



Civil and Administrative Tribunal

New South Wales

---

Case Name: Hill v The Owners - Strata Plan No 16519

Medium Neutral Citation: [2022] NSWCATAP 234

Hearing Date(s): 20 June 2022

Date of Orders: 18 July 2022

Decision Date: 18 July 2022

Jurisdiction: Appeal Panel

Before: G Blake AM SC, Senior Member  
D Fairlie, Senior Member

Decision: (1) To the extent that it is necessary time for lodgment of the notice of appeal is extended to 27 January 2022.  
(2) The appeal against the decision of the Tribunal made on 21 December 2021 is dismissed.  
(3) The appeal against the decision of the Tribunal made on 14 March 2022 is dismissed.  
(4) The application of the respondent that the appellant pays its costs of and incidental to the appeal is dismissed.

Catchwords: APPEALS — constructive failure to exercise jurisdiction  
APPEALS — Procedure — Time limits — Extension of time – application granted  
COSTS – appeal from exercise of discretion in finding special circumstances to make award for costs - appeal dismissed  
COSTS – application that the appellant pay the respondent’s costs of the appeal – application dismissed

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), ss 41, 50, 60, 80, 81  
Civil and Administrative Tribunal Rules 2014 (NSW), r 25

Strata Schemes Management Act 2015 (NSW), ss 4, 178, 182, 188, 226, 232, 251, 261

Cases Cited:

BDK v Department of Education and Communities [2015] NSWCATAP 129  
Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2) [2016] NSWCATAP 224  
Brunsprop Pty Ltd v Joanne Hay & Wes Davies [2015] NSWCATAP 152  
Cominos v Di Rico [2016] NSWCATAP 5  
CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21  
eMove Pty Ltd v Naomi Dickinson [2015] NSWCATAP 94  
Goncalves v Bora Developments Pty Ltd [2021] NSWCATAP 231  
House v R (1936) 55 CLR 499; [1936] HCA 40  
Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22  
Nelson v The Owners – Strata Plan No.49504; The Owners – Strata Plan No.49504 v Nelson [2020] NSWCATAP 194  
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39  
The Owners – Strata Plan 5319 v Price [2020] NSWCATAP 245  
The Owners - Strata Plan No. 47027 v Peter Clisdell Pty Ltd (No 2) [2018] NSWCATAP 46  
Walker v The Owners - Strata Plan No 1992 [2020] NSWCATAP 192  
Walsh v The Owners – Strata Plan No 10349 [2017] NSWCATAP 230  
Zucker v Burbank Montague Pty Ltd [2018] NSWCATAP 135

Texts Cited:

None cited

Category:

Principal judgment

Parties:

Penelope Louise Hill (Appellant)  
The Owners - Strata Plan No 16519 (Respondent)

Representation:

Solicitors:  
Appellant (Self-represented)  
Strata Title Lawyers (Respondent)

File Number(s): 2022/00025115  
Publication Restriction: Nil  
:  
Court or Tribunal: Civil and Administrative Tribunal  
Jurisdiction: Consumer and Commercial Division  
Date of Decision: 21 December 2021; 14 March 2022  
Before: J Ringrose, General Member  
File Number(s): SC 21/07543

## **REASONS FOR DECISION**

### **Overview**

- 1 This is an internal appeal from the decisions of the Consumer and Commercial Division of the Tribunal made on 21 December 2021 and 14 March 2022 in proceedings between the appellant, Penelope Louise Hill (Ms Hill), and the respondent, The Owners - Strata Plan No 16519 (the owners corporation), which is the owners corporation responsible for the management of the strata scheme related to strata plan no 16519 (SP16519) in which Ms Hill sought relief against under the *Strata Schemes Management Act 2015* (NSW) (SSM Act). In these decisions, the Tribunal dismissed the proceedings, and ordered Ms Hill to pay the owners corporation's costs of the proceedings.
- 2 We have decided to dismiss the application of Ms Hill for an extension of time to appeal against the decision of the Tribunal made on 21 December 2021, to dismiss the appeal of Ms Hill against the decision of the Tribunal made on 14 March 2022, and to dismiss the application of the owners corporation that Ms Hill pays its costs of the appeal.

### **The factual background**

- 3 SP16519, which is located at Kirribilli, consists of 11 lots and common property and comprises two buildings: the first building known as Ormiston contains lots 1 to 9, while the second building contains lots 10 and 11.

- 4 In August 2007, the applicant became the owner of lot 4.
- 5 There have been numerous proceedings between the parties which have been commenced by Ms Hill since 2010 in the predecessor of the Tribunal and the Tribunal as well as the Supreme Court of New South Wales. These proceedings are referred to in the decision of the Tribunal made on 14 August 2020 in proceedings SC 20/12443.

