Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 63607 v Kinsella
Medium Neutral Citation:	[2022] NSWCATAP 184
Hearing Date(s):	10 February 2022
Date of Orders:	06 June 2022
Decision Date:	6 June 2022
Jurisdiction:	Appeal Panel
Before:	L Wilson, Senior Member G Burton SC, Senior Member
Decision:	1. Appeal dismissed. 2. In respect of costs of this appeal the following orders are made: (a) Any application for costs, including further evidence and submissions in support of the application, is to be filed and served by the costs applicant within 14 days after the date of these orders; (b) Any further evidence and submissions in response are to be filed and served by the costs respondent within 28 days after the date of these orders; (c) Any submissions in reply are to be filed and served by the costs applicant within 35 days after the date of these orders; (d) Submissions are to include submissions about whether a hearing of any costs application can be dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW); (e)If no application is made under (a) then there is no order as to the costs of the appeal.
Catchwords:	STRATA SCHEMES MANAGEMENT – obligation of owners corporation to maintain and repair common property – alleged unauthorised works agreed to be

	common property – liability for later repairs
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 60, 80, 81, Sch 4 cl 12 Civil and Administrative Tribunal Rules 2014 (NSW), rr 38, 38A Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bonita v Shen [2016] NSWCATAP 159 CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578, [2000] FCA 1343 Collins v Urban [2014] NSWCATAP 17 Craig v South Australia (1995) 184 CLR 163, [1995] HCA 58 Croghan v Blacktown CC [2019] NSWCA 248 El-Wasfi v NSW; Kassas v NSW (No 2) [2018] NSWCA 27 Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2) (2005) 13 VR 435, [2005] VSCA 298 Latoudis v Casey (1990) 170 CLR 534 Oshlack v Richmond River Council (1998) 193 CLR 72 Owners SP 32735 v Swan [2012] NSWSC 383 Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Stolfa v Hempton [2010] NSWCA 218 Thompson v Chapman [2016] NSWCATAP 6
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Owners Strata Plan No.63607 (Appellant) Michael Kinsella (Respondent)
Representation:	Counsel: Mr T Waugh, Solicitor (appellant) Solicitors: Kerin Benson, Lawyers (appellant) Respondent (self-represented)

File Number(s):	2021/00309390
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	5 October 2021
Before:	J A Ringrose, Member
File Number(s):	SC 20/37691

REASONS FOR DECISION

Outcome of appeal

1 For the reasons given below we dismiss the appeal.

Background to appeal

2 The respondent to this appeal owns a lot being one of two penthouses in a multi-level strata scheme of 32 units harbour side in Manly, NSW. The penthouses were constructed in about 1999 and 2000 as an addition to the existing development. He was the applicant in the proceedings below. We call him the owner in these reasons. The appellant is the owners corporation (OC) of the scheme.

3 In his originating application dated 2 September 2020 the owner sought orders concerning repair in November 2019 of double-glazed windows in a sliding door in his lot which had cracked and cracked suddenly and created a hazard. The owner had paid more than $50,000 to install the double-glazed windows in place of existing single-glazed windows in the circumstances described below. The two penthouses were unique in the complex in having glass frontage on all aspects other than their common wall.

4 The owner said that he had received on 8 November 2014 approval of the then executive committee (EC) to install the double-glazed windows as part of

remedial works to common property then being conducted by the OC. He relied on what he said were approved EC minutes.

5 In his application the owner said that the terms of the approved alteration to common property in conjunction with ss 108(4) and (5), 126 and Sch 1 para 22 (the last governing minutes of meetings at OC meetings; cp similar requirements for strata committee (SC) minutes in Sch 2 para 17 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) made the OC liable for maintenance of and repairs to the double-glazing. The double-glazed windows had been recognised from the outset as common property. He said they came within the OC's strict obligations under what in 2019 was SSMA s 106(1) and (2) if someone other than the OC was not specified as responsible for maintenance and repair. The nature of the strict obligation was unchanged from s 62(1) and (2) of the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act) which operated until 5 November 2016.

6 The OC agreed that, whether the installation was or was not authorised, the double-glazed windows were common property and since their installation have been regarded as common property. It disputed that the installation was authorised because there was no special resolution and said that a special resolution approving the installation was required because replacing the existing single-glazed windows with double-glazed windows was not part of the remedial work. It disputed the accuracy of the minutes relied upon by the owner and said that approval by the EC was on condition that the owner was responsible, not only for the cost of installation but also for ongoing maintenance and repair of the double-glazing. It proposed that the owner consent to the passage of a special resolution which included that condition.

7 In his application the owner, in addition to seeking reimbursement, sought removal of the OC chair under SSMA s 238 and an independent review of scheme records, citing in aid the OC's record retention obligations in s 179.

8 There was a defective recording of the primary hearing which was not the fault of the parties. As a consequence there was no transcript of any oral evidence. We have not been informed that there was cross-examination of persons who made competing statutory declarations. In the parties' submissions on this

appeal there was no reference to or reliance upon cross-examination relevant to the issues for our determination in this appeal.

