Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 20427 v A Halliwell Nominees Pty Ltd
Medium Neutral Citation:	[2022] NSWCATAP 225
Hearing Date(s):	24 August 2021
Date of Orders:	08 July 2022
Decision Date:	8 July 2022
Jurisdiction:	Appeal Panel
Before:	T Simon, Principal Member D Robertson, Senior Member
Decision:	1 The appeal is allowed in part. 2 Order 1(3) made by the Tribunal in proceedings SC 20/06967 on 5 March 2021 is set aside. 3 Leave to appeal is refused. 4 The appeal is otherwise dismissed. 5 If either party seeks a costs order in relation to the appeal, the following directions apply: (a) The applicant for costs (costs applicant) must file and serve any application within 7 days after these orders. (b) The respondent to the costs application must file and serve evidence and submissions in response 14 days from the date of these orders. (c) The costs applicant must file and serve any submissions in reply within 21 days from the date of these orders. (d) Submissions must include submissions concerning

	whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act, 2013 dispensing with a hearing.
Catchwords:	STRATA TITLE – common property by law – Unauthorised works - whether unauthorised works by lot owners altering common property should be ordered to be removed APPEAL – question of law – relevant and irrelevant considerations – no evidence
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Environmental Planning & Assessment Act 1979 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Development Act 2015 (NSW)
Cases Cited:	Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 Collins v Urban [2014] NSWCATAP 17 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 House v The King (1936) 55 CLR 499 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 McDonnell v The Owners Strata Plan No 64191 [2019] NSWCATAP 172 Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24 Director General, Department of Finance & Services v Porter [2014] NSWCATAP 6 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Owners Corporation - Strata Plan 22607 v Yang [2018] NSWCATCD 3. Pollak v OC SP 54298 [2013] NSWCTTT 334 The Australian Gas Light Company v Valuer-General (1940) 40 SR (NSW) 126 The Owners - Strata Plan No 63731 v B & G Trading Pty Ltd [2020] NSWCATAP 202 The Owners - Strata Plan No 64191 v Peter McDonnell & Ors, NCAT File No. SC 18/39119, 20 March 2019

Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 20427 (appellant) A Halliwell Nominees Pty Ltd (first respondent) Peter Irvine (second respondent)
Representation:	Counsel: G Carolan (first respondent) Solicitors: Grace Lawyers (appellant) Green & McKay (first respondent)
File Number(s):	2021/00091570
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Nil
Date of Decision:	5 March 2021
Before:	K Ross, Senior Member
File Number(s):	SC 20/06967

REASONS FOR DECISION

1 The appellant owners corporation has appealed against a decision of the Tribunal made on 5 March 2021. In the primary proceedings an application had been made by the owners corporation against the respondent lot owners and a separate cross application had been made by the lot owners. The reasons for decision in the primary proceedings dealt with both sets of proceedings. The owners corporation has appealed the decision in relation to its primary application (SC 20/06967).

Background

2 The strata scheme comprises 8 lots in one building over 4 levels. The first and second respondents are the owners of lots 8 and 7 respectively. Lots 7 and 8 are on the top floors of the building.

3 The complex was built in approximately 1982. It is the subject of a development approval dated 2 February 1982.

4 The strata plan was registered on 1 July 1983. The original roof over the building was a standard gabled roof, with a pitch of 30 degrees and covered with terracotta roof tiles.

5 Lots 7 and 8, as originally constructed, were largely identical (or mirror images), with the habitable area located on level 3 and a smaller (non-habitable) storage loft area located on level 4, which was constructed within the roof space above those lots. Each lot had an enclosed area on level 3 which protruded from the general building envelope. Those areas were referred to by the parties as the “dining atriums”.

6 In about 1988, defects were identified in the building. Remedial work was carried out in about 1989. The owners of lots 7 and 8 allege that there were continuous leaks into their lots beginning in about 2012.

