Supreme Court

New South Wales

Case Name:	Kaye v The Owners – Strata Plan No 4350
Medium Neutral Citation:	[2022] NSWSC 1386
Hearing Date(s):	19 September 2022
Date of Orders:	14 October 2022
Decision Date:	14 October 2022
Jurisdiction:	Common Law
Before:	Basten AJ
Decision:	(1) With respect to the decision of the Appeal Panel given on 25 May 2022 dismissing the appeal from the senior member – (a) Grant the plaintiffs leave to appeal, pursuant to s 83(1) of the Civil and Administrative Tribunal Act 2013; (b) Dismiss the appeal. (2) With respect to the application for leave to appeal from the decision of the Appeal Panel given on 28 July 2022 awarding costs – refuse the plaintiffs leave to appeal. (3) Order that the plaintiffs pay the defendant's costs in this Court.
Catchwords:	LAND LAW – strata title – common property – two by-laws to obtain rights to exclusive use and enjoyment of common property – first proposal offered repairs and maintenance – second proposal offered monetary compensation – other lot owners concerned about noise, loss of privacy, lack of compensation, floodgates for applications – whether refusal of first proposal unreasonable under Strata Schemes Management Act 2015 (NSW), s 149(1) – Tribunal not required to weigh

	interests in determining whether refusal unreasonable – other lot owners entitled to have regard to own interests and rely on experience and beliefs LAND LAW – strata title – Strata Schemes Management Act 2015 (NSW), s 149(2) – s 149(2) considerations addressed to whether to order making of by-law – proponents' rights and expectations not to be weighed against other lot owners' interests COSTS – party/party – appeal from NCAT Appeal Panel – finding of special circumstances – no mandatory considerations – unsuccessful appeal and fact of legal representation permissible considerations – finding of complexity – Tribunal's power to award costs absent special circumstances – Civil and Administrative Tribunal Act 2013 (NSW), ss 35, 60 – Civil and Administrative Tribunal Rules 2014 (NSW), rr 38 and 38A
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), Pt 4, Sch 4, ss 4, 17, 25, 35, 60, 80, 81, 83 Civil Procedure Act 2005 (NSW), s 98 Strata Schemes Management Act 2015 (NSW), Pt 7, Div 3, ss 5, 106, 126, 141, 142, 149 Supreme Court Act 1970 (NSW), s 101 Civil and Administrative Tribunal Rules 2014 (NSW), rr 38, 38A Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	Capcelea v The Owners – Strata Plan No 48887 [2019] NSWCATCD 27 Cooper v The Owners – Strata Plan No 58068 (2020) 103 NSWLR 160; [2020] NSWCA 250 Emery Kaye v The Owners – Strata Plan No 4350 (Civil and Administrative Tribunal (NSW), 29 November 2021, unrep)
Category:	Principal judgment
Parties:	Adam Emery Kaye, Bella Rebecca Kaye, Robert George Kaye (Plaintiffs) The Owners – Strata Plan No 4350 (Defendant)

Representation:	Counsel: Mr R Newlinds SC / Ms M Hall (Plaintiffs) Mr M Isaac (Defendant) Solicitors: Deutsch Miller (Plaintiffs) Kerin Benson Lawyers (Defendant)
File Number(s):	2022/00174374
Publication Restriction:	N/A
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal Appeal Panel
Jurisdiction:	Consumer and Commercial Division
Citation:	[2022] NSWCATAP 173; [2022] NSWCATAP 248
Date of Decision:	25 May 2022; 28 July 2022
Before:	R C Titterton OAM, Senior Member E Bishop, Senior Member
File Number(s):	2021/00363291

JUDGMENT

1 **BASTEN AJ:** The three plaintiffs are the owners of a strata property identified as Lot 4 in a building in Bellevue Hill. The defendant is the owners corporation for the strata scheme. The present appeal is brought from a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal ("Tribunal").[1] The plaintiffs had unsuccessfully brought proceedings in the Tribunal challenging as unreasonable the refusal of the owners corporation to pass a by-law extending their right to use part of the common property, being the roof of Lot 3. Neither the senior member who heard the initial application, nor the Appeal Panel was satisfied that the refusal was unreasonable. In this Court, the plaintiffs asserted errors of law by the Appeal Panel.[2]

[1] Kaye v The Owners – SP 4350 [2022] NSWCATAP 173 (25 May 2022) ("Appeal Panel decision").
[2] Civil and Administrative Tribunal Act 2013 (NSW) ("NCAT Act"), s 83.

Relevant background

2 The upper level of Lot 4 includes a staircase which leads to the flat roof of the building on which an area of some 207 sq ft (or a little under 20 sq m) was a "roof terrace" enclosed by a waist-high balustrade. The staircase itself protruded above the roof level to allow egress to the roof terrace, the height of that structure forming the upper limit of Lot 4. Although the roof terrace formed part of Lot 4, it was in fact situated over the adjourning apartment, Lot 3. The plaintiffs sought a right of exclusive use and enjoyment of the remaining roof area over Lot 3, being an additional area of approximately 60 sq m.

3 The plaintiffs proposed to construct a glass wall around the perimeter of the roof. Because the roof over Lot 3 (beyond the roof terrace forming part of Lot 4) was common property, the plaintiffs' proposal required a "common property rights by-law", as defined in s 142 of the *Strata Schemes Management Act 2015* (NSW) ("Management Act"). As it would have involved a change to the strata scheme by-laws, adoption of the proposal required a special resolution of the owners corporation: Management Act, s 141(1). The value of votes cast at a general meeting of an owners corporation in respect of a lot is calculated by reference to the unit entitlement of the lot: s 5(2). A special resolution requires that the value of votes cast against the resolution not exceed 25%: s 5(1)(b).

4 Two proposals were put forward by the plaintiffs: the first proposal was presented at meetings of the owners corporation held in March and July 2020. On each occasion, the motion failed to obtain the necessary votes. At a third meeting held on 30 September 2020, the first proposal was again put to a vote, as was a second proposal. Neither proposal was passed, the votes against each proposal being 48.58% by unit entitlement.