Primary decision and reasons

9 The primary member found that the 8 November and 30 December 2014 minutes recorded authorisation of the double-glazed windows as alterations to common property and noted the agreement that the outcome was common property. He ordered the OC to pay the owner $1,085 for the 2019 cost of repairs to the double-glazing. It is this money order against which the OC appealed. The appeal was filed in time on 29 October 2021.

10 In the primary hearing the owner had not pressed a claim for loss of rent and other costs said to arise as a result of water damage to his lot from the windows, which the primary member said was out of time anyway under SSMA s 106(6).

11 The primary member said that he had no power to order an independent review of scheme records and also dismissed the claim to remove the chair. There is no cross-appeal by the owner.

Reasons for primary decision

12 The primary member recorded in detail the evidence from witnesses and in documents together with the parties' submissions. Only the findings relevant to the challenge in this appeal are described below.

13 The owner said that there had been no prior attempt to challenge the accuracy of the EC minutes of 8 November 2014 except for a request in December 2014, with which he had complied, to correct the date of 30 January 2015 that he had mistakenly put on a circulated draft minute of the EC meeting of 30 December 2014 that he contended had approved the minutes. The owner pointed to emails where he had circulated the draft minute of the 8 November 2014 EC meeting to other EC members and the minutes of 30 December 2014 with the corrected date.

14 It appeared to be common ground that the owner chose to leave the room while the EC discussed his windows in order to avoid a conflict of duty and interest.

15 The owner said the minutes did not record any conditions being discussed or imposed on his having the double-glazing installed. He disputed the contrary evidence of the chair of the OC and pointed to an email of support for the works, without reference to conditions, from the chair two days after the meeting of the EC of 8 November 2014. That email was next in the email chain from the owner's email of 8 November 2014 circulating to EC members the draft minutes.

16 The owner said that the final minutes of 8 November 2014 and 30 December 2014 and the chair's response email of 10 November 2014 were some of the documents missing when he inspected the strata records some years later.

17 The owner said that he decided to pay for the installation of the double-glazing to ensure that the remediation did not end up as a fiasco because the existing windows may have still leaked and been out of warranty. He said he would never have agreed to install the double-glazing if he had been required (with or without a by-law) to maintain them since they were clearly common property.

18 The OC was recorded as relying upon the statutory declarations in the first part of 2021 by the chair and three lot owners who were EC members in November 2014.

19 One EC member, Mr Keam, said that he attended the 8 November 2014 EC meeting and recalled approval for the double-glazing provided the owner was responsible for all maintenance and repair costs. The primary member noted at [41] that this recollection did not accord with the version of the minutes in evidence and that Mr Keam appeared to have voted in favour of approving the 8 November 2014 minutes without amendments at the next EC meeting on 30 December 2014.

20 Another EC member, Mr Tarry, said that, contrary to what the minutes recorded, he was not at either EC meeting of 8 November 2014 or 30 December 2014.

21 A further EC member, Mr Jeffs, declared that he was in attendance at each of the meetings on 8 November 2014, 30 December 2014 and 30 January 2015

meetings despite being recorded as an apology in each minute in the versions in evidence; this was supported in the other statutory declarations.

22 Mr Jeffs' recollection of the resolution passed on 8 November 2014 was slightly different from other declarants: the owner's installation of double-glazing was approved but only if the owner agreed to pay for any costs for breakage or damage to the windows being significantly more costly than single-glazing windows. Consistent with the owner, Mr Jeffs agreed that the owner absented himself during the discussion.

23 There was in the evidence two emails on the topic of Mr Jeffs' attendance or absence. The owner emailed the other EC members on 7 November 2014 to arrange the meeting the following day when the consulting engineer had confirmed he would attend. The email included the following: "I know Ray is not available but everybody else has confirmed availability for a Meeting tomorrow Saturday" and "Ray if you have any questions don't hesitate to contact me by email, text or phone". On 30 December 2014 the owner emailed the other EC members enclosing the agenda for the meeting that day and concluded "Ray Jeffs sends his apologies".

24 The primary member noted at [45] of his reasons (PR) that the 8 November 2014 minutes were approved at the meeting of 30 December 2014 and the 30 December 2014 minutes also were not shown as having been later corrected, in the versions in evidence. The primary member also referred to the last item in the 30 December 2014 minutes as reading "Ray Jeffs relayed messages that he wished to bring up other items at a future meeting". The word "relayed" was consistent with Mr Jeffs not being present.

25 The primary member at PR [47] said that "It is difficult to understand" how such a specific resolution about repair and maintenance was omitted from minutes and not corrected when the minutes were circulated and later up for approval. He said Mr Jeffs did not address why correction to record his presence did not occur.

26 Mr Bertram, the chair since 2009 or 2010, declared that he told the owner in a contemporary conversation about the owner accepting responsibility for all damage and costs relating to the double-glazing but the OC paying for

installation. He said there was no dispute that the double-glazed windows would be common property. He described passage of a resolution which arguably differed from the conversation in that the owner was responsible for costs of removal, disposal and storage including crane hire (that is, such were excluded from installation costs). He said the resolution also required the owner to agree to a by-law giving effect to the obligations concerning cost of replacement and ongoing responsibility.