7 In May 2012 a quotation was obtained for replacement of the roof tiles for $42,801.00 or $43,934.00.

8 As noted, the first respondent, A Halliwell Nominees Pty Ltd, is the owner of Lot 8. Its director, Alan Halliwell, was Chairman, Secretary and Treasurer of the owners corporation from 26 September 2008 until 23 September 2017 and then Chairman and Secretary from 23 September 2017 until 12 August 2018.

9 In 2015, works were undertaken by the owners of lot 7 to modify the dining atrium in lot 7. At the same time Alan Halliwell (then the Chairman, Secretary and Treasurer) and Peter Irvine began to make arrangements for work to be carried out on the roof of the complex. In 2016 the roof was replaced, and the skylights were replaced with dormer windows. Bathrooms were constructed in the loft area of each of lots 7 and 8 and the southern wall was clad. The owners of lots 7 and 8 paid for these works.

10 A development application was lodged with the Coffs Harbour City Council on 2 November 2015. The application sought approval to works set out in plans which included the installation of dormer windows, but not the installation of bathrooms, in the loft areas of lots 7 and 8.

11 During 2018 the first respondent undertook renovations to the dining atrium of lot 8.

12 At the time the matter came to hearing in the primary proceedings, no occupation certificate had been issued by Council for the roof works or works within either lot 7 or lot 8.

13 Further, there had been no resolution or special resolution of the owners corporation:

- authorising the roof works or any of the works to common property or within lots 7 and 8
- authorising the provision of the owners corporation's consent to the development application or the construction certificate
- authorising the Building Contract between the owners corporation and the Builder who had undertaken the work in 2016 to replace the roof and replace the skylights with dormer windows.
- resolving to pay the Builder for the roof works; or
- approving the construction of additional bathrooms in either lot 7 or 8.

14 The owners of lots 7 and 8 had not, by the date of the primary hearing, requested the owners corporation to consider an exclusive use by-law relating to the roof works.

15 As mentioned above, the owners corporation did not pay the builder for the roof works. Rather the builder was paid for the works by the owners of lots 7 and 8. The owners of lots 7 and 8 allege that they made a loan to the owners corporation for part of the building costs of the roof works. There is no resolution or special resolution of the owners corporation in respect of the loan. The owners of lots 7 and 8 took proceedings in the District Court to recover the amount of the loan. Those proceedings were settled in December 2019 and resulted in the payment of some money to the owners of lots 7 and 8 by the owners corporation.

16 At the appeal hearing before us, the parties advised that motion for the making of a common property rights by-law had been put to the owners corporation and that the motion had not passed. The respondents foreshadowed that they would be making an application to the Tribunal in relation to the refusal of the owners corporation to make the proposed common property rights by-law.

17 In the primary application the appellant had sought an order requiring the removal of the unauthorised works and the restoration of the common property (restoration works) as follows:

> The respondents return the roof, southern wall of the building, and the two dining atriums to their original forms, including removing additional bathrooms constructed in Lots 7 and 8's loft roof area and remove the skylight in Lot 4, at [the address of the strata plan], so that the SP20427 building form and appearance is consistent with the Development Application 117/82 2nd Feb, 1982 as approved by Council, and that the works will be managed by an architect selected by the owners corporation.

18 The appellant had also sought consequential orders for the respondents to pay for the works and provide to the appellant a copy of documentation providing details of the works done as a part of the restoration order.

19 Orders were also sought for leave to return to the Tribunal, in the event the orders were not complied with, to seek orders to enable the owners corporation to carry out the works and recover the cost of carrying out the work from the respondents.

20 It is noted that, at the primary hearing, all parties were self-represented. The Tribunal did not make orders for the restoration works, as had been sought by the owners corporation. Instead the Tribunal made orders for each of the owners of lot 7 and 8 to do the following:

(1) Present a common rights by-law in relation to unauthorised works on the roof and within lots 7 and 8.

(2) Liaise with the Local Council to determine what works were required to enable the issuing of an occupation certificate for the roof works and works within lots 7 and 8 and to present to the owners corporation for its consideration an outline and timetable for the completion of the of the proposed works.

(3) Lodge a building alteration plan which complies with s 19 of the *Strata Schemes Development Act* 2015 (NSW).