5 On 10 November 2020, the plaintiffs commenced proceedings in the Tribunal seeking a number of orders, including (in the alternative) orders under s 149(1)(a) of the Management Act with respect to each of the first and second proposals. Section 149 relevantly provides:

149 Order with respect to common property rights by-laws

> (1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds –
>
> > (a) on application made by an owner of a lot in a strata scheme, that the owners corporation has unreasonably refused to make a common property rights by-law, …
> >
> > …
>
> (2) In considering whether to make an order, the Tribunal must have regard to –
>
> > (a) the interests of all owners in the use and enjoyment of their lots and common property, and
> >
> > (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.
>
> (3) The Tribunal must not determine an application by an owner on the ground that the owners corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant … is not prepared to consent.
>
> …
>
> (5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).

6 In addition, the plaintiffs sought orders that the owners corporation either carry out repairs to the waterproof roof membrane above Lot 3, or consent to the plaintiffs carrying out such work. The effect of these alternative orders requires an explanation of the differences between the first and second proposals.

The two proposals

7 As briefly indicated above, a small section of the roof over Lot 3 constituted a roof terrace which formed part of Lot 4. (There was similar "roof terrace", with access by way of a stairway, above the roof of Lot 8 and which formed part of Lot 8.) Other than those areas, the roof of the building formed part of the common property which was owned and was required to be maintained by the owners corporation. Evidence given in the Tribunal before Senior Member Sarginson, who heard the plaintiffs' application, established that there had, prior to 2020, been a long-running dispute between the owners corporation and a builder about roofing defects which required repair.[3] However, at the extraordinary general meeting on 20 March 2020, the owners corporation accepted an offer by the builder (or its insurer) for repairs to top floor units 7, 8,

[3] Emery Kaye v The Owners - Strata Plan No 4350 (unrep, 29 November 2021) ("Tribunal decision") at [43].

11 and 12. The senior member noted evidence that the owners corporation was in the process of repairing areas of the roof other than that above Lot 3, and that there was no evidence of water penetration into Lot 3.[4]

8 There was no dispute that it was the statutory responsibility of the owners corporation to maintain and keep in good and serviceable repair the common property of the strata scheme: Management Act, s 106(1). It was also common ground that the Tribunal had power, on the application of a lot owner, to order the owners corporation to repair, or consent to work proposed to be carried out by a lot owner to repair, common property: Management Act, s 126(1).

9 The plaintiffs' first proposal provided that, in exchange for the grant of a right of exclusive use and enjoyment of the "Roof Level", the plaintiffs would carry out certain "Works". Definitions contained in the resolution for the proposed special by-law included the following:

> "1.1 In this by-law:
>
> …
>
> i) 'Roof Level' means that part of the Common Property above the roof of Lot 3 at the Building of an area of approximately 60 square metres, cross hatched on the plan annexed marked 'B', from the upper surface of the roof and limited in height to the prolongation of the ceiling of Lot 4 on the roof level,
>
> …
>
> k) 'Works' means the alterations and additions to the Lot and the Common Property described and shown in the Plans and the Schedule."

10 The works identified in the schedule were as follows:

> "1 Removal of existing metal balustrade and concrete hob around the parimeter of the Lot on the roof in accordance with the Plans annexed marked 'A'.
>
> 2 Installation of a new waterproof membrane and tiling to the Lot and the Roof Level in accordance with the Plans annexed marked 'A'.
>
> 3 Installation of a new frameless glass balustrade fixed to the inside face of the existing concrete parapet around the parimeter of the Roof Level in accordance with the Plans annexed marked 'A'.
>
> 4 Any ancillary works required to facilitate the Works referred to herein."

[4] Tribunal decision at [105], [107].

11 A significant element of the first proposal was that the plaintiffs would carry out the installation of a new waterproof membrane across the area not only of the present roof terrace (part of Lot 4) but also over the remainder of the common property (being the roof area over Lot 3). The first proposal contained no provision for any payment to the owners corporation for the grant of exclusive use and enjoyment of the roof area of Lot 3, but anticipated the plaintiffs incurring significant costs in replacing the waterproof membrane. Further, the plaintiffs proposed to undertake to maintain the works in a state of good and serviceable repair, mirroring the obligation of the owners corporation with respect to common property under s 106(1) of the Management Act.

12 The second proposal involved two major changes from the first. One was to exclude from the definition of the "Works", "the application of a new waterproofing membrane to the Roof Level (such works to be undertaken by the owners corporation at its own cost)". It obliged the owners corporation to install the new membrane within 90 days of the passing of the proposed resolution.

13 The second change was to provide that the plaintiffs would pay the owners corporation $7,500 as consideration for granting the rights of exclusive use and enjoyment with respect to the additional 60 sq m of the roof level.

14 The senior member did not accept that there had been an unreasonable refusal by the owners corporation with respect to the proposed changes to the by-laws, but did make an order pursuant to s 126 requiring that the owners corporation undertake the waterproofing of the common property roof area above Lot 3. Particulars of the work required were specified in the order.

15 On 22 December 2021, the plaintiffs lodged an appeal to an NCAT appeal panel. The appeal challenged both the dismissal of the application for an order under s 149(1)(a) of the Management Act and the making of an order that the owners corporation undertake the waterproofing work noted above. The grounds of appeal primarily addressed the failure to determine that there was an unreasonable refusal of the plaintiffs' first proposal; there was no challenge to the dismissal of the application under s 149(1)(a) with respect to the second proposal. The focus of ground 1 was that the senior member had failed to

make a finding as to the relevant jurisdictional facts. The grounds identified "as a consequential matter" that the Tribunal should not have made the order requiring the owners corporation to undertake the waterproofing work, which had been sought in the alternative to a finding as to the unreasonable refusal of the second proposal. That relief was consequential upon success on the primary ground.

