Civil and Administrative Tribunal

New South Wales

Case Name:	Cheung v Talal
Medium Neutral Citation:	[2022] NSWCATAP 352
Hearing Date(s):	27 September 2022
Date of Orders:	10 November 2022
Decision Date:	10 November 2022
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member P H Molony, Senior Member
Decision:	(1) Leave to appeal refused. (2) Appeal dismissed. (3) Orders numbers 1 and 2 made by the Tribunal on 8 June 2022 with respect to file number SC21/44169 and stayed on 8 August 2022, are revived, with the dates for the actions ordered to be performed in both paragraphs extended to 20 December 2022.
Catchwords:	APPEAL – application to admit further evidence refused – leave to appeal refused – service by post of notice of hearing on party sufficient – no obligation on Tribunal to serve notice of hearing by email - no denial of procedural fairness by proceeding with hearing when absent party served by post - no error on a question of law. LAND LAW – Strata titles – noise and vibration affecting lots below – acoustic standard established by By-laws discussed - lot owner's evidence of subjective experience of noise and vibration corroborated by expert reports – orders made for rectification.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014

	Strata Schemes Management Act 2015 Protection of the Environment Operations Act 1997
Cases Cited:	Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111 Bartel v Ryan [2018] NSWCATAP 231 CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578, [2000] FCA 1343 Collins v Urban [2014] NSWCATAP 17 Cominos v Di Rico [2016] NSWCATAP 5 Coulton v Holcombe [1986] HCA 33 Craig v South Australia (1995) 184 CLR 163 Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26 Elsayed v Tassone [2022] NSWCATAP 69 Hogan v Stebnicki [2022] NSWCATCD 63 Felcher v The Owners Strata Plan 2738 [2017] NSWCATAP 219 O'Brien v. Komesaroff (1982) 150 CLR 310 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Zhang v Glykis [2020] NSWCATCD 17
Texts Cited:	None
Category:	Principal judgment
Parties:	Sau Keng Cheung (Appellant) Gulia Talal (Respondent)
Representation:	John Toh (Agent) (Appellant) Respondent (Self-represented)
File Number(s):	2022/00197069
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	8 June 2022
Before:	D, Moujali, Senior Member

File Number(s): SC 21/44169

REASONS FOR DECISION

1 This is an appeal by Sau Keng Cheung (the appellant), a lot owner in a strata scheme, from a decision made by the Tribunal after hearing an application by the owner of the lot directly below hers, Gulia Talal (the respondent), for the appellant to carry out work to her unit, so as to prevent the escape of noise and vibration from her unit to the respondent's unit. The hearing was held on 8 March 2022 by AVL with only the respondent (then the applicant) participating. The appellant (then the respondent) did not appear. At the end of the hearing the Tribunal reserved its decision.

2 On 8 June 2022, the Tribunal provided written reasons for decision and ordered the appellant to carry out specified works in the kitchen of her lot, and to obtain a written statement from a nominated acoustical expert, by 2 August 2022, stating that he is reasonably satisfied that those works, "will achieve compliance with clauses 3.5(b) and 3.5(i) of Special By-law No 20 for Strata Plan 4221."

3 Those orders were made under s 241 of the Strata Schemes Management Act 2015 (NSW) (the SSMA) on the application of the respondent (as an interested person under s 226) for the Tribunal to make an order to settle a complaint or dispute with the appellant under s 232(1).

4 In its reasons for decision the Tribunal explained –

> "By-law No 20 gives owners within the strata scheme certain rights to carry out works affecting the common property. It also specifies certain obligations on owners in respect of such work. Part 3.5 of By-law No 20 is described as "enduring rights and obligations". It includes the following provisions:
>
> > An Owner shall:
> >
> > …
> >
> > (b) use reasonable endeavours to ensure no nuisance is caused as a result of the use of the works including where relevant the prevention of water escape or noise;
> >
> > …
> >
> > (i) must ensure that the works within the lot are not likely to disturb the peaceful enjoyment of the owner or occupier of another lot… "

5 The appeal was filed within time on 6 July 2022.

6 On 3 August 2022, the Tribunal's orders were stayed pending the outcome of this appeal, with the exception of a nominated expert's recommendation (cited as point 2 of para [32] of the Tribunal's decision) that –

> A felt/rubber stopper should be placed on the end of the cupboard door, to avoid structure-borne noise being transferred to Unit 5 from the use of cupboards.