### **The proceedings between the parties in the Tribunal**

- 6 On 18 February 2021, Ms Hill as the applicant commenced proceedings SC 21/07543 against the owners corporation as the respondent by filing a strata schemes application in which she sought an order for “full compliance by it with s 182 of the SSM Act “a.s.a.p.”.
- 7 On 18 June 2021, the Tribunal dismissed the proceedings because of the failure of Ms Hill to appear.
- 8 On 16 August 2021, the Tribunal reinstated the proceedings, made procedural directions for the filing of an outline of submissions by the parties, and an order that a hearing is dispensed with in relation to the proceedings pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).
- 9 On 21 December 2021, the Tribunal dismissed the proceedings, and published reasons for its decision (the 21 December 2021 Tribunal Decision).
- 10 On 14 March 2022, the Tribunal ordered Ms Hill to pay the owners corporation’s costs of the proceedings, and published reasons for its decision (the 14 March 2022 Tribunal Decision).

### **The 21 December 2021 Tribunal Decision**

- 11 In the 21 December 2021 Tribunal Decision, the Tribunal relevantly:
- (1) set out the background to the proceedings ([1]-[9]);
  - (2) set out the history of the proceedings and the dates on which evidence and submissions were filed by Ms Hill and the owners corporation ([10]-[17]);
  - (3) summarised the submissions of Ms Hill ([18]-[27]). The Tribunal ([18]) noted the order sought by Ms Hill in the strata schemes application and that in her final submissions dated 15 September 2021 she sought the following additional orders:

“(a) An order pursuant to s.228 of the Strata Schemes Management Act that the Owners Corporation inform all owners of the applicant’s NCAT matters since 2016

(b) An order that the secretary carry out his duties in good faith and competently without or favour in accordance with s.43 of the Strata Schemes Management Act 2015

(c) An order in accordance with s.71 of the Civil and Administrative Tribunal Act 2013, that a penalty of 50 Penalty Units or 12 months imprisonment or both be imposed for false or misleading statements

(d) An order for the issue of a Penalty Notice pursuant to s.250 of the Strata Schemes Management Act 2015 (e) An order that the secretary of the Department of Finance Services and Innovations be liable for anything done or omitted in good faith for the purposes of executing functions under the Act

(f) An order for the imposition of a penalty on the Owners Corporation for failure to prepare and maintain the Strata Roll (g) An order in accordance with s.238 that the secretary be removed from office as a result of his failure to comply with the Strata Schemes Management Act and Regulations.”

- (4) summarised the submissions of the owners corporation ([28]-[39]);
- (5) dealt with the alleged failure of the owners corporation to notify owners of Ms Hill’s application ([40], [79], [84], [93]);
- (6) dealt with the alleged failure of the owners corporation to address a termite problem ([41], [88]-[89], [93]);
- (7) dealt with the alleged failure of the owners corporation to address roof repairs ([42], [90], [93]);
- (8) dealt with the alleged failure of the owners corporation to undertake works to Ms Hill’s bathroom vents ([43], [91], [93]);
- (9) dealt with a variety of unspecified complaints about the failure of the owners corporation to repair the common property, and of misconduct by the strata managing agent ([44]-[49], [92]-[93]);
- (10) set out the history of the proceedings ([50]-[55]);
- (11) summarised the applicable provisions of s 182 of the SSM Act ([56]-[59]);
- (12) set out the complaints of Ms Hill about the records of the owners corporation ([60]-[62]);
- (13) summarised the submissions of the owners corporation ([63]-[74]);
- (14) set out s 188 of the SSM Act ([75]);
- (15) decided that it was not satisfied that Ms Hill had provided evidence which would justify an order under s 188 or s 232 of the SSM Act ([76]-[78]):

“[76] The applicant has stated that she has made many applications to inspect documents over a period of more than ten years but the

applicant, in the present case, has failed to identify specific documents which she contends have been requested but not produced. Reference has been made to a list of documents but the list does not identify documents which have not been produced upon specific requests.

[77] The Strata Manager, Mr Noad, has clearly indicated that all information requested has been made available although he has not provided email addresses or telephone numbers for persons on the Strata Roll.

[78] The Tribunal has a discretion as to whether to order specific documents to be produced and it is clear that some residents or occupants have expressed concerns about making their email address or their telephone number available to the applicant on the Strata Roll. The Tribunal is satisfied that the Strata Roll provided to the Tribunal as evidence is a roll which complies with the requirements of s.178 and s.261 which identifies an address for service as being either an Australian Postal address or an email address. The Tribunal is not satisfied that applicant has provided evidence which would justify an order under s.188 or s.232 of the Act.”

- (16) dismissed the proceedings so far as relief was sought against Mr Muxworthy as he had never been joined as a party ([80]-[87], [94]-[96]);
- (17) dismissed the proceedings and made procedural directions for the application for costs of the owners corporation ([99]).

### **The 14 March 2022 Tribunal Decision**

12 In the 14 March 2022 Tribunal Decision, the Tribunal relevantly:

- (1) set out the background to the proceedings ([1]-[2]);
- (2) summarised the 21 December 2021 Tribunal Decision ([3]);
- (3) set out the history of the application for costs of the owners corporation ([4]-[6], [36]-[37]);
- (4) summarised the submissions of the owners corporation ([7]-[35]);
- (5) set out s 60 of the NCAT Act ([38]);
- (6) set out the legal principles applicable to an award of costs under s 60 of the NCAT Act ([39]-[44]);
- (7) decided that it was satisfied that special circumstances have been established which would justify an award of costs in favour of the owners corporation because it had concluded that the orders sought by Ms Hill had no tenable basis in fact or law ([45]-[46]);
- (8) decided that Ms Hill should pay the owners corporation’s costs of and incidental to the proceedings on a party party basis ([47]).