(4) Provide to the owners corporation all records relating to the roof works, including, but not limited to, all contracts, approvals, financial records and other relevant documents.

21 Orders were also made that the owners corporation was not to unreasonably refuse to make the common property by-laws. We note that there is no appeal against this order. The owners corporation's application was otherwise dismissed.

Documents

22 The Appeal Panel received the following submissions and documents from the parties:

(a) Notice of appeal received from the appellant dated 1 April 2021, together with submissions and documents.

(b) Reply to the appeal received 21 April 2021

(c) Letter received from Green & Mckay on 28 May 2021 advising the director of the first respondent had passed away.

(d) Submissions received from the appellant on 13 July 2021

(e) Appellant's bundle of documents received 17 August 2021.

(f) Submissions and bundle of documents received from the first respondent 18 August 2021

(g) Submissions in reply received from the appellant on 23 August 2021 and a bundle of cases.

23 The Appeal Panel also had before it a copy of the directions that have been made by the Appeal Panel and a copy of the original orders and reasons for decision.

Internally appealable decisions

24 The decision of the Tribunal is an internally appealable decision and an appeal can be made as of right where there is a question of law, and with the leave of the Appeal Panel on other grounds: see s 80(1) and (2)(b) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act).

25 The appellant has appealed on the basis that the appeal raises questions of law and also seeks leave to appeal.

26 The Notice of Appeal was lodged within the 28-day time period specified in cl 25(4)(b) of the *Civil and Administrative Tribunal Rules* 2014 (NSW) (the Rules).

Grounds of Appeal

27 The Notice of Appeal filed by the appellant stated three grounds of appeal said to involve questions of law:

(1) "There was no proper evidence before the Tribunal that the making of a reinstatement order would or had the effect of inviting the respondents to repeat the mischief;"

(2) The Tribunal's exercise of its discretion not to make a re-instatement order miscarried in that

(a) it took into account irrelevant considerations; and

(b) it failed to take into account relevant considerations.

(3) The Tribunal "erred as a matter of law" in finding that "a building alteration plan for the purposes of s 19 of the *Strata Schemes Development Act* 2015 (NSW) would need to and could be registered to reflect the alterations to the building".

28 The appellant also sought leave to appeal. We will consider each of the grounds of appeal in turn before addressing the application for leave to appeal.

Appeal ground 1 – No proper evidence

29 The appellant submits that there was "no proper evidence" before the Tribunal to make the order it made in relation to the unauthorised works. The appellant asserts that this ground raises a question of law.

30 Whether there was no evidence to support a finding of fact, would amount to a question of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6; *The Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138. We interpret the appellant's reference to "no proper evidence" as meaning the same thing, that is that there was no evidence. If it is intended to have any other meaning, it does not describe an error of law rather than fact.

31 The appellant refers to what it terms a series of findings that are contained at [51] of the reasons for decision. Paragraph [51] is as follows:

> 51 However I am not satisfied that I should make the order sought by the owners corporation. If I was to make the order sought, it would be to invite the respondents to repeat the mischief. In returning the form of the roof to the form it was in, there would be many decisions required. What plans and specifications are to be adopted? What consents are required? What materials (including roof tiles) are to be used? How have construction standards changed since the original roof was constructed and what standards must the

> construction now meet? Who is to be engaged as the builder? Who is to enter into the building contract with the builder? Who is to instruct the builder? If the work is to be supervised by the Owners corporation's architect, who is to engage the architect? Who is to instruct him? If the Tribunal orders the respondents to pay for the work and they fail to do so, how would the owners corporation enforce the order? Unless all of these matters were properly addressed in the order made, it is likely that there will be ongoing disputes between the parties.

32 The appellant submits that the Tribunal erred in finding that the making of the restoration order would *'invite the respondents to repeat the mischief'.* The appellant submits that if a money order had been made under s 132(1)(b) of the *Strata Schemes Management Act* 2015 (NSW) (SSMA), it could have been enforced as a judgment in the appropriate jurisdiction: see s78 of the NCAT Act. Alternatively, if a work order was made and not complied with, the appellant could have sought a renewal of the application pursuant to cl 8 of sch 4 of the NCAT Act.