16 There was a further ground asserting that, by way of alternative relief, the Tribunal should have found that the plaintiffs had consented to the second proposal and, if the payment offered in that proposal were insufficient, would also have consented to a proper amount of consideration of $38,000 (inclusive of GST) which had been identified by the plaintiffs' expert as appropriate. This ground appears to have been based on the qualified constraint on the orders that the Tribunal may make prescribing the making of a by-law, except on terms to which the applicant is prepared to consent under s 149(3). The plaintiff read that provision as empowering the Tribunal to make an order prescribing a change to a by-law on terms other than those which had been considered by the owners corporation, so long as the proponent of the by-law consented to the terms. However, that power was not engaged unless the Tribunal was satisfied as to the precondition contained in subs (1)(a). The Tribunal was not so satisfied in the present case. Nor, as it eventuated, was the Appeal Panel so satisfied. Accordingly, that aspect of the appeal does not arise directly as a basis for challenging the Appeal Panel decision. (Section 149(3) does not confer a power on this Court.)

Determination of Appeal Panel

17 The Appeal Panel commenced its dispositive reasoning by addressing the plaintiffs' submission that the senior member had failed to engage with the first proposal, which had not succeeded at any of the three general meetings at which it was presented.

18 The Appeal Panel accepted that the senior member had considered the refusal of the owners corporation to pass the first proposal at the March and July general meetings; what the senior member failed to do, according to the Appeal Panel, was to address the refusal to pass the first proposal at the

September general meeting: Appeal Panel decision at [40]-[41]. However, at [51]-[52], the Panel appears to have concluded that the senior member "failed adequately to consider whether the respondent's refusal to pass the first by-law version at the March, July and September EGMs was unreasonable".

19 There was no notice of contention challenging this aspect of the Appeal Panel's reasons. However, there are two reasons for attempting to understand the reasoning of the Appeal Panel on this issue. The first is that, in seeking leave to appeal, the plaintiffs asserted that there are issues of principle raised by the reasoning of the Appeal Panel. Secondly, the owners corporation submitted that leave should not be granted because the matter could not be finally determined by this Court and a remittal to the Appeal Panel for reconsideration was unlikely to produce a different outcome. These submissions require that three issues be addressed.

Did the senior member fail to address the first proposal?

20 First, the senior member's statement that it was "appropriate to focus upon" the second proposal, containing an offer to pay the owners corporation $7,500, as appeared in the Tribunal decision at [123], led the Appeal Panel to set out as the dispositive reasoning the following passage in the Tribunal decision at [124]-[127].[5] However, the Appeal Panel did not refer to the reasoning of the senior member at [130]-[133]. In the latter passage the Tribunal stated:

> "130 The applicant submits that the proposed common property rights by-law including a provision that the owner of Lot 4 will replace the waterproofing membrane in the roof area above Lot 3 (and be responsible for future maintenance of that roof area), makes it a significantly attractive commercial proposition for the Lot owners to grant exclusive use by way of a common property rights by-law and that the Lot owners who voted against the proposal [had] no objective reasonable basis for voting against it."

Because the second proposal did not involve the plaintiffs replacing the waterproofing membrane, this discussion could only have been directed to the first proposal.

21 The Tribunal described this submission as one which "clearly has some substance."[6] The Tribunal noted contrary considerations. It observed that the offer of continuing responsibility for future maintenance works was a standard

[5] Appeal Panel decision at [39].
[6] Tribunal decision at [131].

provision where exclusive rights were given with respect to particular common property. Further, the Tribunal noted that "the works proposed by the Lot owner (including removal of existing balustrade, tiling and installation of glass balustrade) may have an impact on the existing waterproofing membrane in any event".[7] These were identified as reasons why it was not unreasonable for the owners corporation to reject the first proposal, given that it made no offer of compensation for obtaining the exclusive rights beyond the matters referred to. That was no doubt the reason why the senior member focused first upon the second proposal, but the Appeal Panel was, in my view, in error in concluding that the senior member had not also considered the unreasonable refusal contention with respect to the first proposal. However, there was no notice of contention supporting the result reached by the Appeal Panel on this ground, and accordingly, this reasoning provides no basis to dismiss the appeal, if leave is granted.

22 Before the Appeal Panel the alleged error on the part of the Tribunal was in "not setting out how it engaged with the first by-law version at the EGMs (other than to note that the first by-law version contained no offer of compensation)", and in not exposing "an active intellectual engagement with whether or not the first by-law version was unreasonably refused." On those bases the Appeal Panel concluded the Tribunal failed to exercise its jurisdiction, and lacked a proper basis upon which to determine whether the refusal of the first proposal was relevantly unreasonable. However, because key passages in the Tribunal's reasons were not referred to, the conclusion of the Appeal Panel with respect to these grounds is open to challenge, although, as noted, was not challenged. (Whether the reasons given by the senior member were inadequate as a matter of law could only be properly addressed by reference to the reasons which were in fact given.)

23 Having found error, the Appeal Panel exercised its powers to determine the application on its merits.[8] That course was not challenged. It will be necessary to return to aspects of the evidence before the senior member, as did the Appeal Panel in addressing for itself the question of unreasonable refusal of

[7] Ibid.
[8] NCAT Act, s 80(3) and s 81(2).

the first proposal. That is because the plaintiffs challenged the reasoning of the Appeal Panel in failing to find the refusal of the first proposal unreasonable. There was force in the criticisms of the Appeal Panel's reasons, but, the respondent submitted, the material before the senior member (inadequately addressed in the reasons of the Appeal Panel), was sufficient to support its findings and, indeed, the conclusion of the senior member.

Failing to follow authority

24 Secondly, the Appeal Panel accepted an alternative submission by the plaintiffs, namely that "the Tribunal failed to follow the guidance of *Capcelea*",[9] in which the Tribunal had earlier considered the operation of s 149(1) of the Management Act.[10] The appellants submitted that in *Capcelea* the Tribunal had properly weighed an applicant's rights and expectations against the other owners' competing interest in an existing proprietary regime, as required by s 149(2) of the Management Act.