### **The history of the appeal**

13 On 27 January 2022, Ms Hill as the appellant commenced proceedings 2022/00025115 against the owners corporation as the respondent by filing a

notice of appeal which was dated “26.1.2022” and in which she asserted that she received the 21 December 2021 Tribunal Decision on “1-2-2022”, the Tribunal made several errors of law, other errors for which leave to appeal should be granted and that she did not require an extension of time (the notice of appeal).

- 14 On 9 February 2022, the appeal was dismissed because Ms Hill failed to appear.
- 15 On 2 March 2022, the Appeal Panel ordered that the appeal was reinstated and dismissed the application for costs of the owners corporation.
- 16 On 16 March 2022, the Appeal Panel gave leave to the owners corporation to be legally represented and made procedural directions for the written submissions of the parties.
- 17 On 25 March 2022, the owners corporation filed its reply to appeal, in which it noted that the notice of appeal appeared to be limited to the claim of Ms Hill under s 182 of the SSM Act, contended that the Tribunal had not made any errors of law and opposed the granting of leave to appeal against the 21 December 2021 Tribunal Decision and the 14 March 2022 Tribunal Decision and did not object to extending time for lodging the appeal (the reply to appeal).
- 18 On 6 April 2022, Ms Hill filed and served the following documents:
  - (1) a bundle of documents comprising bundles A to E;
  - (2) a bundle of documents comprising bundles 1 to 11 which appears to be the documents provided by Ms Hill to the Tribunal.
- 19 On 8 April 2022, Ms Hill filed and served a bundle of documents comprising bundles F to J.
- 20 On 27 April 2022, the owners corporation filed and served its submissions (the respondent’s submissions).
- 21 On 9 May 2022, Ms Hill filed and served a bundle of documents comprising bundles A headed “Appellant’s Final Summation” and B (the 9 May 2022 Hill documents).

22 On 12 May 2022, the Appeal Panel adjourned the appeal and noted that the owners corporation agreed to provide the following documents to Ms Hill within seven days:

“a) Up to date Strata Roll

b) Accounts for the past 3 years of the Strata Plan SP 16519.

c) Copies of statutory insurance policies for the past 2 years.

d) Invoices rendered by Strata Title Lawyers relating to the costs of the proceedings before the Tribunal and the Appeal Panel invoiced and paid to date.”

23 On 17 June 2022, Ms Hill made an application for the adjournment of the appeal and the Registrar decided that the application would be determined at the commencement of the appeal hearing.

### **The scope and nature of internal appeals**

24 Internal appeals may be made as of right on a question of law and otherwise with leave of the Appeal Panel: s 80(2)(b) of the NCAT Act.

25 An internal appeal is not a re-hearing of the original proceedings or a mere opportunity for a party dissatisfied with the outcome in the original proceedings to re-argue its case: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. To succeed in an appeal, the appellant must establish an error of law has occurred, or otherwise an error of the type that it is appropriate to grant leave to appeal.

26 A material failure by the Tribunal to respond to a “substantial, clearly articulated argument relying upon established facts” may be characterised either as a failure to afford natural justice or as a constructive failure to exercise jurisdiction, and will raise a question of law: *Goncalves v Bora Developments Pty Ltd* [2021] NSWCATAP 231 at [9(2)].

27 An appeal in relation to a costs decision which suggests that the discretion of the Tribunal may have miscarried in the sense of *House v R* (1936) 55 CLR 499 (*House v The King*) at 504-5; [1936] HCA 40 raises a question of law. Otherwise leave to appeal must be sought: *Nelson v The Owners – Strata Plan No.49504; The Owners – Strata Plan No.49504 v Nelson* [2020] NSWCATAP 194 (*Nelson*) at [42].



- 28 The Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including but not limited to an order that the appeal is to be dismissed: s 81(1)(a) of the NCAT Act.
- 29 Rule 25(4)(c) of the Civil and Administrative Tribunal Rules 2014 (NSW) (NCAT Rules) relevantly provides that in the case of an appeal from a decision of the Tribunal an internal appeal must be lodged within 28 days from the day on which the appellant was notified of the decision to be appealed or given reasons for the decision.
- 30 In *Cominos v Di Rico* [2016] NSWCATAP 5 (*Cominos*), the Appeal Panel at [13] stated that it may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal.

### **The hearing of the appeal**

- 31 On 20 June 2022, we heard the appeal by telephone. Ms Hill represented herself. Mr T Bacon, a solicitor, represented the owners corporation.
- 32 At the commencement of the hearing Ms Hill did not proceed with her application for the adjournment of the appeal.
- 33 Ms Hill indicated that the appeal was confined to the question of whether an order should be made under s 188 of the SSM Act.
- 34 As both parties consented to the appeal be heard on the papers, we made orders that the further hearing of the appeal be dispensed with pursuant to s 50(2) of the NCAT Act and reserved our decision.