27 The primary member at PR [56] made the same comment about non-recording of such a specific resolution in the minutes of the 8 November 2014 meeting. It was noted that a handwritten note "Resolution Long" and another note "Ray present" did appear against the copy attached to Mr Bertram's statutory declaration. There was no indication when such notes were added.

28 The adoption of the 8 November 2014 minutes at the meeting of 30 December 2014 also was noted at PR [57]. A handwritten note recorded the owner as "Acting Secretary" but there was no notation correcting Mr Jeffs' recorded absence or the relayed message that he wished to bring up other items at a future meeting.

29 Mr Bertram was recorded to have explained the adoption as a failure by the owner to correct the minutes and the failure by other busy people on the EC to notice in the "turmoil of the remedial works at the time". He said his supportive email of 10 November 2014 was on the basis of his version of the resolution passed at the EC meeting on 8 November 2014 (which we again note was not the version recorded in the minutes in the same email chain as Mr Bertram's email of 10 November 2014). There was similar challenge to the status of the minutes of the EC meeting of 30 December 2014.

30 The SC minutes for 27 November 2019 and 3 December 2019 recorded resolutions that single-glazed windows be reinstated in the absence of the owner's taking responsibility for double-glazing and refusal of the owner's request to meet with the SC for what the primary member described at PR [61] as reasons that "do not appear to be connected with the issue of the windows but rather appear to be related matters between the parties".

31 The current strata manager was recorded as confirming receipt and retention of records provided by the previous strata manager.

32 At PR [75] the primary member noted that there was no cross-claim, and there had been no attempt since 2014, by the OC to have ordered a by-law approving double-glazing at the owner's expense or removing the double-glazing at the owner's expense.

33 Within the section of his reasons marked "Decision", the primary member recorded at PR [88]-[89] the decision of the EC not to pay for double-glazing but not to object to the owner so acting at his own cost and the EC's request for the owner's response which the owner said would be given within two days. On 10 November 2014 the owner accepted payment by him of installation cost, suggested arrangements for that payment, and said "The replacement windows in any event will become 'common property' and will belong to the owners corporation". Any objection to that response was requested rapidly. No objection was recorded and it was common ground that the owner paid for installation of the double-glazing.

34 As previously noted, on the same day (10 November 2014) Mr Bertram responded with full support. He also asked the owner to write to the adjoining penthouse owner.

35 The primary member then set out at PR [91]-[93] that the adjoining penthouse owner was "always of the understanding that" the new double-glazed windows in the owner's penthouse "would become common property and the Owners Corporation would take full responsibility for them. No by-law was considered necessary for that reason".

36 The primary member at PR [94] pointed to the absence of evidence that the 8 November 2014 minutes were said to be incorrect or were sought to be corrected after their circulation to EC members and again pointed to their subsequent approval.

37 At PR [95] the primary member again noted the absence from the accepted minutes of 8 November 2014 and the email by Mr Bertram of 10 November 2014 of reference to a detailed resolution (described above) imposing

responsibility on the owner for maintenance and repair and a special by-law concerning the double-glazing. At PR [96] the absence of steps to date to procure such a by-law were again noted. No cross-claim seeking a by-law was filed although the OC's evidence said it stood ready to consider such a by-law. At PR [98] the primary member noted again the handwritten notes on the copy annexed to Mr Bertram's statutory declaration being "Ray present" and "resolution wrong" against the sixth item. At PR [99] he noted that there were entries in minutes of the 30 December 2014 EC meeting produced by Mr Bertram "as his corrected version" that were inconsistent with Mr Jeffs' recollection that he was present, being recording of Mr Jeffs' apologies and that "Ray Jeffs relayed messages that he wished to bring up other items at a future meeting".

38 The primary member also recorded at PR [99] that minutes of the 30 December 2014 meeting were produced by Mr Bertram which recorded, again inconsistent with the recollection of Mr Bertram and Mr Jeffs, that apologies were recorded from Mr Jeffs and "no attempt has been made by Mr Bertram or Mr Jeffs to explain these inconsistencies or to explain why neither of them took further steps to pursue the preparation of a special by-law from" the owner. There was nothing in supplementary declarations from both.

39 The primary member recorded a statutory declaration made 6 April 2021 by the person who was the strata manager in 2014. The member accepted at PR [100] that the then strata manager's statutory declaration "presents what is probably a clear and independent picture of the matters which occurred in November and December of 2014". The then strata manager was recorded at PR [104]-[105] as declaring the following matters:

(1) Between 2014 and 2017 there were several remediation projects involving the owner's penthouse and the other penthouse in attempts to eliminate water leaks.

(2) The penthouse windows were over ten years old and could have been contributing to some of the leaking.

(3) Several contractors were reluctant to take responsibility for existing windows and their reinstallation after remedial works to the hob given the time involved and warranty issues.