7 We have determined that the appeal must be dismissed for the following reasons.

Applicable legal principles

8 Section 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) states:

> "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."

9 Clause 12 of Schedule 4 to the NCAT Act states with respect to decisions made in the Consumer and Commercial Division that:

> "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)."

10 There is no issue that the Tribunal had jurisdiction to hear the application.

11 A question of law may include, not only an error in ascertaining the legal principle but also taking into account an irrelevant consideration or not having regard to a relevant consideration. This includes not making a finding on an element or central issue that is required to be made out to claim an 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.

12 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel said that the following are specifically questions of law:

(1) whether the Tribunal provided adequate reasons, which explain the Tribunal's findings of fact and how the Tribunal's conclusion is based on those findings of fact and relevant legal principle;

(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.

13 The categories of errors on a question of law that give rise to an appeal as of right, discussed in *Prendergast* are not all inclusive.

14 With respect to leave to appeal, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, the Appeal Panel stated at [76]– [79] and [84(2)]:

> "74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in clause 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 paragraph (a) or (b) not occurred or if the fresh evidence under paragraph (c) had been before the Tribunal at first instance.
>
> 75 As to the particular grounds in clause 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
>
> > 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 clause 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 CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].
>
> …
>
> 84 The general principles derived from these cases can be summarised as follows: …
>
> > (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
> >
> > > (a) issues of principle;
> > >
> > > (b) questions of public importance or matters of administration or policy which might have general application; or
> > >
> > > (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
> > >
> > > (d) a factual error that was unreasonably arrived at and clearly mistaken; or
> > >
> > > (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed."

15 With respect to cl 12(c) of Sch 4, an Appeal Panel held in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111, at [23]-[25], that-

> "[23] … the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking

> leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. …"
>
> [24] … something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).
>
> [25] Further, to grant leave simply on the basis of whether a party had been unsuccessful in their attempt to obtain evidence would allow any party who has a personal excuse for not providing evidence otherwise reasonably available an opportunity to seek leave to appeal any decision of the Tribunal. Such an outcome would not promote finalisation of the real issues in dispute in a just, quick and cheap manner, as an opposing party would be liable to face a successful appeal and a rehearing merely because of the personal circumstances of the person who failed to procure necessary evidence."

16 See too *Elsayed v Tassone* [2022] NSWCATAP 69 at [18].

17 Even if the appellant establishes that she may have suffered a substantial miscarriage of justice within clause 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.

18 In circumstances where an appellant is not legally represented it is appropriate for the Tribunal to look at the grounds of appeal generally, and, to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations in favour of the respondent: *Prendergast* at [12]. As to appeals by self-represented litigants, in *Cominos v Di Rico* [2016] NSWCATAP 5, the Appeal Panel explained at [13]:

> 13. It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v Liew* [2013] NSWCA 297 at [68] citing *Hamod v State of New South Wales* [2011] NSWCA 367 at [309]- [316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

Materials before the Appeal Panel

19 In addition to considering the oral submissions made by the parties we have had regard to the following materials filed by them in considering the appeal:

(1) from the appellant:

(a) notice of appeal filed 6 July 2022 with attachments;

(b) submissions in response filed 24 August 2022;

(c) transcript of hearing on 22 March 2022;

(d) submissions in reply filed 26 September 2022;

(2) from the respondent:

(a) reply to appeal filed 13 August 2022 with attachments;

(b) bundle of documents filed on 14 August 2022; and,

(c) submissions in response to appellant's submissions of 24 August 2022.

