Civil and Administrative Tribunal

New South Wales

Case Name:	BNK Café Restaurant Pty Ltd v The Owners – Strata Plan No. 33676
Medium Neutral Citation:	[2023] NSWCATAP 161
Hearing Date(s):	2 February 2023
Date of Orders:	16 June 2023
Decision Date:	16 June 2023
Jurisdiction:	Appeal Panel
Before:	S Thode, Principal Member M Deane, Senior Member
Decision:	1. Leave to appeal refused. 2. Appeal dismissed.
Catchwords:	APPEALS - STRATA TITLE – by-laws – construction - terms of exclusive use by law - LAND LAW - alleged unreasonable refusal of consent by lot owners and owners corporation to proposed amendment – grounds of appeal not identified - no issue of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Regulation 2013 Strata Schemes Management Act 2015
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Garofali v Moshkovich [2021] NSWCATAP 242 Gelder v The Owners – Strata Plan No 38308 [2020] NSWCATAP 227 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141 The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207

	Tudor Capital Australia Pty Limited v Christensen [2017] NSWCA 260
Texts Cited:	Nil Cited
Category:	Principal judgment
Parties:	BNK Café Restaurant Pty Ltd (Appellant) The Owners – Strata Plan No 33676 (Respondent)
Representation:	Solicitors W van Ede Solicitor JS Mueller & Co (Appellant) J Bannerman Solicitor Bannerman Lawyers (Respondent)
File Number(s):	2022/00346277
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	2022 NSWCATCD [*]
Date of Decision:	24 October 2022
Before:	C Paull, Senior Member
File Number(s):	SC 21/51371 and SC 22/18081

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 against a decision made in the Consumer and Commercial Division of the Tribunal on 24 October 2022. The application at first instance is a strata schemes matter decided pursuant to the *Strata Schemes Management Act 2015* (the SSMA).

2 The subject scheme is a mixed commercial retail complex. Lot 33 is a commercial freestanding lot and was formerly used as a bank. A change of use has been approved for lot 33 to operate as a restaurant.

3 In December 2020, under special by-law 12 (the by-law) The Owners - Strata Plan SP 33676 granted exclusive use rights to lot 33. The by-law gives special privileges to lot 33 to facilitate the conversion of the change of use of lot 33 to a café. The lot occupiers commenced the building work in December 2021 in order to implement the change of use of lot 33. That work included extensive electrical works (the electrical works). The owners corporation stopped the electrical works and prevented further access to the main switch room. The appellant sought additional approval from the owners corporation but none has been forthcoming.

4 The owners corporation (the respondent) commenced proceedings SC 21/51371 on 16 December 2021 against the owners and occupiers of lot 33 seeking orders under section 124(1) and section 132(1)(a) of the SSMA for access to inspect lot 33 and for the removal of the electrical works and for the reinstatement of common property.

5 The lot owner (appellant) commenced proceedings SC 22/18081 on 20 April 2022 seeking orders that the owners corporation permit an amendment to the by-law to include the right to install and connect a 200amp electricity supply and permit the work as 'minor works'. The application was amended to include an order under s149 of the SSMA that the owners corporation unreasonably refused the making of a by-law.

Background

6 Lot 33 operates as a café. It is the appellant's submission that the existing supply of 110 amps was inadequate and the appellant requires an additional load of 100 amps electricity supply for its operation as a café and restaurant. The owners of lot 33 sought permission from the owners corporation to amend the by-law to specifically add the installation and connection to upgrade the electricity supply cabling from the main switch room to their lot. That request was made after there was a disagreement between the appellant and the respondent about whether the proposed electrical works were covered by the by-law.

7 The owners of lot 33 were of the view that the by-law affords the lot specific permission to facilitate all installation of electrical works to increase the load from 100amps to 200amps.

8 In or about December 2021, the applicant commenced electrical works, without further permission from the owners corporation. A new sub-main was partially installed from the site's main switch room, via a ceiling roof cavity above the covered walkway at the north of lot 32 (Woolworths) down the western wall outside Woolworths and under the footpath and driveway between lots 32 and 33. The owners corporation advised the appellant to stop any further work. A motion brought by the appellant to amend the by-law to authorise the electrical works was defeated in general meeting of the owners corporation dated 22 February 2022.