### **The issues**

- 35 We are uncertain whether Ms Hill lodged the notice of appeal within the time of 28 days after being given the 21 December 2021 Tribunal Decision prescribed under r 25(4)(c) of the NCAT Rules. The records of the Tribunal show that the 21 December 2021 Tribunal Decision was sent to Ms Hill on 21 December 2021 by email to her email address (being the same email address recorded by

Ms Hill in the strata schemes application commencing proceedings SC 21/07543 and in the notice of appeal). However, Ms Hill has provided no explanation for her assertion in the notice of appeal that she received the 21 December 2021 Tribunal Decision on “1-2-2022”. We note that the reference to “1-2-2022” could not be reference to 1 February 2022 because the notice of appeal was lodged on 27 January 2022. We also note that “1-2-2022” would appear not be reference to 2 January 2022 because the notice of appeal was dated “26.1.2022” which was clearly a reference to 26 January 2022.

- 36 If Ms Hill received the 21 December 2021 Tribunal Decision between 21 and 29 December 2021, then the notice of appeal was lodged out of time. If she received the 21 December 2021 Tribunal Decision on or after 30 December 2021, then the notice of appeal was within time.
- 37 To the extent that the notice of appeal was lodged out of time, we have treated it as implicitly containing an application by Ms Hill to extend the time for lodgment of her appeal to 27 January 2022. On this assumption, a threshold issue is whether an extension of time to lodge the appeal should be granted under s 41 of the NCAT Act.
- 38 If an extension of time to lodge the appeal is granted or the notice of appeal was lodged within time, then having regard to the principles in *Cominos*, we have examined the order challenged on appeal and the grounds of appeal in the notice of appeal, the material provided by Ms Hill, and the Tribunal decision to discern her grounds of appeal. Many of the documents relied on by Ms Hill include material that could properly be described as “scandalous” in the sense of making indiscriminate allegations of wrongdoing against a range of people. We have found it difficult to discern what her complaint is about the 21 December 2021 Tribunal Decision so far as it relates to the dismissal of the claim under s 188 of the SSM Act. As expressed by Ms Hill in the bundle of documents comprising bundle A headed “Appellant’s Final Summation” filed on 9 May 2022:

“The crux of this case is the OC’s denial/refusal to give PH access to its s.182 the Act dox.

1.a Again, I press NCAT to apply/exercise its functions under s.188 the Act to order that the OC/Respondent give me - owner/occupier of unit

4, SP: 16519 - access to its s.182 SSMA 2015 files and to award penalties under s.182 [o] the Act +costs.

b Again, I submit that the Respondent has given no Defence to the OC's breaches of s.182 the Act ... nor bothered to give with reasons why the OC denies me my statutory rights to access to these s.182 dox. I only seek accurate and/or up-to-date names and addresses of new and old tenants and/or owners ... s.187.

c It is a statutory duty for the OC to comply with s.182 the Act OR face s.182[o] penalties.

d. The OC is also in breach of s.183 - inspection of s.182 dox and s.228 the Act -to inform OC of this case in case any owner may wish to join these proceedings.

e. I always paid Strata Partners the going 'inspection' fees- \$4000+ since 2011- worried about our poor files/accounts/records+ misappropriation of OC's funds by our secretary in.2009 - money taken without OC authority for his own evil purposes.”

39 We have discerned the following grounds of appeal:

- (1) ground 1: the Tribunal erred in constructively failing to exercise jurisdiction by not considering the question of whether the owners corporation breached s 182 of the SSM Act;
- (2) ground 2: the Tribunal erred in failing to find that the owners corporation breached s 182 of the SSM Act.

40 However, ground 2 does not arise for determination as Ms Hill in the 9 May 2022 Hill documents at page 27 indicated that she was not seeking leave to appeal against the 21 December 2021 Tribunal Decision.

41 We have not included any ground of appeal relating to the failure of the Tribunal to impose a penalty for the breach by the owners corporation of the obligation under s 182 of the SSM Act to Ms Hill because the Tribunal does not have jurisdiction to impose any penalty for a breach of this provision. As prescribed by s 251(1) of the SSM Act, proceedings for an offence under the SSM Act may be dealt with summarily before the Local Court or before the Supreme Court in its summary jurisdiction.

42 This is no issue about the appeal of Ms Hill against the 14 March 2022 Tribunal Decision having been lodged within the time prescribed under r 25(4)(c) of the NCAT Rules.

43 Finally, the application of the owners corporation that Ms Hill pay the costs of the appeal arises for determination.

## Whether an extension of time to appeal should be granted if the notice of appeal was lodged out of time

44 The relevant principles for the granting of an extension of time to appeal under s 41 of the NCAT Act are set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 (*Jackson*) at [21] and [22]:

[21] Time limits, including the specification of the time within which an appeal from an internally appealable decision to the Appeal Panel of the Tribunal must be lodged, are established by legislation for the purpose of promoting the orderly and efficient conduct of proceedings in the Tribunal, providing certainty for the parties to proceedings, especially the party in whose favour orders have been made, and achieving finality in litigation. For these reasons, these time limits should generally be strictly enforced. That is not to say, however, that exceptions should not be made where the interests of justice so require. The express power in s 41 of the Act to grant extensions of time allows the Tribunal to prevent the rigid enforcement of time limits becoming an instrument of injustice. As the decision in *Gallo v Dawson* quoted above makes clear, it is generally the case that in order for the power to extend time to be exercised in an appellant's favour there must be material upon which the Appeal Panel can be satisfied that to refuse the application for an extension of time would work an injustice.