25 There appear to have been two aspects to the reasoning in *Capcelea* upon which reliance was placed. The first was the proposition (on similar facts) that the offer to replace the existing waterproof membrane on the surface of a terrace constituted "significant compensation to other owners".[11] There are three reasons for disregarding that factor on an appeal limited to questions of law.[12] First, as has been noted, the senior member expressly addressed that issue and found there was substance in the submission that the offer involved a significantly attractive commercial proposition. Secondly, this involved a factual assessment and did not provide any basis for concluding that there had been legal error on the part of the senior member, even had he not followed that approach. Thirdly, the circumstances in *Capcelea* were distinguishable on the facts, if that were relevant. The lot owners in *Capcelea* wished to do work with respect to a terrace over which they already enjoyed exclusive rights of use.[13] There was, therefore, no question of the kind which arose in the present

[9] Capcelea v The Owners – Strata Plan No 48887 [2019] NSWCATCD 27.
[10] Appeal Panel decision at [43].
[11] Capcelea at [74].
[12] NCAT Act, s 80(2).
[13] Capcelea at [5].

case as to whether there should be a payment for obtaining exclusive use rights.

26 More importantly, there was a second aspect to the allegation that the Tribunal erred in law in failing to follow the "guidance" of *Capcelea.* In that case, the Tribunal had made the following statement of principle:

> "100 When one has regard to the two elements in s 149(2), assessed objectively on the evidence as just described, it seems to me that the rights and expectations of the applicants, taken with the absence of objectively-established detrimental effect on the interests of the other lot owners, leads to a conclusion that the refusal of the retroactive and prospective by-laws … was unreasonable."

27 This passage was the basis of the Appeal Panel's observation at [43], that "in *Capcelea* the Tribunal weighed an applicant's rights and expectations against the other owners' competing interests." (That observation recited part of the plaintiffs' submissions which it said, at the outset, it accepted. It is clear from the application of the principle at [92] that this limb of the submission, which correctly reflected the passage from *Capcelea*, was accepted.)

28 This reasoning is problematic for two reasons. First, as a matter of statutory construction, the two matters identified in s 149(2) to which regard must be had, are not expressed as relevant to the unreasonable refusal criterion, but to the determination by the Tribunal as to whether to make an order. Furthermore, s 149(2) identifies two sets of interests to which regard must be had: it does not prescribe a weighing of one set against another. Accordingly, if it were true that the senior member failed to follow these aspects of *Capcelea,* it cannot be said that he erred in law in a material respect.

29 It is true that the criterion of engagement of the power will undoubtedly have a significant bearing upon whether or not an order is made. Having regard to the respective interests of disputants may well inform the question of whether the refusal was unreasonable. Nevertheless, to say that the section prescribed some weighing process is to impose a constraint which is not found in the statute. Taking matters into account is not a mechanical process and may involve a comparison of disparate factors. Apples and oranges can be compared, but how that is done depends on the purpose of the comparison and relevant contextual considerations.

30 Importantly, to apply the test in s 149(2) in determining whether the refusal by the owners corporation was unreasonable is, in effect, to require the owners corporation to apply that test in its decision-making. The fact that the test in s 149(2) does not apply to a determination by the Tribunal of unreasonableness demonstrates that it would be legally wrong to impose that test indirectly on the owners corporation.

Was there other access to the roof area?

31 Thirdly, the Appeal Panel found error on the part of the senior member in the following statement:[14]

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

32 The Appeal Panel stated that "the last sentence was not correct." If further referred to the undisputed proposition that "no other lot owner had access to that [area] of the roof".[15]

33 Whether the statement was literally true or not, the only reason it could be said that the owner of Lot 8 did not have access, was because there was a step in the level of the roofing between his roof terrace and that of Lot 4. It is apparent from earlier statements that the senior member was fully aware of that fact. Secondly, to state that the area "can" be accessed may refer to a capacity rather than an existing fact. That reading would be consistent with the previous sentence, noting that the owners corporation "has not" developed the roof area. As the whole of the roof area was common property, it could properly be said that it was an area which "can" be developed by the owners corporation and then can be accessed.

34 It follows that these criticisms of the decision and reasoning of the senior member are, if not without substance, at least disputable. These reasons militate against a grant of leave, although they would not conclude the matter.

---

[14] Tribunal decision at [129].
[15] Appeal Panel decision at [50].

Only the second raises an issue of law and, in the absence of a notice of contention, it cannot be determined on this appeal.

Reasoning of Appeal Panel on reconsideration

35 As has been noted, having found error, the Appeal Panel determined that it would exercise the powers of the Tribunal under s 81 of the NCAT Act.[16] There is no challenge to that step, which was clearly appropriate. The Panel then undertook a summary of the evidence given before the senior member, dealing first with the evidence of Mr Adam Kaye, followed by an assessment of the evidence of four lot owners, each of whom gave reasons why, in their view, it was appropriate to vote against the first proposal.

36 Mr Adam Kaye gave evidence in response, including by way of response to a statement by Ms Arnold for the respondent, although her evidence had not been admitted, because she was not available for cross-examination. At least part of her evidence was indirectly admitted through Mr Kaye's response.

37 There was also evidence from two experts. Dr Ha Nguyen gave evidence for the plaintiffs to the effect that the waterproof membrane on Lot 3 needed to be replaced in its entirety and could not be repaired by patching. The appellants also called an architect, Mr Bensen, who expressed views as to the visibility of the proposed roof terrace from other parts of the building, including from the roof terrace of Lot 8 and, in reverse, the extent to which Lot 8 was visible from the proposed extension of Lot 4.