(4) It was agreed by all at the time that in this event there would be no need to apply for a by-law as the window replacement was part of the OC remediation. After discussion the EC agreed to approve the installation by the owner of double-glazing at his expense exceeding $50,000 and that the windows remained common property on completion as replacement of windows was preferred to the reinstallation of the old windows: "She discussed with the Committee general by-law functionality and purpose and in this case the older windows were removed and new windows were installed. It was considered a benefit to both the lot owner Mr Kinsella and the Owners Corporation and it was agreed that a by-law was not required": primary reasons (PR) at [18] and [102]-[103].

(5) To the best of the strata manager's recollection (recorded at PR [103]-[104]) the benefits were that the new windows would be installed at other than the OC's expense and reinstallation of the old windows "could be fiddly and time-consuming. There was also a risk that they would no longer properly fit". The primary member summarised this at PR [19] by saying that the owner's paying for the new windows benefited the OC since it did not have to pay for reinstallation of existing windows "which could be time-consuming and sometimes pointless".

(6) Adding by-laws would have benefited the strata manager in fees and she believed she discussed the new potential window installation with the EC and that any agreed by-law needed to be registered. In contrast, the other penthouse owner was required to obtain approval of a new by-law for work outside the OC's remediation works.

40 At PR [106], having finished his recording of evidence and submissions, the primary member found as follows:

> "When these matters are all taken into account the Tribunal has no hesitation in accepting:
>
> (a) the version of the applicant, and
>
> (b) the approved Minutes from 8 November 2014, and 30 December 2014 in relation to the decisions made,
>
> and the version of discussions at the meeting held on 8 November 2014 set out in the Statutory Declarations of Geoffrey Bertram and Raymond Jeffs dated 18 January 2021 and Adam Keam dated 19 January 2021 are not accepted."

41 Having recited the uncontroversial principles governing the OC's strict duty of maintenance and repair of common property under SSMA s 106 (previously s 62 under the 1996 Act), the primary member then repeated at PR [111] et seq the salient facts from the foregoing evidence as accepted. At PR [117] there was express acceptance of the strata manager's evidence in preference to the statutory declarations of Mr Bertram and Mr Jeffs. He said:

> "… it follows that the upgrading of the windows at the cost of the applicant was approved by the EC although it is arguable that further steps may have been necessary."

42 Having referred to s 65A with s 54 of the 1996 Act (now in amended form SSMA s 108), the primary member at PR [119] was satisfied that, in light of the approval he found at the EC meeting on 8 November 2014, the obligation to obtain approval by special resolution which specified maintenance and repair obligations rested with the OC:

> "because the parties had agreed that the windows would remain common property and no obligation had been imposed in terms of the agreement between the parties for the applicant to be responsible for the further maintenance of the double-glazed windows."

43 The primary member then at PR [121] pointed to the absence of any attempt by the OC to obtain such a by-law since 2014. The avenue of review and relief available to a lot owner under s 140 of the 1996 Act (now in substance SSMA s 126) was described. That relief relevantly enabled an adjudicator (now the Tribunal) to order an owners corporation to consent to proposed repairs or alterations to common property directly affecting the owner's lot or to approve such alterations or repairs already made, in each case if the owners corporation's refusal of consent was found to be unreasonable.

Grounds of appeal

44 The OC was granted leave for legal representation on the appeal on 19 November 2021. Its notice of appeal disclosed the following grounds:

(1) An alleged error of law in ordering the OC to pay for the owner's repairs to common property.

(2) An alleged error of fact for which a grant of leave to appeal was justified that at PR [110] the primary member found that in the present case the OC was fulfilling a part of its obligation to repair and/or maintain the common property under what was then s 62 of the 1996 Act. This was said to be against the weight of evidence, also or alternatively not fair and equitable, and otherwise qualified for a grant of leave on the principles set out below.

Applicable legal principles for appeal

45 Section 80 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides as follows:

> "(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note. *Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).*

(2) Any internal appeal may be made —

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may —

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances."

46 Clause 12 of Schedule 4 to the NCAT Act states:

"An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

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

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

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

47 A Division decision is a primary decision of the Consumer and Commercial Division. The primary decision here is such a decision.

48 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

49 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel enunciated the following as specifically included:

(1) whether the Tribunal provided adequate reasons;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

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

(8) whether the decision was legally unreasonable.

50 Turning to errors of fact, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, an Appeal Panel stated at [76]–[79] and [84(2)] as follows:

> "76 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
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> 77 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > (1) If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
> >
> > (2) The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].
>
> 78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
>
> 79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl

> 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to NCAT Act (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55]. …
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> 84 The general principles derived from these cases can be summarised as follows: …
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> > (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
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> > (a) issues of principle;
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> > (b) questions of public importance or matters of administration or policy which might have general application; or
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> > (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
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> > (d) a factual error that was unreasonably arrived at and clearly mistaken; or
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> > (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed."

51 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice within cl 12 of Sch 4 to the NCAT Act, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]). The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

Error of law

52 We have not elaborated on the principles because the error of law alleged is straightforward. It was stated in the appellant OC's written submissions filed with its notice of appeal which were cross-referred to as the grounds in that notice together with the order challenged and the order sought in its place.