Grounds of Appeal

20 The appellant's grounds of appeal may be shortly summarised.

(1) That the appellant was denied procedural fairness because the Tribunal proceeded to hear and determine the application in her absence when she had not been given a notice of the hearing by email and an email address had been provided;

(2) The Tribunal accorded undue weight to the respondent's subjective evidence relating to her perceptions of the levels of noise and vibration in her unit from the appellant's unit above, thereby applying the wrong test in reaching its determination;

(3) The Tribunal failed to take into account a relevant consideration, namely the age of the building, when concluding that the appellant had breached her obligations under cl 20 of Part 3.5 of By-law No 20; and

(4) The Tribunal failed to take account the provision cl 5(g) and cl 8 of Special By-law No 21 when making its determination.

New Evidence

21 In her final submissions the appellant also sought to rely on an email dated 28 July 2021 from a former tenant of her lot (the email) to her agent, concerning the respondent's noise complaint.

22 By direction (5) made by the Tribunal on 10 November 2021 and extended on 23 November 2021, the appellant was ordered to file all material on which she intended to rely by 2 March 2022. The email should have been filed in

accordance with that timetable. The email was clearly accessible by the landlord from the time it was received by her agent on 28 July 2021 and should have been filed with the Tribunal by 2 March 2022, before the hearing on 22 March 2022. In those circumstances, we are not satisfied that the email was not reasonably available at the time the proceedings under appeal were heard. As a consequence, we refused to admit the email as new evidence on the appeal or to grant leave to appeal based on new evidence.

Was the appellant denied procedural fairness because the Tribunal proceeded to hear and determine the application in her absence when she had not been given a notice of the hearing by email, and an email address had been provided – ground 1?

23 This appeal ground raises a question of law.

24 In its reasons for decision the Tribunal explained:

> "6 At the hearing on 22 March 2022, there was no appearance for the respondent. Notice of the hearing was sent by the Tribunal to the respondent at the address for the respondent indicated on the Application. The applicant informed the Tribunal that that address had been obtained from the strata roll kept for the strata plan. There was no indication that the notice of hearing had been returned to the Tribunal.
>
> 7 The Tribunal had previously sent notices to the respondent at the same address as that to which notice of the hearing on 22 March 2022 was sent, including notice of the directions hearing held on 10 November 2021. There was no indication that these prior notices had not been received by the respondent. The Tribunal's file indicates that there was an appearance for the respondent at the directions hearing on 10 November 2021. At that directions hearing, orders were made for the respondent to provide the documents on which the respondent sought to rely. No documents have been provided by the respondent.
>
> 8 Having regard to all of the above factors, the Tribunal was satisfied that the respondent had received notice of the hearing on 22 March 2022. The Tribunal determined that there was no procedural unfairness to the respondent with proceeding with the hearing on 22 March 2022 in circumstances where the respondent had been given an opportunity to provide documents to the Tribunal and to participate in the hearing but had declined such opportunity."

25 We have verified that all notices of hearing addressed to the appellant in the appealed proceedings were sent to her at the same address. The point made on behalf of the appellant was that no notice of hearing had been sent by email, rather than by ordinary mail to the appellant's address. The appellant's representative acknowledged that there was no evidence before the Appeal Panel to the effect that the appellant had not received the notice of hearing.

26 Rule 14(2) of the Civil and Administrative Tribunal Rules 2014 (NSW) (the NCAT Rules) (now repealed) provided a number of alternative methods by which notices or documents can be served. These include personal service, or service by post, or, "in the case of a person or body that has consented to electronic service by means of an email address," by email, among others. Demonstrated service by any means specified in the rule will suffice. There was therefore no obligation on the Tribunal to serve the notice of hearing on the appellant by email. Service by post was sufficient.

27 We think the conclusion which the Tribunal reached with respect to the appellant having been served by post was reasonably open to it on the evidence. The decision to proceed with the hearing, in the absence of any evidence to the contrary, did not deny the appellant procedural fairness.

28 This ground of appeal fails.

Did the Tribunal give undue weight to the respondent's subjective evidence relating to her perceptions of the levels of noise and vibration in her unit from the appellant's unit above, thereby applying the wrong test in reaching its determination – ground 2?

