential lots and underground car-parking.

8 On 12 November 2013, the owners corporation had obtained an expert report from Mr Mo'ane, building consultant of Integrated Building Consultancy Group ('IBC') regarding building defects in the context of the owners corporation obtaining advice about taking legal proceedings against the developer of the strata building for building defects.

9 A further report with an updated scope of works was obtained by the owners corporation from IBC dated 26 September 2014. The reports of IBC identified water ingress issues in the common property of the strata building.

10 The Lot owner purchased Lot 8 in September 2016.

11 For the purpose of this appeal, it is unnecessary to detail the dispute between the Lot owner and the owners corporation. However, the Agreed Statement of Facts and Issues prepared by the parties prior to the Tribunal hearing relevantly states:

(1) In 2016 some work to common property timber decking proximate to Lot 8 was undertaken by the owners corporation. Such work occurred between October and November 2016.

(2) At an Extraordinary General Meeting of the owners corporation on 21 August 2018, the owners corporation resolved to enter into a contact with a remedial builder (Renfray Projects Pty Ltd) to rectify defects in common property in accordance with a scope of works that had been issued by IBC. There had been a previous agreement with a remedial builder based on a scope of works from IBC, but that work was not proceeded with. A copy of the Minutes of the EGM dated 21 August 2018 was in evidence before the Tribunal. The contract price was $729,303. The works included repair to the en suite of Lot 8.

(3) A dispute then arose between the Lot owner and the owners corporation regarding whether the works proposed would adequately rectify defects. The Lot owner sought to undertake a "*proper rectification of the bathtub defect by contributing her own funds and additionally sought the approval form the strata committee to supply tiles at her own expense for the use in her en suite*".

(4) The strata committee refused the Lot owner's request.

(5) At the Annual General Meeting ('AGM') of the owners corporation in May 2019 the Lot owner proposed various Motions, including a Motion to perform works to the bathroom of the Lot herself and a common property rights by-law regarding such works. The Motions were not passed.

(6) On 19 May 2019 the "approved works" to the bathroom and ensuite were "removed" from the owners corporation's contract with Renfray Projects Pty Ltd.

(7) In May 2020 the owners corporation undertook partial waterproofing and retiling work immediately adjacent to the front door of Lot 8 resulting in water penetrating into compromised water proofing membrane and tiling work.

(8) The parties were in dispute about (a) waterproofing and structural defects; and (b) whether the deterioration of timber decking in Lot 8 was due to the failure of the owners corporation to undertake works recommended by its building consultants or due to the Lot owner applying a coating/stain to the decking.

12 The owners corporation commenced proceedings in the Tribunal on 8 April 2021 in Matter SC 21/157634 seeking access to Lot 8 for the purpose of

performing repairs to common property under s 124 of the SSM Act. The Lot owner filed a cross-application in Matter SC 21/19101 on 1 May 2021 seeking that the owners corporation perform repairs to common property under ss 106 and 232 of the SSM Act.

13 Both parties had obtained expert evidence in support of their respective applications. The Lot owner had obtained an expert report from Mr Coombes, building consultant dated 12 June 2021. The owners corporation had obtained a report of Mr Ilievski (engineer and building consultant) of IBC dated 26 July 2021. Mr Ilievski's did not attend the site to prepare his report but conducted a "desktop review" of Mr Coombes' report of 12 June 2021. Mr Ilievski had prepared a scope of works and documents for a tender process to perform remedial works in June 2018.

14 Pursuant to procedural directions of the Tribunal, Mr Coombes and Mr Ilievski had conferred and prepared a joint expert report in the form of a Joint Scott Schedule dated 3 September 2021.

15 The Lot owner had then engaged Mr Coombes to prepare a supplementary report dated 29 September 2021. According to paragraph 1.1 (e) of the report of Mr Coombes dated 29 September 2021:

> I have prepared this update because in my original report I suggested item 2.5 required further investigation. I recently attended the property on 29 September 2021 in order to carry out further investigation. My findings, together with the scope of work and a cost estimate for rectification have been added to section 2.5 of this report. I have also updated the Scott Schedule accordingly and added some photographs concerning item 2.5. Apart from these additions and this clause the original report has not been altered.

16 Item 2.5 to which Mr Coombes referred involved timber flooring to the lower level bedroom. Mr Coombes believed that water was seeping under the hob in the bathroom into the lower level bedroom, causing floorboards to absorb moisture and swell at the joints. Mr Coombes set out a scope of works for a method of rectification.

17 The Joint Scott Schedule contained costings for the works identified by Mr Coombes as appropriate. The total cost identified by Mr Coombes was $46,350.86.

18 Pursuant to a procedural direction of the Tribunal, the parties had filed a Statement of Agreed Issues.

19 The Statement of Agreed Issues stated:

> The primary questions before the Tribunal are:
>
> (a) Which of the following methods would result in the owners corporation's obligation to properly rectify the water proofing and structure defects in the en suite in lot 8:
>
> (i) The application of a sealant as recommended by the owners corporation's expert witness, or
>
> (ii) the full replacement of the en suite as recommended by the lot owner's expert witness and by the owners corporation's building consultant.
>
> (b) Which of the following methods would result in the owners corporation's obligation to properly rectify the bathtub and water proofing in the main bathroom of lot 8:
>
> (i) the bathlip works involving the application of Villaboard and tiling over two of the existing walls abutting the bathtub as recommended by the owners corporation's expert witness; or
>
> (ii) the full replacement of the bathroom as recommended by the lot owner's expert witness.
>
> (c) in respect of the decking of lot 8:
>
> (i) responsibility for the significant deterioration of the decking boards to lot 8:
>
> (ii) whether the appropriate method of rectification is the full replacement as recommended by the lot owner's expert witness and initially by the owners corporation's building consultant.
>
> (d) The responsibility for the repair of the damaged flooring in lot 8 caused by the owners corporation's defective work.
>
> (e) Whether the rectification method recommended by the lot owner's building consultant would result in the owners corporation's obligation (sic) to properly rectify the lower bedroom.

20 The dispute was listed for hearing at the Tribunal on 22 October 2022. The hearing was listed by audio visual link. Mr Yen, Solicitor, of Bannermans Lawyers, appeared for the owners corporation. Mr Khan of PBL Law Group Pty Ltd, appeared for the Lot owner.

21 At the commencement of the hearing, Mr Yen had technical difficulties in logging into the audio-visual link. He then proceeded to appear by telephone until the adjournment for lunch. This period included cross examination of lay and expert witnesses. After lunch, Mr Yen appeared by audio-visual link. The period after lunch involved oral submissions.