53 In its submissions the OC said that the Tribunal misquoted the relevant owner's claim for relief as clarified on 22 February 2021. The clarified claim was said by the Tribunal at PR [2] to be for repayment of the cost of double- glazing which

had already been repaired. The actual claim was said to be under SSMA s 106 for "*repair* of double glazing but repair has already occurred", with emphasis added by the OC. The original application, as noted at the outset of these reasons, had sought relief under SSMA ss 108 and 126; the latter was appropriate given the refusal (noted earlier) of the SC to speak with the owner unless he assumed responsibility for the double-glazing repair and maintenance and the SC's resolution at the same time to restore single-glazed windows.

54 The OC's submission relied upon *Owners SP 32735 v Swan* [2012] NSWSC 383 at [180]-[181], [197]-[198] where it was held that an owner could not recover the cost of re-tiling repairs to a common property balcony which were the responsibility of the OC: see also at [49]-[52], [175]-[176], [182].

55 Implicit in the submission was the contention that the regime as it applied at the time of repairs in 2019, being relevantly SSMA s 126, empowered orders for repairs including approval of repairs already made but did not expressly extend to recoupment of the cost of existing repairs approved under that provision. We note that the substance of the provision in force at the time of *Swan*, being s 140 of the 1996 Act, was the same as the current s 126.

56 We do not of course seek to cast doubt on the decision or reasoning in its support in *Swan*. We however consider that it is not apposite to the present situation for reasons now discussed.

57 The distinction is illustrated by the full terms of challenged order 1 made by the Tribunal which was said to contain the error of law:

> "The respondent [OC] is to pay the applicant [owner] for the cost of repairs to the damage double-glazed window in [the owner's lot] as the parties agree that the damaged window is common property and the Tribunal is not satisfied that the applicant is required to pay for the repair costs of the common property."

58 Expressed shortly (but as set out fully in preceding sections of these reasons), the Tribunal found that there was an approval, reflected in the 8 November 2014 SC minutes, as follows: when installed, the double-glazing formed part of the common property even though the owner paid installation cost (which saved the OC costs); there was no requirement for the owner to pay for repairs to the double-glazing; the EC considered the double-glazing part of the

remediation of the common property so no special resolution authorising and regulating the works under then s 65A of the 1996 Act (now SSMA s 108), that was distinct from what was required to authorise the remedial works themselves, was required.

59 Additionally, the Tribunal found by reason of the foregoing terms of approval that the OC had the responsibility of seeking a special resolution for the double-glazing if it wished and never did. It was also trite law that the OC had a strict duty under s 62 of the 1996 Act and now SSMA s 106 to keep common property in repair.

60 Further, as the OC itself pointed out, the owner had clarified in February 2021 that he was seeking to enforce the strict duty under s 106 of repair. The enforcement did not change character because it had been carried out and paid for by the owner.

61 Further and in any event, SSMA s 229(a) empowers ancillary or consequential orders, of which an order for refund when there was no need for an order to carry out repairs because they had already been done is an example. The scope of the equivalent provision in s 169(a) of the 1996 Act was not considered in *Swan* where, unlike here, only a direct payment order was sought: see *Swan* at [177]. Also unlike in *Swan*, there was no prior application by the owner for unreasonable refusal, which application in *Swan* had not been successful: see *Swan* at [26], [33]-[40].

62 Further, and again in contrast to *Swan*, there was no issue raised of which we have been made aware concerning the quality or cost of the owner's repairs to the double-glazing. There was no express refusal by the OC of consent to the actual form of repair as there was in *Swan*; rather, the 2019 resolution was to have the owner at his cost remove the double-glazed windows irrespective of the quality or nature of the repair and to replace them by single-glazing. In *Swan* the choice of tiles was the subject of express refusal without an expressed unwillingness to do repairs with tiles that the OC considered appropriate.

63 In *Swan*, as made clear at [51], the focus was on the proposed work aspect of then s 140 of the 1996 Act, even though as mentioned above there was a

provision within s 140 that dealt with approval of existing repair work as there is in SSMA s 126, which was the focus in the present case. In this respect, there was a recognition in *Swan* at [52] that, if the equivalent of s 140 applied, then that was a qualification or exception to the OC's control of maintenance and repair of common property.

64 Accordingly, in our view the Tribunal made no error of law in the order that it made on the basis of the reasons that it gave in circumstances that made the outcome and reasons for it in *Swan* different.

65 The OC's attempted application of *Swan* was to an extent dependent on its contention about the factual findings that should have been made. This found expression in the order that it sought in lieu of the challenged order made by the Tribunal:

> "Order 1 of the Applicant's application is dismissed on the basis that the works were not remedial works undertaken by the [OC] pursuant to [s 62 of the 1996 Act] and that in the absence of a special resolution under [s 65A of the 1996 Act], the installation of the double-glazed windows undertaken by the Applicant was unauthorised."