29 Insofar as the appellant says that the Tribunal applied the wrong law by taking into account the respondent's subjective evidence as to the noise and vibration experienced she in her lot from the lot above, this raises a question of law. Insofar, as the appellant says that evidence was given too much weight, then leave to appeal is required.

30 In *Andelman v Small* [2020] NSWCATAP 32 an Appeal Panel dealt with a similar factual situation, in which noise emanating from a unit above was the subject of dispute. The Appeal Panel wrote:

> 46. The appellant contends that the Tribunal erred in failing to comprehend that any order should be based on objective evidence.
>
> 47. The appellant submits that the test whether the by-law is being breached is objective, not subjective.
>
> 48. We accept the appellant's submissions that the test is objective but reject the appellant's submissions that the Tribunal below did not apply this objective test. A fair reading of the Tribunal's reasons indicates that the Tribunal did apply the objective test.

> 49. But that does not mean that subjective evidence may not be given to the Tribunal, as it was in this case, just that the Tribunal must then assess that evidence to determine whether, objectively, the by-law has been breached.
>
> 50. The appellant cited *Felcher v The Owners – Strata Plan No 2738* [2017] NSWCATAP 219 at [31]. In that paragraph the Appeal Panel said:
>
> > "Regrettably for Mr Felcher, he relied only on his uncorroborated personal account of the noise. As the Tribunal noted, the appellant provided no expert evidence to demonstrate that the floating floor allowed an unreasonable amount of noise to penetrate his Lot, and no reports from an acoustic engineer or from a builder. The Tribunal noted that while the appellant may genuinely believe that the floating floor was excessively noisy, he had not provided any expert evidence to prove so. Whilst the reference to expert evidence may have unnecessary, in this case the Tribunal required probative evidence. We have set out above the forms that evidence may take."
>
> 51. The paragraph cited from *Felcher* does not cite a principle that must be followed. It simply says that in that case the uncorroborated evidence of Mr *Felcher* was not sufficient to prove his case. What will be sufficient evidence will vary from case to case as each case will involve different circumstances.
>
> 52. In any event, in the present case the respondent's evidence was corroborated by the evidence of Mr Colla and the former tenant. Mr Colla's observations of noise were not as weighty as perhaps a report from him following tests using his equipment and expertise, but his observations of noise were from a person with expertise in the area and so his observations were perhaps more weighty than those of the lay witnesses.

31 In the present case the evidence considered by the Tribunal with respect to noise consisted of:

(1) a report prepared by Koikas Acoustics Pty Ltd dated 2 December 2021;

(2) a report prepared by Rodney Stevens, an acoustic consultant, dated 21 September 2021; and

(3) the respondent's own evidence of the noise problems.

32 Both experts concluded further sound reduction works were necessary with Mr Koikas indicating "somewhat tentatively," as the Tribunal noted at [33], what the proposed works should be. The respondent also gave evidence of the noise problems she had experienced since renovations to the upstairs kitchen in April 2021. The Tribunal accepted her evidence.

33 The evidence given by the respondent in this case was consistent with and corroborated by the conclusions reached by the experts in their reports. It is not a situation, like that relied on by the appellant in *Felcher v The Owners Strata Plan 2738* [2017] NSWCATAP 219, where the evidence of a lot owner was uncorroborated and stood alone. The Tribunal was entitled to consider the

respondent's evidence as part of the material before it. There is no error of law in accepting it or giving weight to it.

34 It was open to the Tribunal on the evidence before it to conclude that the appellant was in breach of her obligations under clauses 3.5(b) and 3.5(i) of Special By-law No 20, which was the case put by the respondent. That conclusion was consistent with the weight of evidence before the Tribunal, not against it. There is no basis for granting leave to appeal.

Did the Tribunal err by failing to take into account a relevant consideration, namely the age of the building, when concluding that the appellant had breached her obligations under cl 20 of Part 3.5 of By-law No 20 – ground 3?

35 If, by referring to the age of the building as "relevant" the appellant means "mandatory", this raises a question of law.