22 A number of lay witnesses, including the Lot owner, were briefly cross examined. Mr Finkelde, a strata committee member who had been heavily involved in the dispute and who had provided a witness statement, was not cross examined.

23 Both Mr Coombes and Mr Ilievski gave evidence at the hearing and were cross examined.

24 The hearing concluded on 22 October 2021 after the oral submissions of the parties.

DECISION OF THE TRIBUNAL DATED 29 OCTOBER 2021

25 The Tribunal's decision comprises 29 pages.

26 The Tribunal dismissed the owners corporation's proceedings seeking access to the Lot, because the Tribunal made orders in the Lot owner's proceedings that dealt with the issue of access.

27 The Tribunal's findings and orders are summarised as follows:

Jurisdiction of the Tribunal-The Issue of Mediation

28 The Tribunal noted that the owners corporation had submitted that the Lot owner's proceedings had not been to mediation prior to the commencement of those proceedings pursuant to s 227 of the SSM Act; and should either be dismissed or referred to mediation.

29 The Tribunal held that the owners corporation had commenced proceedings first seeking access to the Lot to perform works to common property under s 124 of the SSM Act; and those proceedings were not of a type that required mediation by NSW Fair Trading before being accepted by the Registrar of the Tribunal for filing under s 227 (4) (e) of the SSM Act.

30 As the Lot owner's application for repairs pursuant to ss 106 and 232 of the SSM Act was a cross application to the owners corporation's proceedings, the Tribunal held at [23]:

> In those circumstances, it is understandable that the Tribunal's registrar (sic) would consider that mediation is unnecessary or inappropriate in the circumstances as provided in s 227 (1) (c), and a perusal of the Tribunal's file in relation to the cross-application reveals that such a decision was made.

31 The Tribunal also commented that the owners corporation's "suggestion that an application should be dismissed, at the end of a contested hearing, when the Tribunal is ready to rule on the issues" was contrary to the just, quick, cheap and efficient resolution of the real issues in dispute in the proceedings under s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act'); and that there was nothing unfair or inappropriate about the fact that the Lot owner's proceedings were not set down for a separate directions hearing after they were filed (paras [24-[26] reasons).

32 Although it is not referred to in the Tribunal's reasons, we note that both the owners corporation's proceedings and the Lot owner's proceedings were listed for a directions hearing together in the Tribunal on 2 June 2021; and procedural directions were made in both matters. Such procedural directions did not make any reference to the owners corporation asserting the Tribunal did not have jurisdiction in the Lot owner's proceedings because mediation had not occurred.

33 The Tribunal was satisfied that it had jurisdiction in the proceedings under the SSM Act as the dispute was between a Lot owner and the owners corporation about the management and operation of the strata scheme.

Breach of s 106 of the SSM Act and the Appropriate Remedial Orders to Rectify the Breach

34 Under s 106 (1) and (2) of the SSM Act, an owners corporation has a duty to maintain and keep in a state of good repair the common property of the strata scheme. That duty extends to the renewal or replacement of fixtures and fittings that form part of the common property.

35 The Tribunal noted (at para [5]) that the "Statement of Agreed Facts" (sic) indicated that the owners corporation accepted that it was in breach of its duty under s 106 of the SSM Act other than in relation to the timber decking. Accordingly, the "real issues in dispute" involved the scope of works appropriate to repair the common property, in circumstances where the owners corporation (on the basis of the reports of IBC) and the Lot owner (on the basis of the reports of Mr Coombes) diverged as to the appropriate scope of works to

achieve compliance with the owners corporation's duty under s 106 of the SSM Act.

36 The Tribunal set out the principles in *Seiwa Pty Ltd v The Owners-Strata Plan 35042* [2006] NSWSC 1157 at [3]; and *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 at [71]. The Tribunal also set out the provisions of ss 106 and 108-111 of the SSM Act dealing with the owners corporation's duty to maintain and repair common property; and the manner in which approval is required to alter common property.

37 The Tribunal considered each of the items of common property and made the following findings:

En suite

38 The Tribunal noted that in the Joint Scott Schedule of Mr Ilievski and Mr Coombes, both agreed that the common property required repair and that Mr Ilievski agreed with the scope of works proposed by Mr Coombes other than in respect of one issue.

39 The issue of disagreement was whether the product 'Megasealed' could appropriately be used to waterproof the en suite.

40 The Tribunal referred to Item 3 in the Joint Scott Schedule. Although the Tribunal's reasons did not quote from the Joint Scott Schedule, it relevantly stated as follows:

> …
>
> **Result of Conclave**
>
> MI (Ilievski) agrees the shower enclosure is leaking to adjoining areas.
>
> MI agrees OC liability.
>
> MI agrees with DC's (Coombes) scope of works . However, MI notes OC (owners corporation) may opt to consider Megasealed option on a performance basis.
>
> DC disagrees with Megasealed option.
>
> MI agrees with the cost to rectify if found in favour of Lot 8.

41 The Tribunal then dealt with the evidence of Mr Coombes and Mr Ilievski. The Tribunal preferred the evidence of Mr Coombes as to why application of Megasealed sealant was not appropriate, and why such a course of action

would not comply with applicable building standards. The Tribunal accepted the scope of works proposed by Mr Coombes (at paras [29]-[32]).

Bathroom

42 The Tribunal noted that this was Item 2 in the Joint Scott Schedule. Although it is not set out in the Tribunal's reasons, Item 2 relevantly stated as follows:

> **Applicant Comments**
>
> DC maintains his opinion regarding liability, scope of works, and quantum as set out on pages 13 to 19 of his updated report. However, DC will accept MI's scope of works that includes for Villaboard linings.
>
> **Respondent Comments**
>
> MI maintains his opinion regarding liability and suitability of MI"s scope as outlined in pages 9 to 10 of his report.
>
> **Result of Conclave**
>
> MI agrees the bathtub has been installed incorrectly.
>
> MI agrees with DC's scope of works, if found in favour Lot 8.
>
> MI maintains that MI scope is more cost effective and remains AS compliant.
>
> If found for the owners corporation, DC agrees with MI's scope of works which includes Villaboard linings and stainless steel angle at the external corner.
>
> MI agrees with the cost to rectify, if found in favour of Lot 8.