33 In relation to the reference to mischief at [51] of the reasons the appellant also submits that:

(1) If the use of the expression 'mischief' was a reference to conducting unauthorised common property works, then work conducted by the respondent to restore the common property to its previous state in accordance with the restoration works would be authorised by both the restoration work order itself and be maintenance works pursuant to s106(1) of the SSMA. Accordingly, such work could not be characterised as 'mischief'.

(2) If the reference to mischief relates to the series of mechanical issues referred to in the remainder of [51] in the reasons for decision, the Tribunal misdirected itself in finding it had to resolve the issues raised in that paragraph before making the restoration order (or some other work order to cause the common property to be returned to its authorised state).

34 Paragraph [51] of the reasons for decision does not in our view contain any findings about material facts. In *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 the Court of Appeal was dealing with a question of law relating to of adequacy of reasons. Although the appeal dealt with a different question of law, the judgment contains a helpful summary of the principles to be applied in the review of reasons for decision (at [77], per Bell P, with Ward JA agreeing):

> …

> "i. "Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole": *Re Minister for Immigration and Multicultural Affairs, Re; Ex parte* Applicant S20/2002; *Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 30; 77 ALJR 1165 per Gleeson CJ at [14] (Ex parte Applicant);
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> ii. the court should not read passages from the reasons for decision in isolation from others to which they may be related: *Re Maria Politis v Commissioner of Taxation* [1988] FCA 739 at [14]; 20 ATR 108 at 111;
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> iii. the reasons must be read fairly and as a whole: *Ex parte Applicant* at [147] per Kirby J; *Wu Shan Liang* at 291; *Bisley* at 251;
>
> iv. the reasons recorded ought not to be inspected with a fine tooth-comb attuned to identifying error: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; [1993] FCA 456 *(Pozzolanic)* at 287; *Wu Shan Liang* at 272, 291;
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> v. there should be a degree of tolerance for looseness in the language of the tribunal, unhappy phrasing of the tribunal's thoughts or verbal slips: *Pozzolanic* at 287, *Wu Shan Liang* at 272 and 291…

35 We are also mindful that the parties were self-represented in what were complex strata proceedings. The Tribunal did not have the benefit of legal representation to assist the parties or the Tribunal. Applying those principles to the review of the reasons for decision of the Tribunal in the primary proceedings, we are not satisfied that the Tribunal misdirected itself.

36 It was open to the Tribunal to consider whether to make the order sought by the owners corporation. Paragraph [51] sets out a series of questions the Tribunal considered before declining to make the order in the form sought by the appellant. Those were rhetorical questions and did not require an answer. They were raised for effect and to demonstrate the point that making the order in the form sought would lead to future dispute. The questions raised by the Tribunal at [51] formed part of the overall consideration as to why the orders, in the form sought by the owners corporation would not resolve the matter. The relevant finding at [51] is that the questions raised, which remained unanswered, would likely lead to ongoing dispute between the parties if the orders were made as sought.

37 Paragraph [51] also needs to be read in the context of the paragraphs that follow. The Tribunal also considered the delay in the owners corporation

making the application to the Tribunal and the prejudice which had resulted from the intervening orders made in the District Court. The Tribunal went on to consider what orders should be made.

38 At [22] of the reasons for decision the Tribunal had already found that the subject works undertaken by lots 7 and 8 were more extensive than what needed to be repaired and that the works had altered common property, enlarged the air space of each of lot 7 and lot 8, and had required a special resolution which had not been obtained: see s 111 of the SSMA.

39 Section 232 of the SSMA relevantly empowers the Tribunal to make orders relating to complaints and disputes:

> … to settle a complaint or dispute about any of the following—
>
> (a) the operation, administration or management of a strata scheme under this Act,

40 In our view, s 232 allowed the Tribunal to make the alternative orders that it made, and it was not required to make the order sought by the appellant. The Tribunal gave reasons why it was making the alternative orders.