9 The appellant commenced proceedings SC 22/18081 seeking amendment of the by-law and an order under s110 of the SSMA that the works are minor works. In the alternative the appellants sought an order under section 149 of the Act that the owners corporation unreasonably refused the making of the by-law. Both applications were listed for hearing on 30 June 2022.

10 In its written reasons for decision dated 24 October 2023 (amended 3 November 2022) the Tribunal describes the unauthorised works as follows:

> [25] Again, as best as I can determine from the evidence before the Tribunal, to date the lot occupiers have undertaken drilling and demolition of the concrete footpath that runs between Lot 33 at the Woolworths lot; attached the metal tray container that is to store the cabling to the side of the Woolworths lot; and installed electrical power cables from lot 33 through the steel cladding of the Woolworths lot and through the roof space of that lot. In addition to photographic and report evidence, this is attested to by Darren Garvin, strata manager, who, while I accept he is not an electrician, gave credible evidence of what has transpired as the electrical works proceeded. This evidence also does not appear to be directly refuted by the lot occupiers although, as stated, they have declined to clarify the position in their written submissions.

11 The Tribunal dismissed the appellant's application (SC 22/18081) and made orders in the owners corporation's application (SC 21/51371) for the appellant to remove and reinstate the common property "in accordance with the scope of works set out in paragraphs 13 to 17 in the Forensic Engineering Australia Report dated 11 February 2022."

12 The appellant filed an appeal against both decisions on 17 November 2022.

Scope and nature of internal appeals

13 Internal appeals may be made as of right on a question of law, and otherwise with permission (that is, the "leave") of the Appeal Panel: s 80(2) Civil and Administrative Tribunal Act 2013 (NCAT Act).

14 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

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

(3) Whether a wrong principle of law had been applied;

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

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

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

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

15 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(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).

16 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the

> appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

17 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

18 In *Collins v Urban*, the Appeal Panel stated at [84] that 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.

Submissions and evidence

19 In deciding the appeal, we have had regard to the following:

(1) The Notice of Appeal lodged on 17 November 2022 and the appellant's materials tendered on appeal filed on 22 December 22 consisting of 84 pages.

(2) The respondent's submissions and evidence in reply volume 1 consisting of 500 pages.

Notice of Appeal

20 The Notice of Appeal was lodged on 17 November 2022, which is within the 28 day time period specified in cl 25(3) of the Civil and Administrative Tribunal Rules 2014 (the Rules) in respect of the appellant's application.

Grounds of Appeal

21 The appellant was legally represented at the hearing of the appeal and the representative for the appellant confirmed during oral submissions that there are two main grounds of appeal and one sub-ground of appeal:

(1) The Tribunal erred in finding that the works were not carried out in accordance with the exclusive use by-law, special by-law 12.

(a) The Tribunal erred in not considering, or wrongly considering the Alfonso report.

(2) The Tribunal erred in dismissing the appellant's application under section 149 of the SSMA that the refusal of the owners corporation to make the by-law was unreasonable.

Consideration

22 At the hearing of the appeal the parties supplemented their written submissions with further oral submissions.

Ground 1 "Incorrect Characterisation of the Works in the Context of Special By law 12"

23 The appellant failed to articulate whether this ground concerns a question of law or whether the ground is a ground for which the leave of the Appeal Panel is required. The appellant's submissions in respect of this ground of law are contained at pp 3-4, paragraphs 23 to 26 of the written submissions.

24 The appellant submitted that the Tribunal erred in its interpretation of the by-law. The Tribunal should have found that the works were "ancillary works" within the meaning of subparagraph (a) of the by-law. The appellant made oral submissions that the words "ancillary works" must be read in the context of the whole of the by-law; that *all* works necessary to convert the lot into a café restaurant were incorporated in the by-law and that the appellant required no further approval from the owners corporation to undertake the works.

Consideration:

25 We consider that this case concerns the question of proper construction of an exclusive use by-law relating to the common property (and lot property) pursuant to the SSMA. It involves the proper construction of the by-law and the principles which should apply in its interpretation. In coming to that decision the Appeal Panel referred to and applied the principles applicable to the construction of by-laws set out in the judgment of McColl JA in *The Owners – Strata Plan 3397 v Tate* [2007] NSWCA 207 (*Tate*) at [71]-[72].