43 The Tribunal stated that "as far back as 26 September 2014" it was observed that the bathtub had not been recessed into abutting walls, which was non-compliant with applicable building standards. Both Mr Ilievski and Mr Coombes agreed "the bathtub was installed incorrectly" and the responsibility of the owners corporation was to rectify.

44 The Tribunal stated that the issue in dispute was the "reasonable method of rectification" (para [34).

45 The Tribunal then set out the different opinions of Mr Coombes and Mr Ilievski on the appropriate method of repair. Mr Ilievski identified that the appropriate method of rectification involved applying a water-resistant lining (Villaboard) to the existing tiles and then attaching new tiles to the Villaboard. Mr Coombes disagreed with that method, because it did not address any damage behind the existing structure that had occurred over the previous 8 years (para [36]).

46 After setting out the evidence of Mr Coombes as to why he disagreed with Mr Ilievski, the Tribunal set out at para [41] why it accepted the method of repair of Mr Coombes should be accepted. Four reasons were identified, being:

(1) Mr Coombes' method of repair addressed damage which had occurred over the past 8 years in circumstances where the owners corporation was advised in 2014 that "water entry will result in damage being caused within the confined space and adjacent areas". The Tribunal accepted that while Mr Ilievski's proposed method "will undoubtedly be cheaper and may be effective based on its use in other bathrooms within the property", Mr Coombes' method was more appropriate to comply with the owner's corporation's duty under s 106 of the SSM Act.

(2) The method now proposed by the Lot owner was previously proposed in reports provided to the owners corporation.

(3) Overlooking cosmetic matters such as grout lines and tile colours; and the recessing of taps into a wall "may well be problematic".

(4) Mr Ilievski, in relation to the en suite shower, changed his proposed method of rectification from partial repair to restoration.

Decking

47 The Tribunal noted that the key issue in dispute was whether the Lot owner had applied coating to the timber deck which had altered the common property in a manner that removed responsibility by the owners corporation to maintain and repair the common property; whether the owners corporation was in breach of its duty under s 106 of the SSM Act; and if breach was established, the appropriate scope of repairs.

48 The Tribunal referred to Item 1 in the Joint Scott Schedule. Although the reasons do not quote from the Joint Scott Schedule, that item relevantly states the following:

> **Applicant Comments**
>
> DC maintains his opinion regarding liability, scope of works and quantum as set out on pages 9 to 12 of his updated report.
>
> **Respondent Comments**
>
> MI maintains the opinion that the decking is not original construction. MI notes deck coatings were incorrectly applied and never adequately maintained allowing moisture into timber substrate as outlined in pages 7 to 8 of his report.
>
> **Result of Conclave**
>
> MI agrees deterioration and mould has occurred to the timber decking boards.
>
> MI denies OC liability.

> MI disagrees with DC's scope of works, if found in favour of Lot 8.
>
> MI agrees with the cost to rectify, if found in favour of Lot 8.

49 At paragraphs [43]-[45] of the reasons, the Tribunal set out the salient evidence of Mr Coombes and Mr Ilievski. In respect of the evidence of Mr Coombes, the Tribunal noted at para [43] that he suggested "five causes of premature deterioration", which were set out. Paragraph [43] further sets out the evidence of Mr Coombes as follows:

> …He noted the lot owner had re-applied a stain finish to the upper surface of the decking boards which he said would have been beneficial and that replacement of the decking boards for lots 5 and 6 had been approved and completed, as reflected in the minutes dated 17 October 2016. His opinion was that excessive mould and decay on the underside of the decking boards meant they needed to be replaced and not repaired.

50 The Tribunal stated that Mr Coombes stated in cross examination that the Lot owner had applied a "preservative" to the decking (para [45]). Mr Ilievski's evidence was that he had done a "desktop review" and in response to the Tribunal asking how often any coating or preservative should be applied *"he said 12 months and that while the upper surface would be done, the underneath surface generally would not be done"* (para [45]).

51 The Tribunal noted the owners corporation submitted that there had been "unauthorised work by the lot owner contrary to s 108" and made the following findings at paras [47]-[50]:

> The suggestion that an application of a coating by the lot owner was contrary to s 108 is rejected as s 109 permitted the work to be done. Further, the Tribunal considers that work of the lot owner to be have been beneficial and not detrimental.
>
> Despite Mr Ilievski's concession that the decking timbers should be treating (sic) with a preservative or coating every 12 months, there is no evidence that the owners corporation carried out such maintenance at any time since November 2016.
>
> The suggestion that responsibility for the deterioration of the decking timber should be attributed to the lot owner is rejected. There was no effective challenge to the reasons for deterioration suggested by Mr Coombes and the small distance between the slab and the deck plus the lack of ventilation reinforce the need for maintenance, including the annual coating of at least the upper side of the decking timbers and ensuring that the relevant drain is not blocked.

52 The Tribunal found that the owners corporation had breached its duty to maintain and repair the common property decking under s 106 of the SSM Act

and accepted the appropriate method of repair was to replace the timber decking as recommended by Mr Coombes.

Flooring

53 The Tribunal referred to Item 4 in the Joint Scott Schedule (where the issue was referred to as "the front porch").

54 The Tribunal noted that it was not in dispute that the owners corporation had undertaken partial tiling and waterproofing work near the front door of Lot 8. Mr Coombes believed this incomplete work had caused water penetration into the lower bedroom of Lot 8. Mr Ilievski believed that there was merely water ponding rather than water penetration.

55 Although the Tribunal's reasons did not set out Item 4 of the Joint Scott Schedule, it relevantly stated as follows:

> **Applicant Comments**
>
> DC maintains his opinion regarding liability, scope of works and quantum as set out on pages 26 to 27 of his updated report.
>
> **Respondent Comments**
>
> MI maintains his opinion regarding liability. MI further notes that the area is undercover and not exposed to rainwater therefore ponding appears to be the result of surface tension and lack of sunlight exposure for the evaporation. MI notes there is no demonstrable loss incurred as the area is fit for use and not causing water penetration issues.
>
> MI maintains opinion outlined in page 12 of his report.
>
> **Result of Conclave**
>
> MI disagrees on the basis of extent of ponding not creating demonstrable loss. MI suggests site assessment in accordance with 'Colin Cass-Falls in Floor Finishes' industry article to verify defect.
>
> MI agrees OC liability.
>
> MI accepts DC's scope of works but would improve waterproofing as well, if found in favour of Lot 8.
>
> MI adjusts the cost to rectify by an increased sum of $287.16 to include waterproofing.