[22] The considerations that will generally be relevant to the Appeal Panel's consideration of whether to grant an extension of time in which to lodge a Notice of Appeal include:

(1) The discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the appellant - *Gallo v Dawson* [1990] HCA 30, 93 ALR 479 at [2], *Nanschild v Pratt* [2011] NSWCA 85 at [38];

(2) The discretion is to be exercised in the light of the fact that the respondent (to the appeal) has already obtained a decision in its favour and, once the period for appeal has expired, can be thought of as having a "vested right" to retain the benefit of that decision - *Jackamarra v Krakouer* (1998) 195 CLR 516 at [4], *Nanschild v Pratt* [2011] NSWCA 85 at [39] and, in particular, where the right of appeal has gone (because of the expiration of the appeal period) the time for appealing should not be extended unless the proposed appeal has some prospects of success - *Jackamarra* at [7];

(3) Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:

(a) The length of the delay;

(b) The reason for the delay;

(c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and

(d) The extent of any prejudice suffered by the respondent (to the appeal),

- *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at [55] (per Basten JA) but note also [14], *Nanschild v Pratt* [2011] NSWCA 85 at [39] to [42]; and

(4) It may be appropriate to go further into the merits of an appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of time can show that his or her case has more substantial merit than merely being fairly arguable - *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at [14] (per Hodgson JA, Ipp JA agreeing at [17]) and *Molyneux v Chief Commissioner of State Revenue* [2012] NSWADTAP 53 at [58] - [59].”

45 As to the criteria in *Jackson* at [22(3)]:

- (1) the length of the delay is short being six days;
- (2) there is no explanation by Ms Hill for the delay;
- (3) Ms Hill 's prospects of success are weak for the reasons set out in [46] to [564] below.
- (4) there is no evidence that the owners corporation will suffer any prejudice.

46 Part 1 (ss 1-7) of the SSM Act contains provisions dealing with preliminary matters. Section 4 contains definitions, and relevantly provides:

#### **4 Definitions**

(1) In this Act—

...

**strata roll** for a strata scheme or a former strata scheme means the strata roll for that scheme established under Division 1 of Part 10.

...

47 Part 10 Division 1 (ss 176-181) of the SSM Act contains provisions dealing with the strata roll and other records. Section 178 deals with the content of the strata roll, and relevantly provides:

#### **178 Content of strata roll**

(1) **Information about lots** The following information must be recorded in the strata roll in relation to a particular lot in the strata scheme—

(a) the name of the holder of the estate in fee simple in the lot (in the case of a freehold strata scheme) or the holder of the leasehold estate in the lot (in the case of a leasehold strata scheme),

(b) an address for service of notices,

(c) an Australian postal address, and an email address if the holder has one, if not an Australian postal address, and an email address if provided as the address for service,

(d) the name of the holder’s agent (if any) appointed in accordance with this Act and the agent’s address for service of notices,

(e) information provided under a strata interest notice,

(f) information provided under a tenancy notice.

...

- 48 Part 10 Division 2 (ss 182-186) of the SSM Act contains provisions dealing with the provision of information about strata schemes. Section 182 deals with requests for the inspection of records of the owners corporation, and relevantly provides:

**182 Requests for inspection of records of owners corporation**

(1) **Persons who may inspect** An owner, ..., may request the owners corporation to allow an inspection to be carried out under this section.

(2) **Form of request** The request must be made by written notice given to the owners corporation and be accompanied by the fee prescribed by the regulations.

(3) **Items to be made available for inspection** The owners corporation must make the following items available for inspection by the person who makes the request or the person's agent—

(a) the strata roll,

(b) any other records or documents required to be kept under this Part,

...

(j) any other record or document in the custody or under the control of the owners corporation,

...

- 49 Part 10 Division 3 (ss 187-188) of the SSM Act contains provisions dealing with orders the Tribunal may make about strata roll and records. Section 188 deals with an order to supply information or documents, and relevantly provides:

**188 Order to supply information or documents**

...

(2) The Tribunal may, on application by a person, order an owners corporation, strata managing agent, officer or former strata managing agent of an owners corporation to supply or make available to the applicant a record or document if—

(a) the Tribunal considers that the owners corporation, strata managing agent, officer or former strata managing agent has wrongfully failed to make the record or document available for inspection by the applicant or the applicant's agent, and

(b) the applicant is entitled under this Act to inspect the record or document.

(3) The order may specify the manner in which information is to be supplied or made available.

50 Part 12 Division 3 (ss 226-228) of the SSM Act contains provisions dealing with procedures for applications to the Tribunal. Section 226 specifies the categories of persons who are interested persons, and relevantly provides:

**226 Interested persons**

(1) The following persons are interested persons for the purpose of making an application to the Tribunal under this Act—

...