26 Turning to the appellant's submissions, in grappling with the appellant's argument whether "ancillary works" covered all work, the Tribunal applied a dictionary interpretation. The Tribunal concluded at [36] that

> the everyday dictionary meaning of *ancillary* is defined as "providing necessary *support* to the primary activities or operation of an organization, system etc".

27 The appellant submits that the Tribunal wrongly applied the meaning of 'ancillary' when it found at [37] that

> "[t]he magnitude and invasive nature of the electrical works [carried out by the appellant] in my view exceeds what is "*support*"".

28 It is submitted that this conclusion must be erroneous because elsewhere in the reasons at [32] the Tribunal concluded that "it is implicit that electrical work *must flow* to facilitate their implementation". We find however, that it is misleading to quote paragraph [32] without its context.

29 The Tribunal before reaching its conclusion at [37] that the works are invasive and exceed what could reasonably be considered "support" methodically assesses whether the electrical works were authorised under the by-law.

30 At [31] the Tribunal refers to the by-law. The definition of "Works" approved under the instrument is set out in cl 4:

> (j) Works means the Owner's renovation works to the Lot and the common property to be carried out for and in connection with the conversion of the Lot to a restaurant including:
>
> i. the installation of outdoor signage on the external brickwork of the Building, immediately adjacent to the Lot in the location as set out in the Plans;
>
> ii. the installation of exhaust fans to be ducted through the common property roof exclusively servicing the Lot is set out in the Plans;
>
> iii. installation of a grease pit be located between the external part of the Building and the existing bollards including the installation of privacy screening as set out in the Plans;
>
> iv. the partial removal of the wall (facing Stockton Avenue) to allow for the installation of a new doorway to facilitate side access to the Lot as set out in the Plan; and
>
> v. the installation of a concrete pathway over the common property grass area to allow for a connection to the council footpath as set out in the Plans; together with:
>
> (A) ancillary works to facilitate the works referred to above; and
>
> (B) restoration of lot and common property (including the Lot) damaged by the works referred to above, and to be conducted strictly in accordance with the Plans and the provisions of this bylaw.

31 We consider that the Tribunal correctly identified that ancillary electrical work is limited to work that supports the installation of signage, grease pits, exhaust fans and the partial removal of a wall. The Tribunal expressed some doubt whether the by-law captured an all-encompassing approach and ultimately

found that the terms did not extend to all electrical work required to turn the premises into a café restaurant without any further approval by the owners corporation. Particularly, the Tribunal concluded that the work was substantial and significant in nature and that it intruded on Woolworth's lot property. The magnitude and intrusive nature of the work clearly suggested that the work required approval.

32 The appellant submitted that the by-law provided the appellant with a carte blanche to undertake any electrical work it saw fit, regardless of whether it involved common property or other lot property. We do not agree with the interpretation of the by-law as posed by the appellant.

To accept the appellant's submission would provide a breadth of interpretation of the by-law that would enable the lot owner to perform work in any manner it saw fit, without seeking further approval from the owners corporation.

33 A by-law only operates within an identifiable and limited environment and must be considered in this context: see McColl JA in Tate at [42] referring to the decision of Dowsett J in Re Taylor [1955] 2 Qd R 546 where the Court defined a by-law as "a law or ordinance dealing with matters local or internal regulation, made by a local authority, or by a corporation or association". In the context of this strata scheme, we have taken into account the ordinary meaning of the by-law as read in its statutory context. We consider that the by-law said nothing about relieving the proprietor of lot 33 from liability to obtain permission for every kind of work that impacts on common property or the Woolworths lot. To infer that any and all work is permissible from the inclusion of the word "ancillary" would be contrary to the context of the statutory scheme under which the by-law was made. We conclude that a common property rights by-law could not, as a matter of statutory construction, confer a special privilege amounting to exemption from a provision of the SSM Act.

34 In our view the by-law is poorly expressed, ambiguous and uncertain. Be that as it may, the words do not permit for all electrical work, however extensive, to be carried out without further owners corporation approval. The by-law appears to grant the proprietor of lot 33 rights to convert the premises from a bank to a restaurant. It also sets out a mechanism for the performance of the conversion

and the ancillary electrical works but only in respect of the works identified in subparagraphs (i) to (v).

35 In our view because the by-law is poorly expressed but nevertheless permits performance of some works the appellant has assumed permission to perform all and any work in relation to the conversion, without regard to the separate and different obligations under the Act to obtain permission when performing work on common property or other lot property. The fact that some work is permitted under subparagraphs (i) to (v) does not discharge the obligation to obtain permission for other work. This is expressly stated at paragraph 8(d) of the by law "While the Works are in progress the Owner of the Lot must: (d) only carry the Works at times reasonably approved by the Owners Corporation". Whilst there is a partial discharge of the appellant's obligation to seek approval from the owners corporation for limited electrical works the by-law clearly does not relieve the appellant from future approval for electrical works. In our opinion the terms of the by-law do not have this effect. If they were intended to have this effect they may have said so, by simply expressing that work is permitted including *but not limited to* (emphasis added) the work specified in subparagraphs (i) to (v). Or, alternatively by omitting subparagraph 8(d) which specifically requires further approval.

36 The relevant statutory provisions also reinforce this. The by-law is made in accordance with Part 7 of the SSM Act. The by-law does not operate to discharge the owners corporation from its obligations under section 106 to maintain the common property or to keep it in a state of good and serviceable repair. In addition, ss 108 – 110 of Part 6 of the SSM Act are detailed provisions concerned with the performance of work and how common property is managed. If the appellant's construction of the by-law were correct, the work that could be authorised would not be subject to any statutory provision and would be, in substance, unconstrained by any statutory limit. We do not accept that this is the effect of the by-law.

37 We accept that the owners' corporation's consent is not required under the by-law relating solely to the appellant's lot, however the works undertaken by the appellant do not relate solely to the appellant's lot, it relates to common

property and Woolworths lot property. To the extent that the appellant was required to seek approval from the owners corporation for works that required approval, the appellant failed to do so.

38 For these reasons we are not of the view that the appellant has established an error on a question of law. We are also not persuaded that the decision was not fair and equitable; nor against the weight of evidence such that we would grant leave to appeal on the principles set out in *Collins v Urban*. This ground of appeal must be dismissed.

Ground 1(a) The Alfonso Report

39 We have considered the submission by the appellant that an expert report tendered by the appellant was not considered.

40 The appellant submits that the Tribunal failed to consider the report of Mr Vincent Alfonso dated 16 June 2022. The report was before the Tribunal and Mr Alfonso attended the hearing and was cross-examined. The appellant submits that the written reasons for decision fail to refer to the report or evidence and that the Tribunal has fallen into error. The Grounds of Appeal do not articulate how the Tribunal's failure to refer to the report resulted in a miscarriage of justice or why the leave of the Appeal Panel should be granted.

41 Following questioning from the Appeal Panel, the appellant identified three parts of the report said to be of particular importance which were omitted from the reasons for decision:

42 Section 7.8 of the report:

> "that the connection of the graded supply will be well within the capacity of the existing supply and will not affect the supply to the Woolworths tenancy".

43 Section 7.3 of the report:

> "To meet the electrical demand the existing electrical supply to Lot 33 is required to be upgraded"

44 Section 7.8.6 of the report:

> in conclusion the connection of the new submain to the existing small shops main switchboard will not have a detrimental effect on the electrical installation. If anything it will improve the available electrical supply to those tenancies supplied from the link box 8.

45 Although the Alfonso report is not referred to in the Senior Member's written reasons for decision, we are of the view that this does not constitute an error. The evidence of Mr Alfonso for the appellant is retained in response to the report of Mr Koulos, retained on behalf of the respondent, and extensively referred to in the reasons. The Koulos report states that the course of the cabling through the Woolworths lot and through common property was unnecessary and that the work could have been carried out in alternative ways.

46 The Alfonso report is in our view not relevant to the ultimate issue in dispute; whether the works were authorised under the by-law. The Alfonso report comments on the work the appellant needed to carry out to convert the premises into a restaurant, the quality of the work and whether the work could have been carried out any other way. The opinion that the work was necessary, within capacity and would not have a detrimental effect is not relevant to the ultimate question before the Tribunal of whether the electrical works complied with the by-law.

47 The appellant's submissions in respect of this ground of appeal are thin and contained at pages 2 – 3 of the written submissions.

48 It is submitted that the Alfonso report, had it been considered, would have led the Tribunal to the conclusion that the work should have been "accepted" and the opinion would have been preferred over of that of the Koulos report who poses three other options. Specifically, had the Alfonso opinion been considered, any suggestion that the cabling could have run underground, rather than through common and other lot property, would have been roundly rejected. Further, it is submitted that Mr Alfonso was not cross-examined on critical parts of his evidence and the Tribunal should therefore have accepted his opinion, on the basis that some of his evidence was not opposed and not traversed. The Tribunal should have given the Koulos report less weight because Mr Koulos acknowledged that he had not inspected the cabling in the Woolworths eaves in person and was therefore not in a position to comment on the efficacy of the cabling.

Consideration

49 The appellant has not articulated a ground of appeal.

50 The Appeal Panel has recently considered a legal representatives' duty to particularise and articulate grounds of appeal in *Garofali v Moshkovich* [2021] NSWCATAP 242 at [50] the Appeal Panel held that:

> Parties and practitioners have a duty to assist the Tribunal to achieve the just, quick and cheap resolution of the real issues in dispute (Section 36(3) of the NCAT Act. Some latitude is appropriate to self-represented parties who often struggle to clearly identify what their grounds of appeal are and relate their submissions to each identified ground (Prendergast at [12]). However, it is of no assistance to the Appeal Panel when a legally represented party cannot clearly identify and articulate what errors of law have purportedly occurred; nor clearly identify and articulate the distinction between errors of law (which do not require leave of the Tribunal) and errors other than errors of law to which leave to appeal is required.
>
> The NSW Court of Appeal has been critical of practitioners who do not file and serve clearly articulated grounds of appeal and timely written submissions that engage with the grounds of appeal in Whyte v Broch (1998) 45 NSWLR 354 ('Whyte'); Lorbergs v State of New South Wales (1999) NSWCA 54 and Lake Macquarie City Council v McKellar [2002] NSWCA 90 at [88]-[94]. In Whyte, Spigelman CJ referred to a pervasive "climate of complacency" regarding the failure of practitioners to file and serve timely outlines of submissions that engage with clearly articulated grounds of appeal.

51 All legally represented parties who appear in the Appeal Panel should be able to identify and articulate what are the errors of law or errors that require leave to appeal rather than merely provide a narrative as to why their client disagrees with the decision.

52 In respect of the Alfonso report, the mere fact that it was not referred to does not give rise to an error of law. We have considered the Alfonso report. The three passages which have been identified as the "critical" passages above would not have altered to outcome of the decision.

53 First, as set out above, the three paragraphs which are nominated by the appellant to be critical, even if factually accepted, do not establish that the by-law permitted the electrical work. Specifically, the acceptance of Mr Alfonso's opinion that lot 33 required an upgrade, was irrelevant to the ultimate conclusion of whether the by-law authorised the upgrade in the manner in which it was carried out.

54 Secondly, we have been provided with a transcript of the cross-examination of Mr Alfonso. It established that Mr Alfonso conceded, reluctantly, that the work could have been performed less invasively and that it would be possible to

locate the cabling that is currently running through the roof space of the Woolworth lot, underground. The expert agreed under cross-examination, that although difficult, approval for underground cabling to the main substation can be obtained under New South Wales Service installation rules but was not applied for (see TP 45-46).

55 We conclude that no error has been established merely because the Alfonso opinion is not referred to in the written reasons for decision. Even if the Tribunal did err, we are not of the view that such an error would have made any difference to the ultimate conclusion reached by the Tribunal that 'the electrical works are not approved under the by-law'. As a result, we are not of the view that any procedural unfairness arises from the failure of the Tribunal to refer to the Alfonso report. *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 is often quoted on procedural unfairness and whether the unfairness will entitle a party to a new trial.

56 In *Giretti v Deputy Commissioner of Taxation* (1996) 70 FCR 151 Lindgren J, with whom Jenkinson J agreed, said that in *Stead* could be found both a forward-looking test and a backward-looking test. The question in *Stead* was whether a new trial should be ordered when there had been a denial of the opportunity to make submissions. The forward-looking test was whether a new trial would inevitably result in the making of the same order, so that ordering a new trial would be a futility. The backward-looking test was whether it could be concluded that giving the opportunity to make submissions "could have made no possible difference to the result". In our opinion the appellant does not satisfy either test. No submission has been made that would lead us to conclude that the reference to the three paragraphs relied upon in the Alfonso report would have led the Tribunal to a different interpretation of the by-law.

57 Finally, we conclude that the Tribunal, having considered the Alfonso report, did not refer to it in its reasons because the report was not of relevance to the ultimate issue in dispute. This view is supported by the fact that expert evidence was only referred to under the sub-heading "what electrical work have the lot occupiers carried out", an issue that was to a large extent not controversial. The Tribunal referred to expert evidence only to inform itself of

the nature of the work that had been carried out, arriving at a finding that the work was 'substantial' and 'significant' (see [27]). The Tribunal undoubtedly limited its consideration of expert reports only to determine issues of fact, namely the nature of the electrical work that was carried out by the appellant, because expert opinion is not relevant to determine a question of law as to whether the electrical works were approved by the by-law. In any event, the appellant has not appealed these findings of fact.

58 This is further supported by the question that the Tribunal poses next: "Do (sic) the electrical work need approval?". In the context of this question, the Tribunal did not consider the opinion of either electrical expert because the opinion evidence of experts is not relevant to the disposition of the interpretation of the by-law within the confines of the statutory regime. We infer that the Alfonso report may not have been mentioned in the written reasons for decision because the Tribunal did not consider it relevant to disposition of the critical issue in dispute between the parties.

59 In our opinion the reference to the three paragraphs relied upon by the appellant would have made no real, sensible possibility of a difference. The Alfonso report merely confirmed the work that was carried out was substantial, and there were other possible ways to carry out the work without interference to the Woolworths lot. For all of these reasons we are not satisfied that the appellant has articulated a ground of appeal that establishes an error on a question of law or that the leave of the Appeal Panel ought to be granted.

Ground 2 - "effect of errors on consideration of application pursuant to s149 of the Strata Schemes Management Act 2015"

60 The last ground is set out at paragraphs 44 and following. We have not been provided with a ground of appeal and the appellant does not explain in the Notice of Appeal or in the written submissions whether this ground is said to be an error on a question of law or an error for which the leave of the appeal panel is required.

61 The submissions are brief. The appellant states that:

(1) There was no reliable evidence before the Tribunal that the refusal by the owners corporation to an amended by-law was based on sound considerations or any rational basis;

(2) the owners corporation failed to provide reasons for the refusal for the making of the amended by-law and so the Tribunal may infer it was not or based upon or in accordance with reasonable and sound judgment. *Gelder v The Owners – Strata Plan No 38308* [2020] NSWCATAP 227;

(3) the decision of the owners corporation to refuse to amend the by-law had no rational basis and was not guided by sound judgment or good sense.

62 From these submissions we cannot discern the error alleged or the findings made by the Tribunal that are sought to be impugned. During the hearing of the Appeal it was submitted that the Tribunal should have considered the Alfonso report and in particular the conclusions reached at paragraph 7.8.6:

> in conclusion the connection of the new submain to the existing small shops main switchboard will not have a detrimental effect on the electrical installation. If anything it will improve the available electrical supply to those tenancies supplied from the link box 8.

63 We would make the following observations. First the assertion that the owners corporation gave *no* reasons for its dismissal appears on the face of the documents filed by the appellant is incorrect. The refusal of the owners corporation to make the by-law is contained at page 55 of the appellant's bundle. The minutes note that Motion No 2 of 22 February 2022 was defeated because Woolworths the owners of Lot 32 "have advised that their decision to defeat the motion is based on the report provided by Forensic Engineering Australia. Woolworths have advised that they do not have an issue with the tenant increasing the power to Lot 33 provided the works are done correctly and the main is not overloaded. Woolworths roof space is not to be used for cabling and this must be removed."

64 The respondent provided the Forensic Engineering Report at pp 188 and 189 of the Respondent's bundle which confirms that the appellant has reticulated electrical cable into the Woolworths roof space and into the eaves of Lot 32, before dropping cable down the wall of Lot 32 and encasing it with a stainless steel cover attached to the Woolworths wall.

65 The relevant findings by the Tribunal are contained at paragraphs [48] and following:

66 The Tribunal found that the evidence showed:

(1) “the not insignificant dimensions of the work of the external cabling route required to connect Lot 33 to the main switch room”;

(2) the owners corporation noted its concerns in the Minutes of the Meeting;

(3) an employee of Woolworths gave evidence on behalf of the owners corporation that the appellant had caused its cabling to be routed through Woolworths’ roof space and Woolworths wished to have it removed;

(4) the evidence of Mr Koulos established a strain on the current electrical system which may pose a risk that the main power supply will be overloaded. The expert was not impugned under cross examination;

(5) there were other more reasonable options in evidence for the appellants to attain the electrical power supply they require;

(6) it was of concern that the electrical works interfered with the Woolworths lot, running through the Woolworths roof space, where there were other less intrusive methods available and there was no substantive evidence from the appellant that these other options posed insurmountable difficulties.

67 In our view, engagement with the question whether the respondent had unreasonably refused to consent to the proposed amendments required a meaningful analysis of whether the proposed amendments, if made, would have significant impact on common property and the Woolworths lot and whether there were other options available which would lessen the burden on common property and the neighbouring lot. In our view the Tribunal did rely on the evidence available to arrive at a view that the Woolworths lot was adversely affected, consistent with the evidence.

68 From the registered strata plan; photographs of the various experts reports; it is clear that the electrical works installed by the appellant involve the alteration of common property and the insertion and attachment of electrical cabling on common property within s 108(1) of the SSM Act. The electrical work involves work that is not merely “cosmetic work” under s 109 of the SSM Act, or minor renovations under s 110. Even if the work was minor work within the meaning of s 110 of the SSM Act, it required approval by the owners corporation at a general meeting passed by ordinary resolution. By reason of s 108(2) of the SSM Act, the work should not have been done prior to the passing of a special resolution at a general meeting of the owners corporation; including a [further] exclusive use by-law under s 142 of the SSMA 2015.

69 In any event, it was not made clear in submissions which of the Tribunal's findings are said to be against the weight of evidence. We are of the view that in light of the owners corporation's minutes of the annual general meeting of 22 February 2022 and the Forensic Electrical Report, the Tribunal was entitled to come to a view that the owners corporation did not unreasonably refuse the making of the by-law particularly as the by-law was designed to sanction the unauthorised work already carried out by the appellants retrospectively.

70 In our view, there was no legal error in the decision of the Tribunal that it was not satisfied that the owners corporation was unreasonable in refusing the proposed by-law. Further, absent a serious error on the part of the Tribunal, we would not grant leave to appeal in this matter. It is clear that the majority lot owners had legitimate concerns about the by-law and the way in which the appellants proceeded to install significant cabling without consent and approval of other lot owners.

71 We conclude that it was open to the Tribunal to refuse to make an order under s 149(1). These considerations do not mean that the appellant is prevented from putting forward any other by-law, seeking approval for other options to connect to the main power box to achieve their power supply of 200amps. For these reasons we decline to grant leave to appeal and dismiss the appeal.

Costs

72 The Appeal Panel considers that there should be no order as to costs with the intention that each party pay its own costs.

73 If a party wishes to seek an order for costs we make the following directions:

(1) The applicant for costs (costs applicant) is to file and serve any evidence and submissions on costs within 7 days of the date of publication of these orders;

(2) The respondent to the costs application (costs respondent) is to file and serve any evidence and submissions in reply within 14 days of the date of publication of these orders.

(3) The costs applicant is to file and serve any submissions in reply, if any, within 21 days from the date of publication of these orders;

(4) The submissions of the parties are to include submissions about whether the Appeal Panel can dispense with a hearing of the costs

application pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013.

(5) The Appeal Panel will decide whether a hearing can be dispensed with, or whether a hearing on the question of costs should be conducted in person.

(6) In the event a hearing can be dispensed with, the Appeal Panel will decide the question of costs on the papers and the decision will be published to the parties in due course.

The Appeal panel orders that:

(1) Leave to appeal is refused.

(2) The appeal is dismissed.

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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