56 The Tribunal set out the evidence of Mr Coombes and Mr Ilievski at paras [54]-[57]. Mr Coombes believed that lack of adequate drainage was the issue, rather than ponding caused merely by surface tension. Mr Ilievski stated he had not been to the area to inspect, but was familiar with the area, having been there previously.

57 The Tribunal noted that the owners corporation had submitted that the area required “further investigation” to determine whether there was a breach of duty under s 106 of the SSM Act. The Tribunal rejected that submission, and found at para [59]:

> The unchallenged evidence is that there is an insufficient fall in the floor of the front porch. Accordingly, the issue is one of drainage not evaporation and the Tribunal is not persuaded that surface tension is a satisfactory explanation. It appears that the current situation is the result of partial tiling and rectification work. In relation to this topic, the Tribunal is satisfied that what is required is rectification and not further investigation. For that reason, the scope of works suggested by Mr Coombes is adopted with the additional element of waterproofing since the scope of works proposed by Mr Coombes only covered the removal and replacement of wall tiles.

Bedroom

58 The Tribunal referred to Item 5 in the Joint Scott Schedule. The Tribunal stated (at para [60]) that:

> Simply stated, there is water penetrating in the timber flooring of the lower-level bedroom, evident from the swelling and distortion at the joints between the floorboards.

59 The Tribunal’s reasons did not quote what was set out in Item 5 of the Joint Expert Report, but it relevantly stated as follows:

> …
>
> **Result of conclave**
>
> MI agrees water is penetrating the bedroom from the external courtyard based on photographs (sight unseen)
>
> MI agrees OC liability.
>
> MI disagrees with DC’s scope of works on the basis of further investigation required.
>
> MI agrees with the cost to rectify, subject to further investigation.

60 The Tribunal set out the evidence of Mr Coombes and Mr Ilievski at paragraphs [61]-[65] of the reasons. The Tribunal found that there was water penetration, but accepted that it was possible that there were “other sources” of water penetration rather than from the balcony.

61 At paragraphs [65]-[66] of the reasons, the Tribunal expressed concern that there may be “other sources” of water penetration that may result in the scope of works proposed by Mr Coombes not repairing the common property. This was because Mr Coombes had not performed a flood test.

62 The Tribunal stated at para [67]:

> In those circumstances, the appropriate course is to make an order for the scope of work for which Mr Coombes contends, but make it subject to flood testing being carried out.

Scope of Work Orders

63 The Tribunal noted that in submissions the owners corporation only addressed the en suite and bathroom; and in respect of the other three areas the subject of the dispute "further investigations" should be performed and no work order made. The Tribunal rejected that submission, and stated at para [72]:

> The Tribunal considers that orders should be made in a standard form for matters of this nature, with the scope of works taken from the report of Mr Coombes but with two additional matters. First, the inclusion of a waterproofing step in relation to the flooring issue (i.e. the front porch). Secondly, an additional investigative step to provide for flood testing in relation to what has been referred to as the lower bedroom.

64 The Tribunal attached to its decision a six page detailed scope of works as Schedule 1. The repair work to the lower bedroom was expressed as being that (a) there be flood testing performed in the presence of Mr Ilievski and Mr Coombes; (b) depending upon the outcome of that flood testing, the works were ether to be the scope of works set out in Mr Coombes reports (which were detailed in Schedule 1) or "such other scope of works as may be agreed by Mr Coombes and Mr Ilievski".

65 The Tribunal ordered that the work be completed by 28 February 2022 (the orders contain a typographical error referring to 28 February 2021) and that the Lot owner give reasonable access to the Lot for the work to be performed.

66 On the issue of costs, the Tribunal made directions for costs submissions by both parties.

The Costs Decision

67 On 6 December 2021, the Tribunal made its costs decision. There were written reasons comprising 10 pages.

68 Relevantly, the Tribunal found that the Lot owner had made an offer on 21 October 2021 (i.e. the day before the hearing) in 'Calderbank' terms. The Tribunal was satisfied that the Lot owner achieved a better outcome than what

was contained in the offer; and that in all the circumstances it was unreasonable for the owners corporation to have rejected the offer.

69 The Tribunal was satisfied that "special circumstances" had been established under s 60 (2) of the NCAT Act for the period on and after 22 October 2021 sufficient to depart from the usual principle that each party pay its own costs under s 60 (1) of the NCAT Act.

70 The Tribunal ordered that on and from 22 October 2021 the owners corporation was to pay the Lot owner's costs as agreed or assessed, and further "noted" that the Lot owner was the successful party for the purpose of the issue of levies under s 104 of the SSM Act.

71 The Tribunal's costs decision took into account the Lot owner's written submissions. The owners corporation did not file and serve any costs submissions in accordance with Tribunal directions. On this issue, the Tribunal stated at paras [11]-[12]:

> The owners corporation did not lodge any written submissions on costs, which was said to be on the basis than an appeal was being pursued. As a result, the Tribunal was not provided with disclosure of the costs incurred by the owners corporation in relation to these applications.
>
> It is disappointing when a party and/or the lawyer for that party, with a statutory obligation to assist the Tribunal imposed by s 36 (3) of the CATA , does not provide submissions on a matter which the Tribunal is required to consider.

Appeal Proceedings

72 The owners corporation filed a Notice to Appeal and Application for Stay of Orders on 26 November 2021. The appeal was in respect of the decision of the Tribunal dated 29 October 2021.

73 The owners corporation filed a second Notice of Appeal on 24 December 2021, which included an appeal from the costs decision on 6 December 2021.

74 Both appeals were filed within the relevant limitation period in Regulation 25 of the *Civil and Administrative Tribunal Rules 2014* (NSW).

75 At a directions hearing in the Appeal Panel on 17 December 2021, the Lot owner consented to a stay of the work order made by the Tribunal on 29 October 2021.

76 At a directions hearing in the Appeal Panel on 27 January 2022 in regard to the appeal from the costs decision, the Appeal Panel made the following notation:

> The parties agree that if the substantive appeal is not successful, the costs appeal will not be successful and the costs orders made by the Tribunal will stand.

SCOPE AND NATURE OF APPEALS

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

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

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

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

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

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

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

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

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

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

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

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

81 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in Cl. 12(1) of Sch. 4 of the NCAT Act. In such cases, the Appeal Panel

must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

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

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

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

82 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of Cl. 12(1) of 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.