66 It is self-evident that this formulation of the order was founded on a successful direct challenge to at least one of the factual findings set out above on which the Tribunal's challenged order was based. We accordingly turn to whether there was such an error of fact on the grounds contended for by the OC and whether leave should be granted to raise it.

Leave to appeal alleged errors of fact

67 The OC did not seek to rely upon new evidence. The OC also did not challenge the Tribunal's recitation in the primary decision of the evidence. The challenge was to the Tribunal's findings based on that recording of evidence.

Weight of evidence

68 The focus was on the Tribunal's finding that the double-glazing formed part of the remedial works being conducted in 2014-2015 on common property by the OC. This not only rendered the double-glazed windows part of common property after installation (which was agreed in November 2014) but also rendered authorisation by special resolution unnecessary unless the OC sought it, which it did not in a timely manner. The obligation of maintenance

and repair of the double-glazed windows remained with the OC on the available documentation and the preferred witness evidence. Such evidence reinforced the finding that the double-glazing was part of the remedial works.

69 The OC said that the Tribunal's findings that preferred the evidence of the 2014 strata manager and found the 8 November 2014 and 30 November 2014 minutes accurate were against the weight of evidence.

70 In support, the OC said, by Mr Bertram and Mr Jeffs' evidence, that the then strata manager, whose evidence was accepted over theirs (particularly Mr Bertram's), was not present at the meetings of 8 November 2014, 30 December 2014 and January 2015 and was not involved in the tender process. The OC said there was no evidence that the strata manager had relevant expertise to give an opinion on the benefits of what was found to be the approved scope of remedial work including the double-glazing and that her evidence was not definite ("could" not "would") about those alleged benefits. Further, her evidence and the acceptance of the accuracy of the 8 November 2014 minutes was contrary to the evidence of, not only Mr Bertram and Mr Jeffs, but also in different aspects to evidence of two other then-EC members Mr Keam and Mr Tarry.

71 In support of its attack on the accuracy of the 8 November 2014 minutes (taken by the owner as then secretary) as accepted on 30 December 2014, the OC pointed to the following:

(a) the identical terms of the minutes dated on their face 30 December 2014 and 30 January 2015 the earlier of which was accepted by the Tribunal as approving the 8 November 2014 minutes;

(b) the declarations of three EC members that the minutes remained in draft and Mr Bertram's evidence that the owner was asked to correct the minutes but never did and did not send the minutes to owners or display them;

(c) the inability to locate the minutes in the strata records which inferred they had never been provided as finalised after requested corrections;

(d) the owner's email of 10 November 2014 in its reference to the double-glazing being "in tandem with the remedial work";

(e) the owner's email of 25 February 2015 which referred to the double-glazing not being part of the remedial works contract which was yet to be completed by a particular entity;

(f) Mr Bertram's evidence that the double-glazing was the owner's initiative and that he supported the owner's proposal set out in an email dated 10 November 2014 on the basis of the conditions specified at the 8 November 2014 meeting (including the owner's obligation to maintain and repair the double-glazed windows);

(g) the fact that the double-glazing was paid for by the owner under a different contract from some other remedial works;

(h) the fact that the owner, having already agreed to pay to install the double-glazing in advance of the 8 November 2014 meeting, required time to consider the outcome of that meeting when the only fresh component allegedly was assuming an obligation to maintain and repair the double-glazed windows;

(i) Mr Bertram's evidence that, in two conversations with the owner and the then strata manager, he was advised that no special by-law was required;

(j) Mr Bertram and Mr Jeffs' evidence that the EC was aware that it had no right to approve installation of double-glazing that created an ongoing liability and did not consider the double-glazing to be a superior product;

(k) the absence of evidence that double-glazing was required to maintain the common property – the tender report, being a review by the owner for the EC of tenders for the remedial works, was concerned with the suitability of single-glazing for the location rather than with waterproofing capabilities;

(l) the absence of evidence that subsequent leaks in the adjoining penthouse arose from reinstallation of the single-glazed windows;

(m) the resulting absence of evidence that the double-glazing was remedial in nature.

72 We have set out in detail already the Tribunal's findings and how they were used in terms of attributing weight to evidence in coming to the ultimate preference for certain evidence favouring the owner's contentions and the corresponding ultimate findings. We do not repeat them. We simply point to the fact that the primary member gave weight to contemporary documents that could have been pressed at the time to be amended if they did not reflect the correct position, and to the evidence of a witness who was reasonably seen (absent suggestion to the contrary so far as we have been told and can see from what we have been given) as independent.

73 The Tribunal's fact-finding and attribution of weight was careful and comprehensive. On the authority we have cited it requires good grounds to overturn its assessment of and ultimate conclusions on the evidence.

74 We do not find those good grounds in the matters advanced by the OC and set out above, taking those matters singly or cumulatively.

75 Many of the grounds depend on acceptance of the evidence of Mr Bertram and Mr Jeffs. This begs the question as to why the Tribunal's findings against preferring or accepting their evidence should be overturned. In at least one aspect it is circular – the EC members would not be aware that they no right to approve an ongoing liability for the double-glazed windows unless it was clearly established that such were not part of the remedial scope of works.