41 The appellant also submits, in relation to this ground, that the Tribunal did not put to the respondents the question whether they could restore the previous common property. While that may be the case, the Tribunal did not refuse to make the order, as sought by the owners corporation, because the respondent could not restore the common property. Rather the Tribunal refused to make the order as sought because it would lead to future dispute, there had been delay in the making of the application, and there had been intervening District Court proceedings.

42 The appellant also refers to cases in which the Tribunal or its predecessor has made orders for a respondent lot owner to restore specified parts of the common property: see *The Owners - Strata Plan No 63731 v B & G Trading Pty Ltd* [2020] NSWCATAP 202; *Pollak v OC SP 54298* [2013] NSWCTTT 334; *Owners Corporation – Strata Plan 22607 v Yang* [2018] NSWCATCD 3.

43 The appellant also refers to the unreported primary decision of the Tribunal in *The Owners-Strata Plan No 64191 v Peter McDonnell & Ors,* NCAT File No. SC 18/39119, 20 March 2019, in which the Tribunal stated:

> There is no necessity for the Tribunal to make particular prescriptive orders how the work must be removed. It is sufficient to order that the common property be restored and that respondents make good the common property.

44 The Tribunal subsequently ordered the removal of all works above a particular lot and the fire door and ordered the reinstatement of the common property (without specifying the detail of that restoration work). The decision was appealed, and the appeal was dismissed: See *McDonnell v The Owners Strata Plan No 64191* [2019] NSWCATAP 172.

45 It is not in dispute that the Tribunal has made restoration orders in other proceedings. However, the Tribunal in these proceedings did not find that the Tribunal was not empowered to make the orders sought by the appellant. Rather, the Tribunal was not satisfied that it should make the orders in that form, and the reasons for the decision explain why the Tribunal came to that conclusion.

46 The appellant also submits that the Tribunal misdirected itself about the inability of an owners corporation to enforce a restoration order or money order because the owners corporation could:

(a) Make a renewal application or bring fresh proceedings seeking orders for it to do the necessary work on the common property and for the respondents to pay for the cost of that work under section 132 of the SSMA; and

(b) Enforce any money order as a judgment in any Court of competent jurisdiction under section 78 of the NCAT Act.

47 Once again, the questions asked by the Tribunal at [51] need to be read in their context. It is true that the owners corporation could take the steps set out by the appellant, in the event of non-compliance by the lot owners. The Tribunal did not find otherwise. Rather, the Tribunal found that to make the orders as sought, would mean that it was *'likely that there will be ongoing disputes between the parties'.*

48 In our view, the appellant does not identify a question of law arising out of the comments at [51] of the reasons for decision. On that basis this ground of appeal must fail.

Appeal Ground 2 – Miscarriage of Discretion

49 The appellant asserted that the Tribunal erred in law in the exercise of its discretion not to make the order sought by the appellant. The appellant submits that the discretion miscarried because the Tribunal took into account irrelevant considerations and failed to take into account relevant considerations. The appellant acknowledged the limitations upon appellate review of the exercise of discretion set out in *House v The King* (1936) 55 CLR 499.

Irrelevant considerations

50 The appellant submits that the Tribunal took into account irrelevant considerations at [51] to [55] of the reasons for decision.

51 Taking into account an irrelevant consideration can raise a question of law, as explained in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 per Mason J at 40:

> In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ...

52 The appellant submits that the Tribunal took the following irrelevant matters into account:

(i) That there would be many decisions to be made by the respondents to comply with an order to reinstate the common property: considered at [51] of the reasons for the decision

(ii) That a money order would not be enforceable: also considered at [51] of the reasons for the decision

(iii) The prejudice said to result from the intervening orders made in the District Court

53 It is noted that the appellant did not press the matter at paragraph 2(a)(iv) of its grounds of appeal.

54 In respect to the matters identified at sub-paragraphs (i) and (ii) at [52] above, the appellant relied on the submissions it had made in relation to the appeal ground 1. For the reasons given by us in relation to appeal ground 1, we do not

find that those matters raised by the appellant were irrelevant to the Tribunal's reasoning. Whether the form of order sought by the appellant was appropriate was a relevant consideration in our view.