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

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

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

85 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains discretion whether to grant leave under s 80(2) of the NCAT Act. The appellant

must demonstrate something more than the Tribunal was arguably wrong (*Pholi v Wearne* [2014] NSWCATAP 78 at [32]).

GROUNDS OF APPEAL

86 The owners corporation's written submissions dated 21 January 2022 contain the grounds of appeal it relies upon.

87 Paragraph 10 states:

> The owners corporation now appeals the Decision on the basis that:
>
> A. The decision of the Tribunal was made against the weight of evidence relied on by the owners corporation.
>
> B. Procedural fairness was not granted to the owners corporation with respect to the AVL hearing; and
>
> C. Ms Graorovska made intentionally misleading statements to the Tribunal during the hearing under cross examination.

88 In respect of appeal ground "C", the owners corporation's submissions and grounds of appeal dated 21 January 2022 do not identify what error of law, or error of a type that leave should be granted under Cl. 12 of Sch. 4 of the NCAT Act, has occurred by reason of the Lot owner's purported "intentionally misleading statements".

89 Appeal ground B identifies an error of law.

90 Appeal ground A is an error of a type that involves Cl. 12 of Sch. 4 of the NCAT Act.

91 No ground of appeal was identified that the Tribunal had made any error of law by reason of applying the wrong legal principle to its findings that the owners corporation had breached its duty under s 106 of the SSM Act, or the remedial orders made.

92 Further, no ground of appeal was identified that the Tribunal had made an error of law because the Tribunal had no jurisdiction to consider the Lot owner's application on the basis there had not been mediation at NSW Fair Trading prior to the commencement of proceedings pursuant to s 227 of the SSM Act.

93 There was also no ground of appeal identified that an error of law had occurred because the Tribunal Member had not disqualified himself during the hearing on grounds of apprehended bias. Accordingly, it is unnecessary to consider the

well-established principles pertaining to error of law due to apprehended bias (such principles are summarised in *Charisteas v Charisteas* [2021] HCA 29 at [11]-[12]).

CONSIDERATION

Denial of Procedural Fairness

94 As appeal ground B identifies a purported error of law, we will deal with that ground first.

95 The denial of procedural fairness asserted by the owners corporation falls into the following three categories:

(1) The Member excessively and unnecessarily interrupted the Solicitor for the owners corporation; "rushed" the cross examination of Mr Coombes; exerted pressure on the Solicitor for the owners corporation to curtail questioning of Mr Coombes; and answered questions on behalf of Mr Coombes and the Lot owner. The owners corporation submitted that the conduct of the Member was of such magnitude it breached the NCAT Member Code of Conduct.

(2) Repeated technological disruption of the AVL link and the Solicitor for the owners corporation being unable to see witnesses or the Member prevented the owners corporation from having a reasonable opportunity to have its evidence and submissions considered.

(3) The Solicitor for the Lot owner was observed by members of the owners corporation who had logged into the hearing "whispering" to the Lot owner whist she was giving evidence in circumstances where the Lot owner and Solicitor were in the same room. The Member allowed this to occur.

Conduct of the Member at the Hearing-Applicable Principles and Consideration of the Issues Raised

96 It is well established that the Tribunal has a duty to conduct its hearings in a procedurally fair manner and take such measures that are reasonably practical to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings (s 38 (2) and (5) (c) of the NCAT Act). The Tribunal has the power under s 38 (6) (c) of the NCAT Act to require the presentation of parties' respective cases before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.

97 It is uncontroversial that procedural fairness requires that both parties have a reasonable opportunity to present their case (*Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at [40]; *Sullivan v Department of Transport* [1978] FCA 48; (1978) 20 ALR 323 at 343)

98 The Tribunal has as its guiding principle the just, quick and cheap resolution of the real issues in dispute in the proceedings (s 36 (1) of the NCAT Act. Parties and legal representatives have a duty to co-operate with the Tribunal to give effect to that guiding principle (s 36 (3) of the NCAT Act). The practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings (s 36 (4) of the NCAT Act).

99 Imposition of time limits on parties' presentation of their cases does not, of itself, constitute a denial of the reasonable opportunity to be heard (*Wootten v Godfrey* [2019] NSWCATAP 255 at [61]-[62]). Further, the task of a Tribunal Member is to conduct the hearing in a fair and efficient way so that both parties have a reasonable opportunity to present their case and have their submission considered within the allocated hearing time. To properly administer a hearing, it is necessary for a Member from time to time to interrupt parties and representatives to keep them focussed on the real issues in dispute. It is not the role of the parties and representatives to dictate the procedural framework of the hearing to the presiding Member (*Macionis v Franklin* [2021] NSWCATAP 367 at [53]).

100 The submissions of the owners corporation referred to the decision of the Full Federal Court in *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144 ('*Gambaro'*). *Gambaro* identifies applicable principles where excessive, unnecessary and unreasonable judicial intervention during the course of the hearing constitutes procedural unfairness (at paras [18]-[26]).

101 Further, the NSW Court of Appeal recently considered such principles in the context of whether a judicial officer excessively questioned an expert witness during a hearing in *Manly Fast Ferry Pty Ltd v Wehbe* [2021] NSWCA 67

(‘*Wehbe*’) at [23]-[40]; [116]-[121]; [169]-[185] and [214]. The principles are summarised as follows:

(1) The test to be applied is whether judicial questioning or pejorative comments have created a real danger that the hearing was unfair (*Wehbe* at [38]). That involves an objective assessment of what occurred during the whole of the hearing (*Wehbe* at [214]).

(2) Excessive judicial intervention causing a denial of procedural fairness is frequently, but not always, coupled with a ground that asserts apprehended bias. However, the legal concepts are different and involve different tests (*Wehbe* at [165]-[166]).

(3) Judicial officers are entitled to intervene during the course of a hearing to restrain excessive questioning (and submissions) so that parties and witnesses are focussed on the real issues in dispute; clarify answers or ambiguities; raise tentative views about the evidence or submissions; deal with objections; and test submissions. Judicial officers are not expected to be mute and ‘sphinx like’. The questioning and testing of submissions may be legitimately vigorous and robust (*Gambaro* at [25]-[26]).

(4) Far from signifying unfairness, judicial questioning gives witnesses, legal practitioners and self-represented parties an opportunity to answer questions that have arisen (*Wehbe* at [183]). A judicial officer is entitled to make comments and ask questions to understand; test; and clarify a party’s case (*Gambar*o at [29]).