76 Other of the grounds depend, in an evidently conflicted context, on acceptance of the recollection (apparently unassisted by documents and in some cases contrary to those documents) of two other EC members, in addition to Mr Bertram and Mr Jeffs, to overturn or weaken the credibility of what appeared on the face of available contemporary documents.

77 As we have said, we have no transcript of the oral evidence and were not pointed in submissions to any cross-examination on the conflicting evidence. We therefore need to assess the quality of the primary member's findings on what is available. A particular example is the alleged absence of expertise in the then strata manager to comment. Exploration of this challenge in cross-examination may have elicited an explanation, for example, that the strata manager in the course of her duties had an obligation to inform herself about, did inform herself about, and had the expertise and experience to understand, expert material from various qualified persons including the OC's remedial experts sufficiently to enable her to assess the risks and benefits of certain courses of action on which the OC and its EC might seek, and on her evidence did seek, her counsel as strata manager.

78 This also illustrates that some of the matters alleged are capable of an alternative explanation. One example is the inability to locate the minutes of several EC meetings in the strata records, which of itself and without more bespeaks vicissitude rather than the inference contended for by the OC that

such minutes were never finalised with the amendments they sought. Another example is the hesitation of the owner at the EC meeting on 8 November 2014. Final thought before commitment does not necessarily infer the introduction of a new element to consider and possibly change one's mind over.

79 The identical wording of the 30 December 2014 minute with the January 2015 minute casts doubt, if anywhere, on the accuracy of the later minute in January 2015 not the earlier one of 30 December 2014. In any event it was explained as a dating error by the owner that was corrected. It does not cast sufficient doubt to overturn the Tribunal's assessment based on an absence of correction alleged to be required to the draft minutes when, first, there was an ability to insist that such correction be made and, secondly, an acknowledgement by the relevant OC deponents that they were aware that it was their duty to make such correction if required so as not to expose the OC to ongoing liabilities of maintenance and repair. The importance of fulfilling that duty if a correction was required diminishes the weight of the explanation of oversight in Mr Bertram's evidence. Mr Bertram's evidence is further weakened by his acceptance in his email of 10 November 2014 of the owner's proposal in the same email chain as the draft minutes without reference to the need to correct the terms of the proposal as minuted.

80 We do not accept the interpretation sought to be attributed by the OC to phrases in the owner's emails. The words "in tandem" in the owner's 10 November 2014 email do not of themselves or in context necessarily infer that the double-glazing was accepted by the owner as separate or distinct from the remedial works scope, as opposed to being executed in a sequence during those works. The fact that a different contractor installed the double-glazing outside of a particular stage of works contracted for with another entity, as stated in the 25 February 2015 email, simply speaks of who did or was to do what and when rather than defining the scope of remedial works to exclude the double-glazing. It was not a matter of great surprise that a window contractor would install the windows.

81 There was no evidence that we were pointed to which was sufficient to establish that locational suitability of double-glazing rather than single-glazing

was not a factor in itself in assisting waterproofing or the building's maintenance and repair.

82 As to the criticism of absence of expert evidence led by the owner on the contribution or desirability of double-glazing to the remedial work, we note several matters:

(1) First, there was clear evidence that the windows had to be removed and either reinstated or replaced as part of the scope of remedial work specified by the OC's experts.

(2) Secondly, it does not follow that, if double-glazing replacement was an option within replacement that was available to choose, it had to be the only option; there was no evidence that it was an unsuitable option.

(3) Thirdly, it was open to the OC to lead expert evidence on the topic to counteract the owner's tender report and the assessment and advice of the then strata manager that there was benefit (for reasons canvassed in the evidence and the Tribunal findings set out above) in terms of potential water penetration resistance and ongoing maintenance of the building to replace ten-year-old windows at the top of the building on an exposed waterfront. This was all the more so as there was the additional benefit to the OC that the owner was offering to pay for installing one option for replacement windows at his cost whereas the OC would, as part of its strict obligation under SSMA s 106, be paying to reinstall the ten-year-old single-glazed windows (even if that in itself was a cheaper option, which was not established on the material before us).

(4) Fourthly, absent such competing expert evidence, there was no material to contest the place of double-glazing as an option for putting the windows back as part of the scope of remedial work consistent with the owner's tender report and, more significantly, the benefit assessment of the strata manager.

(5) Fifthly, the owner's tender report conveyed the views of the tenderers on warranty and other concerns from reinstating the windows; there was no evidence before us that doubted the accuracy of conveyance of such views (on which the then strata manager also appeared to have relied in expressing her views).

(6) Sixthly, the foregoing matters supported the basis for the EC to include, by approval consistent with its duty and the OC's strict obligations, the double-glazing within the scope of remedial work.

Decision fair and equitable

83 We equally consider that the matters raised to allege the Tribunal's decision was not fair and equitable do not support such a conclusion.

84 It begs the question to say that a finding on the scope of remedial work which added to the financial obligations associated with that work renders such finding not fair and equitable. Those burdens arise from law in respect of whatever is found to be within the scope of remedial work.