38 As noted, there was evidence as to the market value of the exclusive use rights of the common property sought to be acquired by the plaintiffs. The original valuation of 29 July 2020 had assessed fair market value at $7,500, but a later report obtained by the plaintiffs in June 2021 assessed the value as about $35,000. A valuer for the owners corporation placed the value at between $38,000 and $43,500. For some reason which was not explored on this appeal, a "before-and-after" valuation, giving an amount of $180,000, was discounted by the cost of construction and other factors, to reach the figure of $38,000. On one view, these figures were of little moment, because the first proposal offered no compensation, but relied upon the offer to pay for the cost of repairs

[16] Appeal Panel decision at [56].

and maintenance. On the other hand, the comparison between the final market value and the construction costs (estimated at $72,776 by Mr Casemore) had relevance.

39 It is not necessary to explore the evidence further for the purpose of this appeal. The key focus of the plaintiffs was upon the reasoning which followed. The Appeal Panel summarised the matters relied upon by the owners corporation in the following terms:

> "88 In summary, the matters raised by lot owners (other than the appellants) included that:
>
> (1) the roof was common property and therefore not available for exclusive use and never should be;
>
> (2) the information presented with the motion was scant and not detailed enough;
>
> (3) the works would disrupt others with noise;
>
> (4) the use of the area after the completion of works would disrupt others with noise;
>
> (5) if the proposal is approved, it might open a 'pandora's box' of other applications and approvals;
>
> (6) changing the balcony terrace requires development consent which could trigger a fire order;
>
> (7) no compensation was provided;
>
> (8) the potential loss of privacy, including any person standing on the proposed exclusive use area will be able to see directly onto the Lot 8 rooftop area, into the stairwell of Lot 8 and possibly into the living area of the lot;
>
> (9) Mr Adam Kaye was looking to make 'a quick buck' from his investment and he would likely sell Lot 4 once he had exclusive use over the roof terrace;
>
> (10) there was no reassurance that additional common property benefits would not be sought."

40 The Appeal Panel identified those matters as "the reasons for the respondent refusing to pass the [first proposal] at any of the EGMs."[17] The actual decision in *Capcelea* was distinguished on the basis that compensation had been proffered in that case. The Appeal Panel continued:

> "Furthermore, we consider that, at least, in relation to the matters identified in subparagraphs (1), (3), (4) and (8) of [88] when considered collectively, and in particular with (7), provide the basis on which to find the refusal of the

[17] Appeal Panel decision at [89].

> respondent to pass the [first proposal] at any of the EGMs was not unreasonable."

41 The plaintiffs contended that the specific matters relied upon were either unsupported by any evidence or based on wrong understandings of the relevant law. First, with respect to (1), it was trite to say that the roof was common property, but it was wrong to say it was "not available for exclusive use and never should be". The whole purpose of Pt 7, Div 3 of the Management Act (ss 142-145) was to provide a mechanism whereby an owners corporation could confer a right of exclusive use and enjoyment of the whole or any part of the common property on the owner of a specific lot or the owners of several lots. Reason (1) was in substance a blanket refusal to consider the exercise the statutory power in any circumstances, an approach which would involve an error of law. Accordingly, it was submitted, that could not be a valid reason to refuse the first proposal.[18]

42 There was substance to this concern, although one might struggle to give that interpretation to a succinctly stated reason which contained such an obvious flaw. There are more nuanced reasons which might justify a conservative approach to the approval of a common property rights by-law. For example, an owners corporation might legitimately be reluctant to grant such a consent if not satisfied that sufficient information had been presented, or because one approval might open a floodgate to other applications which could not then reasonably be rejected, or because the same lot owner might in the future seek to expand the rights in a piecemeal fashion. However, these reasons were broadly covered by matters (2), (5) and (10) in the Appeal Panel's list, none of which was expressly relied upon. If (1) were to be placed on the scales, it could have little or no weight.

43 The plaintiffs also disputed the availability of (3). There was evidence that the waterproof membrane above Lot 3 would need to be replaced in any event. Thus, work, and the noise which accompanied it, was inevitable. There was no rational basis to consider that any additional work required to provide a new balustrade could give rise to a sufficient reason to refuse the first proposal.

---

[18] See Cooper v The Owners – Strata Plan No 58068 (2020) 103 NSWLR 160; [2020] NSWCA 250 at [46]-[47].

While noise disruption was not legally irrelevant, it may be accepted that reason (3) could not have been given significant weight.

44 The challenge to (4) was less persuasive. In written submissions, the plaintiffs accepted that "there was evidence some lot owners had this 'concern'" but asserted that "such a concern was unreasonable when it was speculative, not supported by any pre-existing noise issues with respect to the roof terrace and by-laws exist restricting the amount of noise residents can make in any event."

45 Whilst minds might differ as to how much weight to give to such a consideration, the use of the area the subject of the first proposal would undoubtedly be ongoing, unlike the noise resulting from construction work. There was no legal error on the part of the Appeal Panel in taking this matter into account, nor was that approach legally unreasonable. The weight to be given to that consideration was a matter for the Appeal Panel.

46 In one sense, the challenge to (8) suffered the same difficulty. Relying on a potential loss of privacy for those entitled to enjoy the Lot 8 roof area, the stairwell of Lot 8, and possibly the living of area of the lot, did not reveal legal error. The owners of other lots were not obliged to ignore privacy concerns and the Appeal Panel was not obliged to reject such concerns as invalid reasons for rejecting the proposal; nor was it required to find that the factual basis of the concerns was "speculative" or not supported by the evidence.

47 Underlying this challenge (and that to (4)) was an assumption that the owners corporation would act unreasonably by having regard to "speculation" as to any possible disadvantage that might accrue to other lot owners from the proposed common property rights by-law. That was a false assumption. Those voting at the extraordinary general meetings were not required to disregard all considerations which were not established by some objective material placed before the meeting. Nor were they required to give particular weight to particular matters. Lot owners were entitled to have regard to their own interests and, so long as they did not act unreasonably, have regard to their own experience and beliefs as to how a particular change might affect them.