(5) However, judicial intervention cannot reach the “point of unfairness”. Whether the point of unfairness has been reached is considered in the context of the whole hearing in light of the number, length, terms, and circumstances of the intervention (*Wehbe* at [171]; citing *Galea v Galea* (1990) 19 NSWLR 263 at 281).

(6) The point of unfairness may be reached if the judicial officer unreasonably and excessively constrains cross examination of a witness; appears obviously hostile to a witness, party or legal practitioner; makes sarcastic or belittling remarks about a witness, party or practitioner; or questions a witness in such a manner it objectively appears the judicial officer is acting as an advocate for a party (*Wehbe* at [182]).

(7) Excessive questioning of witnesses or interruptions by a judicial officer may demonstrate that they have unfairly impeded their capacity to objectively evaluate the evidence (*Wehbe* at [216]; *Gambaro* at [29]-[30]).

102 Examples of where excessive and unreasonable judicial intervention constituted a denial of procedural fairness include *Gambaro* (where the judicial officer repeatedly and consistently interrupted a self-represented litigant; and was frequently rude, aggressive, and overbearing towards the self-represented

litigant); and *Paraiso v CBS Build Pty Ltd* [2020] NSWSC 190 (where a Tribunal Member made critical comments about an expert witness prior to the witness giving evidence at the hearing; excessively questioned the expert witness; asserted the expert witness was acting as an advocate; and did not allow cross examination of the other party's expert witness).

103 Examples of where judicial intervention did not 'cross the line' into procedural unfairness include *Wehbe* (where the questioning of an expert witness by a judicial officer was not excessive or unreasonable; nor prevented a party from fairly presenting its case).

104 Ultimately, it depends upon all the objective circumstances during the course of the hearing as a whole as to whether there was excessive judicial intervention. Isolated instances of excessive judicial intervention or unjustified critical comments about witnesses or representatives will not usually be sufficient to 'cross the line' into the point of unfairness.

105 A party may raise excessive judicial intervention as a denial of procedural fairness even if it was not raised at the hearing and no application was made for the judicial officer to recuse themselves (*Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 at [34]; [255]; and 298]).

106 The owners corporation submits that the Member told the Solicitor for the owners corporation to move onto the "next question" 26 times during the hearing, but did not use the same language towards the Solicitor for the Lot owner. The owners corporation also complains that the Member, when either disallowing a question or seeking that the Solicitor for the owners corporation articulate a relevant question, stated on a number of occasions that the Tribunal wanted to "*finish this case by reference to the clock and not the calendar*".

107 We are not satisfied that such conduct constituted excessive judicial intervention. It was entirely appropriate for the Member to keep the Solicitor for the owners corporation focussed upon the just, quick, cheap and efficient resolution of the real issues in the proceedings, particularly where questioning was discursive and irrelevant. The Member was not hostile, aggressive, rude, or impolite to the Solicitor for the owners corporation. Assessed objectively in

the full context of the hearing, the Member's conduct was appropriate and procedurally fair.

108 The owners corporation's submission that the Member unfairly "cut off" questioning by the Solicitor for the owners corporation is also not supported by the transcript of hearing. The occasions where the Member intervened during the questioning arose because questions were not relevant to the real issues in dispute; or the questions were framed in a confusing manner.

109 The owners corporation points to one exchange (set out at para [80] of its submissions) where, after an objection from the Solicitor for the Lot owner on grounds of relevance to a line of questioning, the Member stated: *"Yes, they're going to have no probative value, but it's just quicker to allow them I think*". In isolation and without context, such a comment may appear inappropriate. However, that comment needs to be considered in circumstances where the Member had to deal with a number of objections based on relevance; and direct the Solicitor for the owners corporation to ask clear and relevant questions.

110 We are not satisfied that that comment, considered in the context of the whole of the hearing, constitutes excessive judicial intervention. As discussed previously, the provisions of ss 36 and 38 of the NCAT Act make clear that the task of a Member is to conduct a hearing in a procedurally fair and efficient manner that ensures the parties and their representatives focus upon the just, quick and cheap resolution of the real issues in dispute. That may involve, from time to time, comments that are critical of a party; a witness; or a legal representative. A Member may also make remarks expressing frustration. The mere fact some critical comments are made does not demonstrate that judicial intervention has reached "the point of unfairness".

111 The owners corporation submits that the Member "answered" for Mr Coombes and the Lot owner on occasions. A fair reading of the transcript does not support this interpretation. The Member sought, on some occasions, to clarify or confirm the evidence that was being given by the relevant witness. The conduct of the Member in doing so was consistent with ss 36 and 38 of the

NCAT Act. There was no excessive judicial intervention that caused a denial of procedural fairness.

112 The owners corporation further submits that the conduct of the Member breached the NCAT Code of Conduct for Members of the Tribunal. The submissions of the owners corporation erroneously conflate the NCAT Code of Conduct with the principles of excessive judicial intervention causing a denial of procedural fairness. The relevant purported error of law is excessive judicial intervention causing a denial of procedural fairness, irrespective of the NCAT Code of Conduct. No ground of appeal was identified that the Member displayed actual or apprehended bias; and in any event no application was made during the hearing that the Member disqualify himself on grounds of actual or apprehended bias.

113 The assertion that the conduct of the Member breached the NCAT Code of Conduct is without merit. We are satisfied that the Member conducted the hearing in a scrupulously fair, professional, and efficient manner.

Conduct of the Hearing-Audio Visual Link Difficulties

114 The owners corporation submits that the hearing was not procedurally fair due to audio-visual link difficulties. As discussed previously, the owners corporation's Solicitor appeared by telephone. The owners corporation submits there were delays between questions and answers; the Member became frustrated at times due to technical issues with the audio-visual link; the Solicitor for the owners corporation could not see witnesses; and the Solicitor for the owners corporation could not see the Solicitor for the Lot owner "whispering" to the Lot owner before she answered questions.

115 The Tribunal has discretion as to the manner in which a hearing is conducted. The benefit to the administration of justice of matters being heard remotely during the COVID-19 pandemic has been enunciated on many occasions (e.g. *Sanson v Sanson* [2021] NSWSC 417 at [19]-[35]; *Australian Securities and Investments Commission v GetSwift Pty Ltd* [2020] FCA 504 at [7] and [28]-[40]; *Fabcot Pty Ltd v Glen Eira CC* [2020] VCAT 957 at [5]-[14]).

116 Accordingly, the mere fact that the hearing was conducted by audio-visual link does not create procedural unfairness. The appropriate enquiry is whether any

difficulties at the hearing caused procedural unfairness to the owners corporation.

117 The applicable legal test is whether the owners corporation suffered practical injustice by reason of technological difficulties at the hearing. In *Ah Sam v Mortimer* [2021] NSWCA 327 Brereton JA (with whom Basten JA and Payne JA agreed) stated at [22]:

> The problems with the audio-visual link described by Mr Ah Sam are, regrettably, not unfamiliar. They are borne out by the transcript available to this Court. It may readily be accepted that the conduct of proceedings remotely, using imperfect technology, presents additional difficulties for all parties. However, what the appellant has conspicuously failed to do is to identify how those problems caused him any practical injustice. He had the opportunity to make submissions after receiving the transcript, and, if he wished, to correct any errors in it. In particular, he has not identified any material matter which influenced the primary judge's judgment which he was precluded from addressing, nor any matter which he wished to place before the Court that he was unable to adduce. Nor has he shown how any finding of the primary judge adverse to him was affected by any shortcoming of the audio-visual link. It does not appear that the conduct of these proceedings remotely operated in any practical way prejudicially to the appellant, nor that it resulted in any injustice to him.

118 We are not satisfied the owners corporation has demonstrated that any technological difficulties or issues with the audio-visual link hearing caused any practical injustice. The Solicitor for the owners corporation was prepared to proceed with the hearing appearing by telephone, and raised no objection to this course of action. During the course of the hearing, the Solicitor for the owners corporation did not clearly identify any difficulties or unfairness due to the Solicitor appearing by telephone and witnesses appearing by audio-visual link.

119 Had the Solicitor for the owners corporation done so, the Member would have had the opportunity to consider any further appropriate measures to be taken, such as repeating questions or answers given in evidence. No application for an adjournment was made by the owners corporation due to any purported disadvantage due to the manner in which the hearing was proceeding caused by purported technological problems.

120 We are not satisfied any practical injustice has occurred by reason of the Solicitor for the owners corporation not being able to see the Lot owner sitting with her Solicitor and any interaction that occurred. There is nothing unusual

about a Solicitor sitting in the same room as their client during a hearing conducted remotely. The Solicitor for the Lot owner denied in his submissions that he prompted or coached his client to answer questions in a certain way.

121 Further, a number of members of the strata committee were observing the hearing by way of being logged into the audio-visual link. If any such person had any issue about there being inappropriate conduct, they could have either raised this themselves at the hearing; or separately telephoned the Solicitor for the owners corporation and informed him of their concerns so that he raised the issue with the Member. This did not occur. Had such action been taken, the issue would have been ventilated and the Member would have made any appropriate procedural ruling.

122 An opportunity forgone, but reasonably available, does not demonstrate breach of procedural fairness; and it must be shown that the party lost an opportunity to put any information or argument before the decision maker, or otherwise suffered detriment (*Italiano v Carbone & Ors* [2005] NSWCA 177 at [88]). The owners corporation failed to raise the issues it now complains of at the hearing and had a reasonable opportunity to do so as a legally represented party.

Procedural Fairness-Member Not Observing Interaction Between the Lot Owner and Her Solicitor

123 At the commencement of the appeal hearing, the owners corporation sought leave to rely upon witness statements of Mark Finkelde dated 20 January 2022; Dylan Carr dated 19 January 2022.; and Robert Yen dated 19 January 2022.

124 Mr Finkelde and Mr Carr are strata committee members who observed the hearing. Mr Yen is the Solicitor who appeared for the respondent at the Tribunal hearing.

125 Mr Finkelde and Mr Carr asserted that they observed “difficulties” with the audio-visual connection; and that the Solicitor for the respondent “whispered” in the ear of the Lot owner after the camera was moved away from the Lot owner.

126 Mr Yen states that he had “difficulties” using the audio-visual link and that it was only after cross examination of the Lot owner finished that he realised that the Solicitor for the Lot owner was in the same room as the Lot owner.

127 We refused leave for the owners corporation to rely on this evidence and informed the parties that we would provide our reasons for this decision when publishing our reasons in the appeal.

128 The application fell to be considered by reference to the provisions of Schedule 4, cl 12, to the NCAT Act, which relevantly provides:

> "(1) An Appeal Panel may grant leave under s80(2)(b) of this Act for an internal appeal against a division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> …
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with."

129 For the reasons that follow we formed the view that the evidence was not significant new evidence that was not reasonably available at the hearing.

130 As discussed previously, at any stage during the hearing Mr Finkelde and Mr Carr could have voiced their concerns with the Member; or in the alternative contacted the owners corporation's Solicitor and voiced their concerns with him.

131 If the Solicitor for the respondent was unsure whether or not the Lot owner was in the same room as her Solicitor, he could have reasonably raised this issue and any concern he had at the hearing. By his own admission, he "realised" after the lunch adjournment that the Lot owner and his Solicitor were in the same room. Even at that stage he could have raised with the Member any concerns he had; or sought to obtain instructions from Mr Finkelde and/or Mr Carr about what they had previously observed at the hearing. The Solicitor for the owners corporation could have sought leave to re-open cross examination of the Lot owner and put to her that she had been coached or influenced in her answers by the Solicitor for the Lot owner. No such action was taken.

132 In any event, the Solicitor for the Lot owner denies that he coached or influenced the Lot owner in answering questions. It is a very serious allegation to raise against a legal practitioner that they have acted unethically by coaching or improperly influencing a witness. If there were any concern by the

owners corporation in that regard, they should have been raised at the hearing and the owners corporation had ample opportunity to do so.

133 Further, we are not satisfied that there is any substance to the submission that the Solicitor for the Lot owner coached or influenced his client. Further, considering that the issues in dispute essentially revolved around the expert evidence, no practical injustice has been demonstrated.

134 There is also nothing in the transcript of evidence to substantiate the submission that the Member failed to adequately observe what was occurring at the hearing. If anything had occurred which caused the Member concern, we anticipate that the Member would have raised the issue and made any appropriate procedural ruling.

Denial of Procedural Fairness-Conclusion

135 The owners corporation have failed to establish a denial of procedural fairness.

Decision Against the Weight of Evidence

136 The owners corporation does not identify a ground of appeal that there is an error of law because there was no evidence to support a factual finding of the Tribunal; or that the Member applied incorrect legal principles. Rather, the owners corporation seeks leave to appeal on the basis that the decision was against the weight of evidence.

137 For the owners corporation to be granted leave to appeal on this ground, it must satisfy the Appeal Panel of the principles set out in *Collins v Urban*.

138 The owners corporation submits that the decision is against the weight of evidence because:

(1) The Member should have relied upon what was agreed between the experts in the Joint Expert Report rather than accepting the evidence of Mr Coombes.

(2) In respect of Item 2 (Bathroom) the Member allowed Mr Coombes to depart from what he had agreed to in the Joint Scott Schedule where Mr Coombes had agreed with Mr Ilievski's scope of works to repair common property, but gave different evidence at the hearing.

(3) The Member did not understand and give appropriate weight to the evidence that the Lot owner had applied a coating to the timber deck (Item 1); and the Member should have given more weight to the opinion

of Mr Ilievski. The submission further stated that there was “no evidence” to support the Member’s finding at [48] that the coating applied by the Lot owner was “beneficial and not detrimental”.

139 The owners corporation’s submission about Item 2 in the Joint Scott Schedule misinterprets and takes out of context the evidence before the Tribunal.

140 The Joint Expert Report clearly states that Mr Coombes only agreed with Mr Ilievski’s scope of works including Villaboard linings and stainless steel angle *“if found for the owners corporation”,* just as Mr Ilievski stated he agreed with Mr Coombes’ scope of works “*if found in favour of Lot 8”*. There was no concession by either expert that the other expert’s proposed scope of works was appropriate to repair the common property.

141 Accordingly, there was always disagreement between the experts on the appropriate method to repair. The Member was not allowing Mr Coombes to depart from an agreement reached at the conclave (to which the principles discussed in *Garofali v Moshkovich* [2021] NSWCATAP 242 at [70]-[71] apply). Rather, the Member had to consider the evidence of both experts and make findings as to what method to repair the common property was appropriate. The Member’s reasons clearly and cogently explain why Mr Coombes’ opinion was accepted over the opinion of Mr Ilievski.

142 The submission regarding Item 1 (the timber deck) also misinterprets the evidence at the hearing. Both experts agreed the Lot owner applied a coating to the timber decking; and the Tribunal found at para [48] of the decision that a coating had been applied. The issue was not whether the Lot owner had applied a coating to the timber deck; it was whether the common property timber deck was in a state of disrepair irrespective of that coating.

143 At para [43] the Member clearly sets out that Mr Coombes’ evidence was that the coating applied by the Lot owner was “beneficial”. It is clearly wrong to submit that there was no evidence to support the factual finding of the Tribunal at para [48] that the coating applied by the Lot owner was “beneficial and not detrimental” because Mr Coombes gave that evidence.

144 As with Item 2 of the Joint Scott Schedule, the Member's reasons dealing with Item 1 clearly and cogently explain why he accepted the evidence of Mr Coombes over the evidence of Mr Ilievski.

145 We are not satisfied that the evidence of the owners corporation at the hearing (including the evidence of its expert Mr Ilievski) in its totality preponderates so strongly against the conclusion found by the Tribunal at first instance that it can be said that the conclusion was not one that a reasonable Tribunal Member could reach (*Collins v Urban* at [77]).

146 The Tribunal appropriately weighed the evidence and made findings which were logical and orthodox.

Lot Owner 'Misleading' the Tribunal in Cross Examination

147 The owners corporation submits that the Lot owner "misled" the Tribunal about whether mediation had been attempted prior to the commencement of the proceedings.

148 This submission is inconsequential for the following reasons:

(1) No error of law is identified.

(2) A fair reading of the transcript establishes that, at its highest, the Lot owner was confused about whether she was being questioned about mediation in these proceedings or earlier proceedings. We are not satisfied there was any intention to mislead the Tribunal.

(3) The Member accepted that the parties had not been to prior mediation in the context of these proceedings. The Lot owner stating she had "attempted mediation" makes no difference to the outcome. The Tribunal's reasons at paras [22]-[25] clearly set out why the Tribunal found that the proceeding should not be dismissed, and those findings were not the subject of any ground of appeal.

(4) We are not satisfied that the issue raised causes the decision to be not fair and equitable, or against the weight of evidence.

CONCLUSION

149 No error of law is established. No error of a type that leave to appeal under Cl. 12 of Sch. 4 of the NCAT Act is established.

150 Accordingly, the appeal is dismissed, and the appeal of the costs decision is also dismissed, as no separate appeal grounds were ventilated in the costs decision. The parties had also agreed at the Appeal Panel directions hearing

that if the appeal in the substantive proceedings was dismissed, the appeal of the costs decision would also be dismissed.

151 Although the appeal from the costs decision has been dealt with, it is an important matter of principle to point out that a party is not relieved from its obligation to comply with Tribunal directions to file and serve costs submissions merely because the substantive decision is under appeal, or there is an intention to appeal.

152 A costs decision is not stayed or adjourned merely because the substantive decision is under appeal, and the Tribunal was obliged to determine the issue of costs because if it failed to do so the Appeal Panel would have no jurisdiction to deal with the issue of costs at first instance (*LMA Contractors Limited v Changizi* [2017] NSWCATAP 145 at [19]). The decision of the owners corporation not to make costs submissions because it intended to appeal the substantive decision was self-defeating in the sense that it deprived itself of the opportunity to put forward counter arguments to the Lot owner's costs submissions.

153 The decision of the Tribunal included an order that repair works be completed by 28 February 2021 (sic). Considering the work order was stayed pending determination of the appeal, it is appropriate to vary the orders of the Tribunal under s 81 (1) (b) of the NCAT Act to extend the date of compliance with the work order to 3 months from the date of this decision.

THE ISSUE OF COSTS

154 As both parties are legally represented, we envisage that there will be a costs application. We have made directions to accommodate and dispose of any costs application.

ORDERS

(1) Leave to appeal is refused.

(2) The appeals are dismissed.

(3) Stay orders of the Appeal Panel dated 17 December 2021 and 27 January 2022 are lifted.

(4) Order 2 of the Tribunal dated 29 October 2021 in Matter SC 21/19101 is varied to extend the time for compliance to 3 months from the date of this decision.

(5) If there is a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of this decision.

(6) The costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of this decision.

(7) The costs applicant is to file and serve costs submissions in reply from 35 days from the date of this decision.

(8) The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

(9) The Appeal Panel may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.

(10) Either party may apply to the Appeal Panel in writing to vary or extend the timetable for costs submissions.

(11) If no application for costs is made in accordance with these orders, there is no order as to costs with the intention that each party pay its own costs of the Appeal.

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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

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