85 It equally begs the question to say that the entire approval terms as found by the Tribunal was not fair and equitable because the Tribunal did not find that a term of the agreement imposed ongoing maintenance and repair obligations for the double-glazing on the owner.

86 Further and as already said, the OC had the opportunity by expert evidence to contest the scope of remedial work when the owner's evidence contained material (the tender report and the strata manager's benefit assessment) which supported approval of the double-glazing as part of the scope of remedial work.

87 What was within the scope of remedial work determined whether a special resolution was required for the double-glazing. If double-glazing replacement of the windows formed part of the OC's strict obligation of maintenance and repair, then no such approval in a general meeting was required. It is clear law that the OC does not require approval by the owners in general meeting of the OC to carry out its strict statutory duty under SSMA s 106: *Stolfa v Hempton* [2010] NSWCA 218 at [9]-[10].

Other leave requirements

88 It is unnecessary to consider the remaining requirements for leave since the appellant OC has not made out either threshold requirement for which it contended, for the reasons just set out.

Appeal outcome

89 NCAT Act s 81 provides as follows:

> "(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
>
> (c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance."

90 As said earlier, the appeal must be dismissed because the appellant OC has not made out its appeal grounds. No further substantive relief is required to be considered.

Costs of appeal

91 The successful respondent to the appeal appeared in person. Leave for legal representation in the appeal was granted to the appellant on 19 November 2021 but the appellant has not succeeded on its appeal grounds. The respondent is protected by SSMA s 104 against liability for levies in respect of the appellant's costs, which would include being refunded his payment of any such levy already imposed. There accordingly needs to be no determination by us on the respondent's contention concerning compliance with SSMA s 103 in terms of the appellant's obtaining of legal services in respect of this appeal and the proceedings generally.

92 Rule 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW) applies the same costs rules as applied in the Division when there is a departure under the Division rules (such as under Rule 38) from NCAT Act s 60. Rule 38 applies when the amount claimed or in dispute in the proceedings exceeds $30,000.

93 In *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 esp at [86]-[111] the Appeal Panel decided (in a case involving re-allocation of unit entitlements) that strata applications do not fall within rule 38 if they do not involve a direct claim for monetary relief exceeding $30,000. That appears to be the case in the present appeal.

94 Accordingly, the parties would need to make submissions and provide any further evidence they wish in order to establish special circumstances under

NCAT Act s 60, for any order as to costs to be made. We provide a short timetable for this purpose, including for any submissions for a further hearing on costs. If no application for costs is made, there will be no order as to the costs of the appeal.

95 For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered. The principles are explored in *Latoudis v Casey* (1990) 170 CLR 534, *Oshlack v Richmond River Council* (1998) 193 CLR 72 and in this Tribunal in *Thompson v Chapman* [2016] NSWCATAP 6 and *Bonita v Shen* [2016] NSWCATAP 159, citing earlier consistent authority.

96 The special circumstances that form an inclusive list in NCAT Act s 60(3) reflect bases that justify an award of costs on an indemnity basis under the ordinary costs rules. There must be a distinction, if only of severity of impact or conduct, between their being threshold matters to justify an award of costs at all and an award of costs on a special basis. Otherwise, special circumstances would always justify an award of indemnity costs and that could be a more generous regime than if the ordinary costs rules applied.

97 The principles governing Calderbank offers (offers made "without prejudice save as to costs" or similar wording) were set out in the reasons of the Appeal Panel in *Thompson v Chapman* [2016] NSWCATAP 6 at [91] in reliance upon authority in the NSW CA and Supreme Court there cited, to which can be added *Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2)* (2005) 13 VR 435, [2005] VSCA 298, *El-Wasfi v NSW; Kassas v NSW (No 2)* [2018] NSWCA 27 and *Croghan v Blacktown CC* [2019] NSWCA 248 and authority there discussed.

98 In summary: the offer must constitute a real and genuine compromise; rejection must be unreasonable in the circumstances; reasonableness of rejection is to be assessed at the time the offer is made, not with the armchair of hindsight; relevant factors in assessing unreasonableness include the stage of the proceedings when the offer was made, time allowed to consider the offer, extent of compromise in the offer, the offeree's prospects in the litigation at the

time the offer was made, clarity of terms of the offer, and whether an application for indemnity costs was foreshadowed in the event of rejection.

99 The parties may wish to take the foregoing into account in considering any application for costs.

Order

100 The orders we accordingly make are as follows:

(1) Appeal dismissed.

(2) In respect of costs of this appeal the following orders are made:

(a) Any application for costs, including further evidence and submissions in support of the application, is to be filed and served by the costs applicant within 14 days after the date of these orders;

(b) Any further evidence and submissions in response are to be filed and served by the costs respondent within 28 days after the date of these orders;

(c) Any submissions in reply are to be filed and served by the costs applicant within 35 days after the date of these orders;

(d) Submissions are to include submissions about whether a hearing of any costs application can be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW);

(e) If no application is made under (a) then there is no order as to the costs of the appeal.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar