Civil and Administrative Tribunal

New South Wales

Case Name:	Colman v The Owners – Strata Plan 61131
Medium Neutral Citation:	[2023] NSWCATAP 308
Hearing Date(s):	19 September 2023
Date of Orders:	17 November 2023
Decision Date:	17 November 2023
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member G Ellis SC, Senior Member
Decision:	1. Leave to appeal is refused. 2. The appeal is dismissed. 3. Subject to order (4), the appellant is to pay the respondent's costs of the appeal, on the ordinary basis, as agreed or assessed. 4. If either party wishes to contend that a different costs order should be made, order (3) ceases to have effect and the following orders apply: (a) Any application for a different costs order is to be provided, to the Tribunal and the other party, supported by submissions (not exceeding five pages in length) and evidence, within 14 days of the date of these orders. (b) Any submissions (not exceeding five pages in length) and evidence in response are to be provided, to the Tribunal and the other party, within the following 14 days.

(c) Any submissions (not exceeding two pages in length) and any evidence in reply are to be provided, to the Tribunal and the other party, within the following 7 days.

(d) Each party's submissions should indicate whether it is agreed that costs should be determined on the papers, without the need for a further hearing.

Catchwords:

APPEALS – Adequacy of reasons

LAND LAW – Strata title – By-laws - Interpretation of by-law – Whether by-law is an "instrument" for the purposes of the Interpretation Act 1987 (NSW)

WORDS AND PHRASES – "Instrument"

Legislation Cited:

Anti-Discrimination Act 1977 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW)
Interpretation Act 1987 (NSW)
Residential (Land Lease) Communities Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Titles Act 1973 (NSW)

Cases Cited:

Collins v Urban [2014] NSWCATAP 17
Conroy's Smallgoods Pty Ltd & Anor v Channel Seven Adelaide Pty Ltd [2007] SASC 76; 97 SASR 14
Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250; 103 NSWLR 160
Endre v The Owners – Strata Plan No. 17771 [2019] NSWCATAP 93
Goodwin v Commissioner of Police [2012] NSWCA 379
John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Mitchell v Cullingral Pty Ltd [2012] NSWCA 389
New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231; 100 NSWLR 578
Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157

	Stolfa v Owners Strata Plan 35042 [2009] NSWSC 589 The Owners – Strata Plan 32735 v Heather Lesley-Swan [2012] NSWSC 383 The Owners – Strata Plan No 63607 v Kinsella [2022] NSWCATAP 184 The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207; 70 NSWLR 344 The Owners Strata Plan No 80412 v Vickery (No 2) [2019] NSWCATAP 97 Thomson v The Owners – Strata Plan No 87812 [2020] NSWCATAP 132 Waterford v The Commonwealth (1987) 163 CLR 54; [1987] HCA 25 Whisprun v Dixon [2003] HCA 48 YBOS Pty Ltd t/as BIG4 Tweed Billabong Holiday Park v Creek [2020] NSWCATAP 284
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Gary Mark Colman (Appellant) The Owners – Strata Plan 61131 (Respondent)
Representation:	Counsel: D Elliott (Respondent) Solicitors: Appellant (Self-represented) Grace Lawyers (Respondent)
File Number(s):	2023/00212397
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial
Citation:	[2023] NSWCATCD
Date of Decision:	07 June 2023
Before:	G Sarginson, Senior Member

File Number(s): SC 21/39322

REASONS FOR DECISION

Outline

1 This is an internal appeal, under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (the NCAT Act), against a decision made in the Consumer and Commercial Division of the Tribunal dismissing an application by a lot owner relating to work carried out on the rooftop common area of a strata-titled building in Pyrmont.

2 Having considered the documents lodged by the parties and both the written and oral submissions, we have determined that there was no error of law and that there is no basis for granting leave to appeal.

Background

3 This dispute is between the owner of Lot 147 (the appellant) and the owners corporation (the respondent) in relation to a strata-titled building comprising 279 lots. Lot 147 is a residential apartment on level 10 with a title that included a rooftop terrace on level 11, comprising an eastern and western terrace, separated by a corridor. There are also common property areas on level 11. The genesis of the dispute was in 2019 when the respondent approved repairs to an expansion joint and associated works at the western terrace.