55 In respect to the matter identified at (iii) at [52] above, the Tribunal stated, at [52] and [53] of the reasons for decision:

> 52 In exercising my discretion not to make the order sought I also take into account the delay in bringing this application before the Tribunal, and the prejudice which results from the intervening orders made in the District Court.
>
> 53 This is not to say that the status quo can remain. The owners of lots 7 and 8 need to propose a by-law for consideration by the owners corporation. They need to address the owners corporation's other concerns and provide proper documentation for the work carried out. They need to co-operate with the owners corporation to facilitate the completion of the works to ensure that occupation certificates are obtained for the works. If Council requires any alteration or addition to the works to facilitate the issuing of an occupation certificate, those works need to be undertaken, but only with the consent of the owners corporation. As the works have resulted in an increase in the airspace for each of the lots, any request for consideration of a by-law ought ordinarily to include an offer of compensation to the owners corporation. (I do not know the extent to which any such issue was considered by either party in the agreement reached in the District Court proceedings).

56 At [44] of the reasons for the decision the Tribunal had stated:

> During the period of the delay, proceedings in respect of the roof have been settled in the District Court. There would not appear to have been any other significant matters during that time. However the fact that there were proceedings in the District Court in relation to payment for the roof works is a significant matter. I do not have evidence before me as to whether these NCAT proceedings were contemplated by either party during the District Court settlement (although I note that mediation, required as a prerequisite to commencing these proceedings, had been requested prior to that time). It is rather odd that the owners corporation agreed to contribute to the cost of the roof works, only now to seek to have those works demolished.

57 The appellant submits that the prejudice referred to by the Tribunal at [52] is at odds with the finding made at [44] and any prejudice is irrelevant because:

- it is the owners corporation's prejudice and not the respondents'
- at the final hearing, the respondent did not put to the Tribunal that the District Court proceedings gave rise to prejudice that should prevent the making of the restoration order (the respondents' defence was that the owners corporation had agreed to the disputed work). The discussions in relation to the District Court proceedings were in relation to why the respondents could not pursue their cross-application for additional payments from the owners corporation
- the District Court proceedings were settled by a consent judgment without any hearing on the merits. No issue estoppel can arise out of such a settlement.

58 We are of the view that the commencement and outcome of the District Court proceedings were relevant to the weighing up of the discretion. At [53] of the reasons for decision, the Tribunal simply noted that it was "rather odd that the owners corporation agreed to contribute to the cost of the roof works, only now to seek to have those works demolished".

59 The District Court proceedings had been drawn to the Tribunal's attention and the Tribunal was entitled to consider them as part of its consideration of whether to make the orders. The intersection of this application with the District Court proceedings was an appropriate matter to consider in the context of making orders to settle a dispute about the operation, administration, or management of the strata scheme.

60 We are not of the view that the Tribunal took into consideration irrelevant matters when weighing up the discretion about what orders to make.

Relevant considerations

61 The appellant also submits that the Tribunal failed to take into account relevant considerations in exercising the discretion.

62 The failure to take into account a relevant consideration may amount to a question of law. In *Director General, Department of Finance & Services v Porter* [2014] NSWCATAP 6, the Appeal Panel stated the following at [26] to [29]:

> 26 Failure to take into account a relevant consideration which the decision maker was bound to take into account is an error of law (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-6) 162 CLR 24 at 39 per Mason J).
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> 27 Determining what is to be taken into account when making a decision is a matter of construction of the statute conferring power. Where the relevant matters are not expressly set out those matters are determined by implication from the subject matter, scope and purpose of the conferring statute: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* at 39-40 per Mason J. What weight the Tribunal should give to those considerations is, however, generally a matter for the Tribunal (at 41 per Mason J).
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> 28 Whilst the question of weight is one for the Tribunal, the Tribunal will not have given adequate attention to a relevant consideration where its process is merely a formulaic reference: see *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [49] per Basten JA (with Santow and Ipp JJA agreeing). Instead what is required can be described as a proper, genuine and realistic consideration of the relevant consideration: *Bruce v Cole* (1998) 45 NSWLR 163 at 185-6 per Spigelman CJ. However, as Basten JA warned in *Azriel* at [51] referring to Spigelman CJ in *Bruce* at 186, assessing whether the

decision-maker has given a proper, genuine and realistic consideration to a mandatory matter must be approached with caution, with care to avoid an impermissible reconsideration of the merits of the decision.