48 Further, the interests of the proponents and the interests of other lot owners were likely to be in conflict. It was not for the Appeal Panel to seek to "balance"

those interests by apportioning weight between them, so as to conclude that a refusal would be unreasonable if the balance favoured the proponents. The function of the Appeal Panel was to determine whether the refusal was "unreasonable". In making that assessment, it was entitled to treat as a valid reason for voting against the proposal a belief or opinion, whether or not it was supported by "evidence". The Management Act does not require that the owners corporation accept any proposal which was objectively reasonable. Nor should the Tribunal, in applying s 149(1)(a) of the Act, decide that a refusal was unreasonable merely because it considered the proposal to be reasonable. The plaintiffs' contentions came close to such an assertion.

49 The remaining reason, which the Appeal Panel had regard to, was the absence from the first proposal of an offer of compensation for the exclusive use rights. Dealing with compensation was undoubtedly a core element of the plaintiffs' case. There were two limbs to the element of compensation. The first was that it would be unreasonable to refuse a proposal if it were financially advantageous to the owners corporation. The second element was that it was unreasonable to disregard the plaintiffs' offer in the first proposal to undertake, at their own cost, the remediation of the roof area above Lot 3.

50 Both limbs were necessary for success in the plaintiffs' case. However, neither should be accepted in the unconditional way in which they were proffered. First, while economic benefit was undoubtedly a significant consideration, it was not necessarily unreasonable for the owners corporation to refuse a proposal which was financially attractive in order to retain other intangible, and even speculative, benefits. Secondly, there was a temporal issue in the sense that undertaking repairs to common property meant incurring immediate costs, whereas the benefit of having exclusive use of the common property would be enjoyed indefinitely into the future and the loss of use of the common property for other purposes would continue indefinitely into the future. This point may be seen in the following passage from the reasons of the Appeal Panel:

> "90 As to the rights and reasonable expectations of the appellants in the [first proposal] being made, we can understand their feeling and expectation that as the only access to the relevant area of the roof was through their lot, it would be unreasonable not to allow them exclusive use, [particularly] in circumstances where they were offering compensation. However, the

> 'compensation' being offered by them was not compensation to the respondent for loss of use of the roof space, rather, the compensation, was for the undertaking of repairs and ongoing maintenance obligations."

51 What then followed in the Appeal Panel's reasons arguably reflected a mistaken view of the legislative scheme, but it was not a mistake which favoured the plaintiffs. The reasoning continued as follows:

> "91 We have summarised the interests of the lot owners (other than the appellants) in the use and enjoyment of their lots and common property (s 149(2)(a)) and the rights and reasonable expectations of the appellants in deriving or anticipating a benefit under a common property rights by-law (s 149(2)(b)).
>
> 92 In our view, when the interests of all owners in the use and enjoyment of their lots and common property (on the one hand) and the appellants (on the other hand) are evaluated, the refusal of the respondent to pass the [first proposal] at any of the EGMs was not unreasonable. It appears to us that the concerns of the lot owners outweigh the expectations of the appellants.
>
> 93 It follows we reject the submission of the appellants that there was no objectively reasonable basis to refuse the [first proposal]."

52 The statement in [91] was anodyne: it merely reflected the terms of s 149(2). However, as appears at [92], the Appeal Panel treated s 149(2) as requiring that it undertake a balancing exercise in determining whether the refusal of the owners corporation was "unreasonable". As has been noted above, in its terms, s 149(2) does not require a balancing exercise, nor does it address the criterion of unreasonable refusal: it is concerned with the discretionary exercise of the power of the Tribunal to make an order prescribing the by-law, assuming that the criterion of unreasonable refusal has been established. There is no requirement that the owners corporation have regard to the matters in s 149(2) and there is certainly no foothold in the statute for an implication that failure to have regard to those matters would render a refusal unreasonable.[19]

53 However, in adopting the approach it did in [92], the Appeal Panel effectively imposed a higher obligation on the owners corporation than that imposed by the statute. It was, nevertheless, satisfied that the plaintiffs had not established that the refusal was unreasonable. Accordingly, any legal error in that regard provides no basis for a challenge in this Court to the decision of the Appeal Panel.

---

[19] See at [28]-[30] above.

54 It remains to make one observation about the wording of [93]. Whilst it correctly assumed that there was an onus on the plaintiffs to establish that the owners corporation unreasonably refused the first proposal, there was a potential gloss on the statute by referring to the failure to establish that there was "no objectively reasonable basis" to refuse the first proposal. What the plaintiffs needed to establish, affirmatively, was that the refusal was unreasonable. The parties accepted that that question was to be addressed by identifying the "reasons" relied by those who opposed the proposal at the extraordinary general meetings and then to assess whether there was an objective basis for those reasons.

55 Similarly, care must be taken in considering the plaintiffs' submissions as to how the Appeal Panel dealt with the appeal. These submissions were headed "Why the Appeal Panel erred in finding the [first proposal] was not unreasonably refused". That formulation has implicit in it a variation of the onus of proof. The Appeal Panel did not make an affirmative finding in that regard; rather, it was not satisfied that the plaintiffs had established unreasonable conduct on the part of the owners corporation. That was the correct approach.

56 Finally, if, as should be accepted, the actual reasons articulated by the opponents of the resolutions were to be taken into account, there was a reasonably lengthy summary of those reasons contained in Annexure A to the minutes of the September extraordinary general meeting. Because the Appeal Panel in its reasons spent much time analysing the written and oral evidence given by witnesses before the Tribunal, it is difficult to know how much weight the Panel placed on the summary in Annexure A. They should have been discussed because they reveal a number of reasons which the factfinder might have considered persuasive in considering whether rejection of the first proposal was unreasonable.

57 The first matter noted in that document, which appears to have been a general concern, was expressed in the following terms:

> "Noted concern about the building structure being able to hold a large number of people on the roof and would like to see an Expert Report by a suitably qualified and insured Expert before making any decision, to see some intention to manage the changed drainage, run-off and pooling of water on the

> roof which is not currently presented in the Works motions or annexures and an Expert Report to support the same."