36 The appellant referred to two first instance decision in the Consumer and Commercial Division where the Tribunal had considered the age of the building concerned when determining what acoustic standards ought to be considered. These are *Hogan v Stebnicki* [2022] NSWCATCD 63 (Hogan) NSWCATCD 63 and *Zhang v Glykis* [2020] NSWCATCD 17 (Zhang). In *Zhang,* the building concerned was 45 years old. With respect to the acoustic standard to be applied Senior Member Ringrose said, at [60]:

> "It is appropriate to note that the Building Code of Australia of 2016 provides a method for an objective assessment of noise which relates to new buildings and current Standards. The expectation of occupants in buildings which are much older with probably a thinner floor slab must necessarily be less than those in a new building where compliance with that Standard is required."

In *Hogan,* the strata plan was first registered in 1979. Senior Member French said it was, "not clear" that the standards in the Building Code of Australia (BCA) applied, but in any event, the minimum standards had been exceeded. The appellant submitted that by failing to consider the age of the building the Tribunal failed to have regard to a relevant, indeed a mandatory, consideration.

37 While the Tribunal in this case did not refer specifically to the age of the building, there was no evidence of that age before it (or before us) and no evidence as to how its age would impact on relevant acoustic standards. Similarly, there was no evidence as to the quality of the building, which might also impact on noise and vibration transmission within the building. There was

also no submission or evidence before the Tribunal from the appellant raising the issue of the age of the building and applicable noise standards. Only on appeal has this issue been raised.

38 In any case the standards applied by the Tribunal were not those in the Building Code of Australia, but those established by clauses 3.5(b) and 3.5(i) of Special By-law No 20 for Strata Plan 4221. This includes the requirement that "a lot owner must ensure that the works within the lot are not likely to disturb the peaceful enjoyment of the owner or occupier of another lot."

39 In his report, Mr Koikas found that while the building met the acoustic standards in the BCA, the noise in the respondent's lot from above was offensive noise within the definition of the *Protection of the Environment Operations Act 1997* (NSW). Overall, he considered that the noise from the appellant's lot was in breach of the standard fixed by 3.5(i) of Special By-law No 20 for Strata Plan 4221. Neither expert report considered the age of the building as an important consideration in the acoustic assessment.

40 There is nothing in the text or context of s 241 of the SSMA which made the age of the building a mandatory consideration for the Tribunal. In the absence of it having been raised for the Tribunal's consideration by the appellant, we are not persuaded that the age of the building was even a relevant consideration in the circumstances.

41 There is no error of law.

Did the Tribunal err by failing to take account the provision cl 5(g) and cl 8 of By-law No 21 when making its determination – ground 4.

42 This ground was put as an error of law.

43 Essentially, this relates to the provisions of Special By-law 21, insofar as it applies to authorised minor renovation works. These are defined as "works on the lot and the common property to be carried out for an in connection with" specified modifications, including renovations to kitchens (cl 5(g)(i)) and installing or replacing wood or other hard floors ((cl 5(g)(iii)). Clause 2 of the By-law provides that:

> "The Owner has the right to perform Minor Renovation Works and keep the Minor Renovation Works installed on the common property subject to the conditions set out in the by-law."

44 Clause 8 relevantly provides:

> "To be compliant under this by-law, the Minor Renovation Works (if approved) must:
>
> …
>
> (c) comply with the provisions of the Building Code of Australia and Australian Standards (where relevant)…"

45 Clause 13 then provides that an owner:

> "(c) must ensure that the Minor Renovation Works and their use do not contravene any statutory requirements of any Authority;
>
> …
>
> (e) must use reasonable endeavours to cause as little disruption as possible when using the Minor Renovation Works;

46 The appellant argued that the Tribunal should have had regard to this provision in Special By-law 21, rather than the provisions of cls 3.5(b) and 3.5(i) of Special By-law No 20, when making its decision. The appellant submitted that the standards imposed by cl 8 of Special By-law 21 are less onerous than those set out cls 3.5(b) and 3.5(i) of Special By-law No 20. The appellant said that the Tribunal was aware of Special By-law 21, because it was in evidence, and should have made its determination under cl 8. Its failure to do so is said to be a failure to take into account a mandatory consideration in respect of which we should intervene. We disagree for two reasons.

47 First, while the Tribunal must realistically engage with the case of each party (*Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26) the appellant did not put the applicability of the relevant by-laws into contest before the Tribunal. Indeed, copies of the relevant Special By-Laws were put before the Tribunal by the respondent and were first referred to by the appellant on the appeal. As was explained in in *O'Brien v. Komesaroff* (1982) 150 CLR 310, Mason J., in a judgment in which the other members of the Court concurred, said at p 319:

> "In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided

> (Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473, at p 480; Suttor v. Gundowda Pty. Ltd. (1950) 81 CLR 418, at p 438; Green v. Sommerville (1979) 141 CLR 594, at pp 607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy.
>
> The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial".

See also *Bartel v Ryan* [2018] NSWCATAP 231 and *Coulton v Holcombe* [1986] HCA 33. Whilst the content of Special By-Law 21 was before the Tribunal at first instance, the appellant's failure to put its effect into contest means that the factual issues regarding whether the appellant's use of the works constituted reasonable endeavours to cause as little disruption as possible was not determined, and any argument that it did could have been met by further evidence from the respondent. That is usually determinative of whether a party should be given permission to raise a new issue on appeal, and we are not satisfied it lends itself to us doing so here.

48 Secondly, the appellant's submission is based on the assumption that Special By-law 21 applied in the circumstances, rather than Special By-law 20, and that by stipulating Minor Renovation Works must comply with the Building Code of Australia, Special By-law 21 imposed a lesser noise standard than Special By-law 2. That submission is not obviously correct. Again, the appellant failed to raise the issue in the proceedings at first instance.

49 Each of the by-laws, prima facie, had application in the circumstances. They do not refer to or amend each other. When each was made is unknown. It is noteworthy that both Special By-laws 20 and 21 provide that in the event of an inconsistency between each of them and any another by law, "the provisions of this by-law shall prevail."

50 As already explained in the decision at first instance, Special By-law 20 is concerned with the enduring rights and obligations of lot owners. Compliance with cl 8 of Special By-law 21, will ensure the Minor Renovation Works are done to a standard in the Building Code of Australia and, additionally, that, after the renovations are complete, the owner will make reasonable efforts to cause as little disruption as possible when using the works. Compliance with cls 3.5(b) and 3.5(i) of Special By-law No 20, ensures the protection of the

enduring rights and obligations of lot owners, including that works are not likely to disturb the peaceful enjoyment of another lot owner. Whether there is any conflict or inconsistency between the peaceful enjoyment obligations of the lot owner undertaking works under both By-Laws is not obvious, and is not a matter that we need decide.

51 The applicant before the Tribunal expressly relied on cls 3.5(b) and 3.5(i) of Special By-law No 20. The Tribunal was not being asked to make an order in reliance on cl 8 of Special By-law 21. In that sense, Special By-law 21 was irrelevant to the issues before it unless raised for consideration. No submission to the Tribunal indicated that the appellant would seek to rely on By-Law 21, or that it should prevail over By-law 20.

52 We are not satisfied we should intervene in those circumstances as it is not expedient in the interests of justice that the question should be argued and decided.

Leave to appeal

53 As regards leave, there is no issue of principle or general public importance raised. The allegations of error turn entirely on the way the application was determined by the Tribunal in the specific circumstances before it. Nor does the case that there was injustice to the appellant rise above the merely arguable. Leave to appeal should be refused.

Conclusion

54 It follows that the appeal must fail.

55 The orders which were stayed on 3 August 2022 will be revived, with the times specified for actions to be performed in orders 1 and 2, made 8 June 2022, extended to 20 December 2022.

Orders

56 The Appeal Panel makes the following orders:

(1) Leave to appeal refused.

(2) Appeal dismissed.

(3) Orders numbers 1 and 2 made by the Tribunal on 8 June 2022 with respect to file number SC 21/44169 are revived with the dates for the

actions ordered to be performed in both paragraphs extended to 20 December 2022.

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