29 In assessing a purported failure to take into account a relevant consideration a mere failure to refer expressly to a matter will not necessarily justify an inference that there has been a failure to take into account a relevant consideration. Despite this, such an inference is still open to be drawn by the Tribunal in those circumstances: see *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127 at 132 per Burchett J. In determining whether or not to draw the inference that failure to deal at all or in detail with a relevant consideration gives rise to an error by the decision-maker, the extent to which the facts and circumstances of the particular matter engage that consideration will be relevant and often determinative. Further, in the context of an appeal from a decision of an administrative review tribunal, such as this appeal, the nature and scope of the submissions put to the tribunal at first instance may also inform that process of determination.

63 The appellant submits that the Tribunal failed to consider the following:

(i) The mandatory effect of s 108 of the SSMA and the limited discretion available to the Tribunal to permit the keeping of unauthorized common property works.

(ii) The occupation of the areas altered by the works in the absence of an occupation certificate is unlawful and exposes the appellant, as owner of the land, to consequences under the *Environmental Planning & Assessment Act* 1979 (NSW)

(iii) The alternative regime as contained in the order is equally as uncertain and ineffective as a reinstatement order and is unworkable.

(iv) That absent an order to reinstate the common property, the appellant is responsible for ongoing maintenance of the unauthorized common property works under ss 106(1) and/ or 108(4) of the SSMA

(v) The effect of dismissing the proceedings without an order to remove the unauthorized work and reinstate the common property would act as a bar against the appellant seeking the removal of the unauthorised works in the future, and making the appellant responsible for ongoing maintenance of the works could result in potential liability for loss and compensation under s 106(5) of the SSMA.

64 The appellant submits that each of those matters should have been considered and were not and that the failure to consider the matters warrants the setting aside of the primary orders.

65 The appellant refers to s 108 of the SSMA which provides that any addition to the common property must be approved by way of special resolution.

66 *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 was a case dealing with s 65A of the former *Strata Schemes Management Act* 1996 (SSMA 1996), which was in the same terms as s 108. At [72] Parker J stated:

> On the other hand, the purpose of s 65A was clearly to protect minority owners in a building from having the costs of enhancement imposed on them by the majority. The minority may prefer to continue to eke out the existing facilities even if in the longer run, that may prove more expensive or inefficient. They may have less money to spend, or their priorities may be different. The legislative purpose behind s 65A could arguably be subverted if unnecessary costs could be imposed on the minority at the discretion of the majority just because some, much less extensive, repair or maintenance is required.

67 The appellant submits that the Tribunal failed to properly consider the purpose and effect of s 108 of the SSMA.

68 Section 108 deals with the procedure for changes to common property and ongoing maintenance. The Tribunal found at that the works undertaken to lots 7 and 8 were works that required a special resolution (see [22]) and that a special by-law was required in relation to maintenance (see [25]). On that basis, the Tribunal was aware of the effect of s 108 and had considered s 108 in making its determination.

69 The orders as made by the Tribunal leave open the possibility that, if the respondent is unable to obtain the approval of the owners corporation for the common property rights by-laws, or, alternatively, satisfy the Tribunal that the owners corporation has unreasonably refused to make the common property rights by-laws, the appellant may make a further application seeking an order for removal of the works. Mr Carolan, who appeared for the first respondent on the appeal, explicitly conceded in the course of oral submissions that no issue estoppel or res judicata would arise from the primary decision to prevent the owners corporation bringing fresh proceedings.