58 It seems likely that that was the matter which was summarised by the Appeal Panel at (2) that the information presented with the motion was "scant and not detailed enough". If so, it is curious that the Appeal Panel did not give it express weight at [89].

59 Annexure A recorded another matter raised in opposition to the motion in the following terms:

> "Furthermore, if a DA [development approval] is provided, the Owners of Lot 4 should be responsible for any costs in satisfying the DA (for example, if an order is placed on the building as a result of this DA and which requires a further upgrade), that whilst a draft by-law indemnifies the Owners Corporation from liability of Lot 4 obtaining any required approvals, there is no written advice presented by the Owners of Lot 4 from Woollahra Council that one will or will not be required for the Works and additionally, no evidence has been presented that a DA would not be required from Council for the Works."

60 Another objection was noted in the following terms:

> "Noted that the waterproofing membrane should not be walked on, permitted to have tiles installed, and that walking on it is likely to harm the waterproofing membrane and cause it to need repair or [compromise] its integrity, tiling over a patched area is likely to cause damage to the aged membrane and therefore should not be done should that be Lot 4 Owner's intention which is not clearly apparent one way or another within the motions and annexures, and if it were – Floating tiles would be a better option to not damage the roof."

61 If the Court were minded to find legal error on the part of the Appeal Panel, this material would tend to support the respondent's submission that the Court should refuse leave to appeal because a further hearing would have insufficient prospects of a different outcome.

Conclusion

62 In my view, there was no legal error in the decision of the Appeal Panel that it was not satisfied that the owners corporation was unreasonable in refusing the first proposal.

63 Further, absent a serious error on the part of the Appeal Panel, I would not have granted leave to appeal in this matter. It is clear that a large minority of the lot owners had legitimate concerns about the wisdom of granting the first proposal.

64 It is also by no means clear what might be described as the "reasonable expectations" of the plaintiffs. Certainly, it cannot be said that they had any "right" to approval of the first proposal. Expectations often arise from previous promises or previous indulgence. There had been no similar proposal approved by this owners corporation in the past, nor had any representation been made suggesting that the first proposal would be approved. Some owners were clearly concerned that one approval would breed other applications which in turn could no longer be reasonably refused. The "Pandora's box", or floodgate, argument undoubtedly had a basis in human experience. If one lot can obtain exclusive use of common property on the roof of the building, others may wish to do the same. Once exclusive use of an area is obtained, there may be application to expand the use by closing parts in. The plaintiffs submitted that every application must be considered on its merits, but that does not preclude taking into account prospectively the effects of a precedent.

65 Accordingly, it would have been well open to the Tribunal to refuse to make an order under s 149(1), even if affirmatively satisfied that the refusal was unreasonable. These considerations do not mean that, had there been held to be an unreasonable refusal, the Tribunal would necessarily have refused to make the order sought in one form or another. However, there is sufficient doubt about that to weigh against a grant of leave, had that question arisen. As it is, no error of law having been made out, that question does not arise. It is appropriate to grant leave to appeal, but dismiss the appeal.

Costs in NCAT

66 The dismissal of the appeal to the Appeal Panel resulted in an application by the owners corporation for a costs order in its favour. Pursuant to a second decision, made on 28 July 2022, the Appeal Panel ordered that the plaintiffs pay the owners corporation's costs as agreed or assessed.[20] The plaintiffs challenged that decision by an amended summons seeking leave to appeal.[21]

[20] Kaye v The Owners – Strata Plan No 4350 [2022] NSWCATAP 248 ("Costs decision").
[21] Amended summons, filed in court, grounds 9-11.

67 The focus of the proposed appeal turned upon the power of the Tribunal to award costs, as found in s 60 of the NCAT Act. That provision relevantly reads as follows:

> **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.

68 In short, the default rule in the Tribunal, unlike courts governed by the *Civil Procedure Act 2005* (NSW), s 98, and the Uniform Civil Procedure Rules 2005 (NSW), ("UCPR"), r 42.1, is that there be no order as to costs, so that costs will not usually follow the event. The power of the Tribunal to award costs depends upon it being satisfied that there are "special circumstances" warranting an award of costs: s 60(2). A number of factors are identified as matters to which the Tribunal may have regard in determining whether there are special circumstances, but these are not restrictive, concluding with a reference to "any other matter that the Tribunal considers relevant": s 60(3)(g). There are no mandatory considerations.

69 The proposed grounds of appeal with respect to the costs order are threefold, each relating to the determination that there were special circumstances in this case. First, two matters were said to be irrelevant, namely that (i) the plaintiffs had ultimately been unsuccessful and (ii) both parties were legally represented:

ground 9. Secondly, and somewhat inconsistently with ground 9, it was said that the Appeal Panel failed to take account of matters which were relevant, including that the plaintiffs had been partly successful on the appeal and that their arguments had not been found to be untenable: ground 10. Thirdly, the plaintiffs challenged the conclusion that the proceedings were "complex" in circumstances which the plaintiffs submitted did not justify the epithet and where there were no reasons given by the Appeal Panel to support that finding: ground 11.

Question of principle?

70 The third ground was the only ground which could be said to raise a point of principle. However, the term "special circumstances" is not a term of art. Its scope and operation will depend heavily on the context in which it appears. A particular circumstance which appears to be special in one case may not be so in another. It is not a phrase which readily gives rise to appellate explication.

71 In s 60, upon an application for costs, an appeal panel is required to reach a state of satisfaction as to the existence of special circumstances. No matters are expressly excluded. While that does not mean that there are no legal limits on that to which the appeal panel may have regard, those limits will only be implied by reference to the scope and purpose of the power.

72 In this Court, the plaintiffs submitted that the fact that they had been "ultimately unsuccessful" on the appeal was an "irrelevant" consideration, as was the fact that the parties were legally represented. However, for the purpose of establishing error of law, an "irrelevant" consideration is one which the Tribunal is prohibited from taking into account. Neither of the facts relied upon was an irrelevant consideration.