(d) an owner of a lot in the scheme, ...

...

51 Part 12 Division 4 (ss 229-288) of the SSM Act contains provisions dealing with orders that may be made by the Tribunal. Section 232 deals with the making of orders to settle disputes or rectify complaints, and relevantly provides:

**232 Orders to settle disputes or rectify complaints**

(1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, ..., make an order to settle a complaint or dispute about any of the following—

(a) the operation, administration or management of a strata scheme under this Act,

...

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

...

52 Part 14 (ss 256-276A) of the SSM Act contains miscellaneous provisions. Section 261 deals with an address for service, and provides:

**261 Address for service**

An address for service given under this Act may be an Australian postal address or an email address.

53 In *Walker v The Owners - Strata Plan No 1992* [2020] NSWCATAP 192 (*Walker*) an Appeal Panel in an appeal from a decision under s 188 of the SSM Act held that an owner has a right to inspect the levy register, being part of the financial statements and accounting records within s 182(3)(b), (j) and (k) of the SSM Act. The Appeal Panel at [42] found that there is no issue of “privacy” which derogated from the statutory right of an owner to access financial information and accounting records where such a right is expressly provided

under the SSM Act. The Appeal Panel at [46] made the following observations as to the proper interpretation of s 188 of the SSM Act:

“[46] Properly construed, if an applicant establishes a right to access information under the SSM Act, as we have found in this case, then there is generally no discretion enlivened other than with respect to the “manner in which the information is to be supplied or made available” to an applicant under sub-s (3). We say that the discretion is generally not enlivened because absent a reason to relieve the owners corporation from the mandatory obligation to give access under s 182, the Tribunal should make an order under s 188(1) (ie. supply information) or under s 188(2) (ie. supply or make available a record or document). The use of the word “may” in s 188 suggests that the Tribunal may refuse to make an order under s 188(1) or (2) in some circumstances. In our view, there was no reason for the Tribunal to refuse to make such an order in the circumstances of this matter.”

- 54 There was no dispute before the Tribunal that the strata roll in accordance with the definition in s 4, and ss 178(1)(c) and 261 of the SSM Act is to contain an Australian postal address, and an email address if applicable. Further, there was no dispute before the Tribunal that the owners corporation was required pursuant to s 182(3)(a) of the SSM Act to make the strata roll available for inspection by Ms Hill.
- 55 We do not understand Ms Hill as having appealed against the failure of the Tribunal to supply to her an unredacted strata roll for inspection. In case the notice of appeal does challenge this order, then having regard to the terms of s 188 of the SSM Act and the principles in *Walker* at [42] the Tribunal did not make any error of law in refusing to order the owners corporation to supply an unredacted strata roll for inspection by Ms Hill. Equally, while we accept that Ms Hill is an interested person within s 226(1)(d) of the SSM Act, the Tribunal did not make any error of law under s 232(1)(a) or (e) of the SSM Act in refusing to order the owners corporation to supply an unredacted strata roll for inspection by Ms Hill.
- 56 Contrary to the contention of Ms Hill, the Tribunal did not make any error of law in failing to consider her application for the making of an order under s 188 of the Act. The competing evidence of the parties and the decision of the Tribunal is set out in the 21 December 2021 Tribunal Decision at [76]-[78].
- 57 We are conscious that Ms Hill is not a practising legal practitioner and appears not to have been aware that the notice of appeal was lodged out of time.



Accordingly, we have not taken into account her failure to offer any explanation for lodging the notice of appeal out of time. Further, for the reasons set out in [46] to [56] above, Ms Hill's prospects of success are weak and do not warrant an extension of time to appeal out of time being granted. However, as we did not raise with Ms Hill at the hearing the question of whether the notice of appeal had been lodged out of time, and the owners corporation does not object to an extension of time, we have decided that to the extent that it is necessary time for lodgment of the notice of appeal should be extended to 27 January 2022.

**Ground 1: the Tribunal erred in constructively failing to exercise jurisdiction by not considering the question of whether the owners corporation breached s 182 of the SSM Act**

58 We are satisfied that this ground raises a question of law.

59 For the reasons set out in [56] above, the Tribunal did determine this question. The fact that the Tribunal disagreed with Ms Hill's contention that the owners corporation had breached s 182 of the SSM Act does not mean that the Tribunal constructively failed to exercise jurisdiction by not considering this question.

60 Accordingly, we reject ground 1. It follows that the appeal against the 21 December 2021 Tribunal Decision should be dismissed.

**Whether the exercise of the discretion of the Tribunal in making the 14 March 2022 Tribunal Decision miscarried**

61 Ms Hill in her documents relied on in support of the appeal did not advance any submissions as to why the exercise of the discretion of the Tribunal in making the 14 March 2022 Tribunal Decision miscarried.

62 As the 14 March 2022 Tribunal Decision was a discretionary decision, to determine whether the exercise of the discretion under s 60(2) of the NCAT Act in making this decision miscarried it is necessary to apply the principles of *House v The King* at 504-5 where Dixon, Evatt and McTiernan JJ stated:

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the

judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

- 63 These principles are applied in the Tribunal in relation to an appeal against the making of an order for costs in favour of a party under s 60 of the NCAT Act: see, for example, *Cusick Real Estate Pty Ltd t/as L J Hooker Gosford v Kochan* [2017] NSWCATAP 191 at [25]; *Nelson* at [55].
- 64 We are not satisfied that the Tribunal made any error in exercising its decision in making the 14 March 2022 Tribunal Decision. It follows that the appeal against this decision should be dismissed.

### **Whether an order should be made that Ms Hill pay the costs of the appeal**

#### *Introduction*

- 65 The costs application of the owners corporation is pursuant to s 60(2) of the NCAT Act. The determination of this issue involves answering the following two questions:
- (1) whether there are special circumstances warranting an award of costs in favour of the respondent in respect of which the respondent relies on s 60(3)(c), (e) and (g) of the NCAT Act;
  - (2) if so, whether the discretion should be exercised to award costs.
- 66 Before considering this issue, it is appropriate to set out the applicable statutory provisions and the relevant legal principles, and summarise the submissions of the parties.

#### *The applicable statutory provisions – s 60 of the NCAT Act*

- 67 Section 60 of the NCAT Act deals with costs, and relevantly provides:

#### **60 Costs**

- (1) Each party to proceedings in the Tribunal is to pay the party’s own costs.
- (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

- (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
- (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
  - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
  - (d) the nature and complexity of the proceedings,
  - (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
  - (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
  - (g) any other matter that the Tribunal considers relevant.
- (4) If costs are to be awarded by the Tribunal, the Tribunal may—
- (a) determine by whom and to what extent costs are to be paid, and
  - (b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.
- (5) In this section—
- costs includes—
- (a) the costs of, or incidental to, proceedings in the Tribunal, and

...

*The relevant legal principles - Costs under s 60(2) of the NCAT Act*

- 68 “Special circumstances” in s 60(2) of the NCAT Act are circumstances that are out of the ordinary; they do not have to be extraordinary or exceptional circumstances: *CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley* [2015] NSWCATAP 21 at [32].
- 69 In considering whether special circumstances exist for the purposes of s 60(2) of the NCAT Act:
- (1) each case will depend upon on its own particular facts and circumstances: *Brunspop Pty Ltd v Joanne Hay & Wes Davies* [2015] NSWCATAP 152 at [27];
  - (2) the discretion to award costs must be exercised judicially and having regard to the underlying principle that parties to proceedings in the Tribunal are ordinarily to bear their own costs: *eMove Pty Ltd v Naomi Dickinson* [2015] NSWCATAP 94 at [48];

- (3) mere success (or failure) of an application does not give rise to special circumstances: *The Owners – Strata Plan 5319 v Price* [2020] NSWCATAP 245 at [46];
- (4) where special circumstances are found to exist, the Tribunal has a discretion to exercise in deciding what, if any, order should be made. Relevant to the exercise of that discretion are those facts upon which the finding of special circumstances was based. However, those findings do not constitute the whole of the relevant matters to be considered in deciding what, if any, order for costs should be made. Rather, the principles applicable to awarding costs generally must also be taken into account: *Brodyn Pty Ltd v Owners Corporation Strata Plan 73019 (No 2)* [2016] NSWCATAP 224 at [24].

70 As to the factor in s 60(3)(c) of the NCAT Act, in *Zucker v Burbank Montague Pty Ltd* [2018] NSWCATAP 135 at [44] the Appeal Panel made the following observations:

“[44] A finding that a claim is “not proved on the balance of probabilities” is not the same as a finding that a claim is “not tenable in fact or law”. They are different concepts. The expression “no tenable basis in fact or law” relates to the common law tests developed and applied in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. For a claim to have no tenable basis in fact or law it must be so obviously untenable that it cannot possibly succeed: *General Steel* at 130. “Manifestly groundless” or “clearly untenable” are equivalent expressions. In our view, for the purpose of s 60(3)(c), it matters not whether a conclusion that a claim has no tenable basis in fact or law is reached in connection with an application for summary dismissal or after a full hearing on the merits.”

71 As to the factor in s 60(3)(e) of the NCAT Act, in *BDK v Department of Education and Communities* [2015] NSWCATAP 129, in which the appellant was self-represented as she had been in the decision below, the Appeal Panel at [62]-[66], [72] said in relation to the identical expression in s 55(1)(b) of the NCAT Act:

“[62] It will be seen that this Tribunal’s power is somewhat differently expressed. The Tribunal’s power refers not only applies to proceedings that are “frivolous” or “vexatious”, but then applies to proceedings that are “misconceived” or “lacking in substance”. Section 55(1)(b) does not have a generic catch-all category of “abuse of process” to pick up conduct in relation to the issuance and pursuit of proceedings that might, arguably, fall outside the four specific categories set out there.

[63] In *Alchin v Rail Corporation NSW* [2012] NSWADT 142 Judicial Member Wright SC (as he then was) examined the meaning of the predecessor provision to s 55(1)(b) – s 73(5)(g)(ii) of the Administrative Decisions Tribunal Act 1977. As to the meaning of “misconceived” and “lacking in substance”, he said:

25 The expressions used in s 92(1)(a)(i) of the ADA, namely “misconceived” and “lacking in substance” are found not only in the ADA but also in s 73(5)(g) of the ADT Act and similar legislation in other states. With respect to a similar provision found in the Equal Opportunity Act 1984 (Vic), Ormiston JA in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at [14] said:

“misconceived” and “lacking in substance” have not, so far as I am aware, been used in this context before though each expression is commonly used by lawyers, the one connoting a misunderstanding of legal principle and the other connoting an untenable proposition of law or fact. If one may discern, in these provisions, an attempt to express the powers of tribunals in non-technical language, then “misconceived” would represent a claim which did “not disclose a cause of action” ..., whereas “lacking in substance” might be seen to represent a claim where the defendant could obtain summary judgment ...

26 This approach of construing “misconceived” as including a misunderstanding of legal principle and “lacking in substance” as encompassing an untenable proposition of fact or law has been applied by the Tribunal in many decisions including, for example, *Keene v Director-General, Dept of Justice and Attorney-General* [2011] NSWADT 59 at [14], *McDonald v Central Coast Community Legal Centre* [2008] NSWADT 96 at [22] and *Stanborough v Woolworths Ltd* [2005] NSWADT 203 at [50].

[64] In the present case, the Tribunal referred to the frequently-cited explanation of this term by Roden J in *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

[65] It will be seen that Roden J’s first category covers conduct that falls within the meaning of “frivolous”, while his third category embraces the kind of cases to which the expressions “misconceived” and “lacking in substance” are directed (or, in the case of the UCPR categories, cases not disclosing a reasonable cause of action).

[66] In our view a reasonably broad connotation should be given to the meaning of the four categories of conduct identified by s 55(1)(b). The intent of the provision, as we see it, is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass. While “misconceived” and “lacking in substance” may be seen as relatively specific terms, we think a flexible, purposive interpretation can be adopted in determining whether proceedings are “frivolous” or “vexatious”, conscious always of the gravity for an applicant or plaintiff of summary dismissal of proceedings.

...

[72] The question that arises here is whether the power to dismiss summarily a proceeding on the ground that it is “vexatious” can be applied to a proceeding that invokes an available legal right. It is clear, we consider, that the description “vexatious” has been applied to cases where the applicant or plaintiff was exercising an available legal right.”

72 In *The Owners - Strata Plan No. 47027 v Peter Clisdell Pty Ltd (No 2)* [2018] NSWCATAP 46 at [44] the Appeal Panel decided it would not have exercised the discretion under s 60(2) of the NCAT for reasons which included that the respondent was not legally represented at the hearing of the appeal.

### *The submissions of the parties*

#### **The submissions of the owners corporation**

73 In the respondent’s submissions, the owners corporation made the following submissions:

- (1) the appeal is misconceived and lacking in substance, because Ms Hill has been unable to produce any evidence whatsoever to substantiate any non-compliance with s 182 of the SSM Act and has not found any error of law in the 21 December 2021 Tribunal Decision;
- (2) the appeal is to be considered frivolous and lacking in substance because Ms Hill has not established that any information has been “wrongfully withheld” from her pursuant to s 188(1) of the SSM Act, to establish the legal elements necessitating the making of an order of the kind sought. She appears to have been motivated entirely by the desire for yet another opportunity to air years of perceived ‘wrongs’, the vast majority of which have been the subject of multiple previous proceedings;
- (3) the order sought has no tenable basis in fact or law. It is not clear from the disjointed and incomprehensible stream of consciousness put forward by Ms Hill what action she would like to be taken to ensure ‘full compliance’ with s 182 of the SSM Act, nor which action specifically has been undertaken which indicates a lack of compliance with s 182 of the SSM Act.

#### **The submissions of Ms Hill**

74 In the 9 May 2022 Hill documents Ms Hill did make any submissions in relation to this issue.

### *Consideration and determination*

75 We are not satisfied that the owners corporation has established special circumstances warranting the making an order for costs in its favour within s 60(2) of the NCAT Act. In substance, the appeal is an example of the failure

of an appellant to establish any error of law. The matters relied on by the owners corporation do not come within any of s 60(3)(c), (e) or (g) of the NCAT. It follows that the application of the owners corporation that Ms Hill pay its costs of the appeal should be dismissed. As set in s 60(1) of the NCAT Act each party to the appeal is to pay their own costs.

76 If we had been satisfied that the owners corporation had established special circumstances warranting the making of an order for costs in its favour within s 60(2) of the NCAT Act, we would not have exercised the discretion under s 60(2) of the NCAT Act to make a costs order in its favour in view of the fact that Ms Hill was not legally represented.

### **Orders**

77 We make the following orders:

- (1) To the extent that it is necessary time for lodgment of the notice of appeal is extended to 27 January 2022.
- (2) The appeal against the decision of the Tribunal made on 21 December 2021 is dismissed.
- (3) The appeal against the decision of the Tribunal made on 14 March 2022 is dismissed.
- (4) The application of the respondent that the appellant pay its costs of and incidental to the appeal is dismissed.

\*\*\*\*\*

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.