70 The appellant also submits that the Tribunal failed to consider that refusing to make the order to remove the unauthorised works had the effect of making the owners corporation responsible for the work under s 106(1) of the SSMA.

71 However, the Tribunal has recognised, at [25] of the reasons for decision, that '*without a by-law, the owners corporation remains responsible'* for the

maintenance of the common property, the subject of the unauthorised works. Again, this was contemplated in the way that the final orders were made.

72 In relation to exposing the owners corporation to potential enforcement action by Council with respect to works to the common property that had not received planning approval or an occupation certificate, there was no evidence that such action was imminent. In any case, the Tribunal was aware that no occupation certificate had been obtained. At [48] of the reasons for decision the Tribunal found that '*an occupation certificate certifies that the construction has been completed in accordance with the approved development consent and construction certificates'.* The Tribunal had considered the lack of an occupation certificate in the determination. This is also contemplated by the orders as they were finally made, as the orders are designed to remedy the lack of an occupation certificate. That, in effect, would also resolve any Council intervention and clarify the issue of responsibility for the works.

73 We do not find that the effect of dismissing the proceedings without an order to remove the unauthorised work and reinstate the common property would act as a bar against the appellant seeking relief for the removal of the unauthorised works in the future. In our view, there would be nothing preventing the appellant from making a further application in the event that a by-law had reasonably been refused by the appellant. As noted, that proposition was conceded by counsel for the first respondent. That matter, as raised by the appellant, was not a relevant consideration.

74 We are not satisfied that the Tribunal failed to take into consideration relevant matters in weighing up the exercise of the discretion.

75 We find no question of law in the *House v King* sense arising in relation to the Tribunal's exercise of its discretion, and on that basis this ground of appeal is dismissed.

Ground 3 – Building Alteration Plan

76 The Tribunal ordered that the respondents lodge a building alteration plan under section 19 of the *Strata Schemes Development Act* 2015. The appellant submits that the question of a building alteration plan was not raised in the strata application or before the Tribunal at the final hearing and that, in those

circumstances, that question was not a matter before the Tribunal and should not have been considered.

77 The respondents agree that order 1(3) in relation to the building alteration plan, was unnecessary and has been dealt with in the proposed by-laws. The respondents agreed before us that order 1(3) for the lodging of a building alteration plan should be set aside. On that basis the third ground of appeal is allowed and the order is set aside.

Leave to Appeal

78 The appellant also seeks leave to appeal in relation to each of the grounds.

79 As the decision the subject of appeal is a decision of the Tribunal in the Consumer and Commercial Division, the Appeal Panel may only grant leave to appeal where it is satisfied the appellant may have suffered a substantial miscarriage of justice because:

> (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).
>
> (see NCAT Act, Sch 4, cl 12)

80 In *Collins v Urba*n [2014] NSWCATAP 17 the Appeal Panel stated at [76] that a substantial miscarriage of justice 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 circumstances in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

81 If the appellants satisfy the requirements of clause 12(1), the Appeal Panel must still consider whether it should exercise its discretion pursuant to s.80(2)(b) of the Act.

82 We find no grounds to grant leave to appeal. The appellant's submissions in relation to leave are in essence the same as the issues raised in relation to the questions of law propounded by the appellant.

83 Accordingly, we do not grant leave to appeal.

ORDERS

84 We make the following orders and have also made directions in relation to any costs application:

(1) The appeal is allowed in part.

(2) Order 1(3) made by the Tribunal in proceedings SC 20/06967 on 5 March 2021 is set aside.

(3) Leave to appeal is refused.

(4) The appeal is otherwise dismissed.

(5) If either party seeks a costs order in relation to the appeal, the following directions apply:

(a) The applicant for costs (costs applicant) must file and serve any application within 7 days after these orders.

(b) The respondent to the costs application must file and serve evidence and submissions in response 14 days from the date of these orders.

(c) The costs applicant must file and serve any submissions in reply within 21 days from the date of these orders.

(d) Submissions must include submissions concerning whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act, 2013 dispensing with a hearing.

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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