73 Secondly, it was said, somewhat inconsistently with the first submission, that the Panel had failed to take into account "relevant" considerations, namely that the plaintiffs had been in part successful on the appeal and that their arguments had not been found to be untenable. In identifying an error of law, the term "relevant" does not mean permissible, but mandatory. Section 60 does not mandate any considerations, nor is it clear that these factors were mandated by implication from the scope and the nature of the powers. Indeed,

the plaintiffs' submission to the effect that the outcome was irrelevant suggested otherwise. Further, the fact that a party relied on untenable arguments would certainly be a permissible consideration, as might the fact that it did not. However, at least in the latter case, it is difficult to understand why the fact that a party raised arguable points was a mandatory consideration in determining the existence of special circumstances. In any event, both these facts were well-known to the Appeal Panel and were taken into account in its reasons.[22] After noting that the plaintiffs had been partly successful and noting a submission by the owners corporation that their arguments were "obtuse and doomed to fail", it is apparent that neither matter was accepted as dispositive. No error of law has been demonstrated in that regard.

74 Thirdly, the plaintiffs submitted that the Appeal Panel had erred in characterising the proceedings as "complex", a characterisation which was specifically identified in s 60(3)(d), as a matter to which the Panel could have regard. Whether the proceedings were properly so characterised was an evaluative decision to be made by the Tribunal: its conclusion on that matter did not raise a question of law.

75 Further, it is significant that s 60 applies broadly in proceedings in the Tribunal, both in relation to first instance decisions and internal appeals. (For reasons developed next, it cannot be said that it applies universally, although in terms it appears to.) Given the vast number of cases dealt with by the Tribunal, and the range of matters covered, the appeal panels are uniquely well-placed to determine what, in the context of the jurisdiction of the Tribunal as a whole, would constitute special circumstances for the purposes of an award of costs. It will be a rare case in which it would be proper for this Court to intervene to override the Panel's judgment. If the Panel were to determine a costs application on the basis of the ethnicity of one party (contrary to State and Commonwealth legislation) or by reference to hair colour, no doubt intervention would be appropriate and necessary. Whether such cases will ever arise may be doubted.

[22] Costs decision at [27] and [30].

76 In these circumstances, leave to appeal the Costs decision of the Appeal Panel should be refused.

Application of correct provision?

77 However, there is a further matter which could also provide a sufficient reason to refuse leave.

78 Before the Appeal Panel the parties accepted that s 60 was the applicable provision governing costs. Although no issue was raised in this Court, I am not persuaded that s 60, with its requirement for special circumstances, was engaged. It is clearly arguable that rr 38 and 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) governed the award of costs. Those rules read as follows:

> **38 Costs in Consumer and Commercial Division of the Tribunal**
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—
>
> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.
>
> **38A Costs in internal appeals**
>
> (1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the ***first instance costs provisions***) differed from those set out in section 60 of the Act because of the operation of—
>
> (a) enabling legislation, or
>
> (b) the Division Schedule for the Division of the Tribunal concerned, or
>
> (c) the procedural rules.
>
> (2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

79 The key question is whether the proceedings involved an “amount claimed or in dispute” which was more than $30,000. That which was in dispute was not an

amount of money, but it involved a valuable property right which, as the evidence showed, was worth well in excess of $30,000. It is true that r 38(2) does not adopt the language of s 101(2)(r) of the *Supreme Court Act 1970* (NSW), which refers to "a matter at issue amounting to or of the value of" or "any claim … respecting any property … of the value of", the rules refer to an "amount claimed or in dispute", but the effect is arguably to the same effect and is engaged in the present case.

80 If r 38 were engaged, then it was to be applied by the Appeal Panel pursuant to r 38A(1)(c). Accordingly, it would not be necessary to make a finding of special circumstances to support an order for costs. If that reading of r 38 is not correct, circumstances analogous to those in which it lifts the requirement for special circumstances could constitute special circumstances.

81 It may appear counterintuitive that a rule can override s 60 of the NCAT Act, which does not state that it is subject to any other provision or rule. That reasoning would be supported by s 25(1) of the Act which says that the Rule Committee may make rules of the Tribunal "not inconsistent with this Act". However, s 4 provides:

> **4 Definitions**
>
> …
>
> (4) Any provisions of this Act that are expressed to be subject to the procedural rules have effect subject to any exceptions, limitations or other restrictions specified by the procedural rules.
>
> (5) Subject to section 17(3), procedural rules that make provision as referred to in subsection (4) are not inconsistent with this Act.
>
> **Note—**
>
> Section 17(3) provides that the provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of this Act or the provisions of the procedural rules. See also item 23 of Schedule 7. Also, the procedural rules cannot be inconsistent with enabling legislation. See sections 25(1) and 90(2)(a).

82 The note to s 4(5) accurately states the operation of s 17(3), but, although there is a "Division Schedule" for the Consumer and Commercial Division (Sch 4), that does not make provision for costs. Despite these indicators, the key provision for present purposes is s 35, which reads as follows:

35 Application of Part

Each of the provisions of this Part is subject to enabling legislation and the procedural rules.

83 Section 35 is the first provision in Pt 4, which includes s 60. Accordingly, if rr 38 and 38A are engaged, they operate to the exclusion of s 60.

Orders

84 Because the plaintiffs have been unsuccessful in their challenges to the decisions of the Appeal Panel, the ordinary rule as to costs following the event should apply in this Court.[23]

85 The Court makes the following orders:

(1) With respect to the decision of the Appeal Panel given on 25 May 2022 dismissing the appeal from the senior member –

(a) Grant the plaintiffs leave to appeal, pursuant to s 83(1) of the *Civil and Administrative Tribunal Act 2013*;

(b) Dismiss the appeal.

(2) With respect to the application for leave to appeal from the decision of the Appeal Panel given on 28 July 2022 awarding costs – refuse the plaintiffs leave to appeal.

(3) Order that the plaintiffs pay the defendant's costs in this Court.

****

[23] UCPR, r 42.1.