4 After 16 December 2019, when that work commenced, the builder discovered that waterproofing was necessary. The appellant instructed that builder to do extra work at his expense, which work involved common property. It was not until after that instruction was given that the respondent became aware of those circumstances, with the result that the respondent had not provided consent for that work and no common property rights by-law had been passed.

5 On each of 24 December 2019, 31 December 2019, and on 7 January 2020 the appellant submitted a Building Works Application Form. On 29 May 2020, by-law 44, which had been passed at the Annual General Meeting (AGM) held on 3 December 2019, was registered.

6 On 16 November 2020 the appellant proposed five common property rights by-laws for the AGM to be held on 14 December 2020. At that meeting, three of the proposed by-laws (52, 53 and 54) were passed but two (55 and 56) were defeated.

7 On 30 December 2020 and 22 February 2021 the appellant submitted further Building Works Application Forms but no approval was given by the respondent at a general meeting for the works the subject of those applications to be undertaken.

8 In an application lodged in the Tribunal on 16 September 2021, the appellant sought 12 orders:

(1) A declaration under s 127 and an order under s 126 of the *Strata Schemes Management Act 2015* (NSW) (the SSMA) in relation to the 30 December 2020 Building Works Application Form.

(2) The same orders in relation to the 22 February 2021 Building Works Application Form.

(3) Orders "finding" that certain works were "minor works" and that the respondent had unreasonably refused consent to those works, plus an order approving those works.

(4) An order that the previous order be approved "to date from 16 December 2019".

(5) An order under s 126 requiring the respondent to consent to the works covered by the previous two orders.

(6) An order "noting" that the appellant has ongoing responsibility for the maintenance and repair of the works covered by order 3.

(7) An order "declaring" that work covered by the 24 December 2019 Building Works Application Form was "minor work" under s 110, or a "finding" under s 126 that such work was "minor work" to which the respondent unreasonably refused consent, and "requiring" the respondent to consent to that work. We note that the application used the term "minor work", although s 110 of the SSMA deals with "minor renovations".

(8) A "finding" that the respondent damaged lot property of the appellant and an award of damages, including exemplary and aggravated damages.

(9) Various "findings" that the respondent had breached its duty to maintain and repair common property, causing damage to the appellant's lot.

(10) In the alternative to (9), similar findings under s 232 including a breach of s 106 and negligence.

(11) Damages under s 232, for "loss of use and enjoyment" of the appellant's lot, and "negligent acts and failures and for causing a private nuisance", which included a claim for aggravated and exemplary damages.

(12) An order for costs and an order that the respondent not impose a levy on the appellant in respect of its legal costs of the proceedings.

9 The reasons why the application was dismissed may summarised as follows:

(1) Section 126 did not apply as there had been no relevant refusal at a general meeting of the respondent,

(2) The works in respect of which the appellant sought orders were not "minor renovations" covered by s 110,

(3) By-law 44 did not authorise the works,

(4) There had been no breach of s 106 by the respondent, and

(5) There was no basis for any award of damages whether for nuisance or otherwise.

Scope and nature of internal appeals

10 Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) of the NCAT Act. In *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) the Appeal Panel set out at [13] listed of questions of law as:

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

11 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 Sch 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).

12 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins)*, 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.

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

14 In *Collins,* at [84], the Appeal Panel stated 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.
>
> either with or without further evidence, in accordance with the directions of the Appeal Panel.

Documents

15 On 3 July 2023 the Tribunal received the Notice of Appeal, accompanied by 12 pages setting out the grounds of appeal and the basis upon which leave to appeal was sought, plus other documents. The respondent filed its Reply to Appeal on 20 July 2023. On 25 August 2023 the Tribunal received submissions for the appellant, comprising 15 pages of submissions, a 27-page table, and two folders containing 953 pages of documents. That was followed

by the respondent's submissions dated 9 September 2023 and the appellant's submissions in reply dated 15 September 2023.

Grounds of Appeal

16 The first ground of appeal was expressed as follows:

> The Tribunal erred in law in that it constructively failed to exercise jurisdiction by not addressing material issues and overlooking material evidence and mischaracterising evidence in a material way affecting the Tribunal's decision of the matters in dispute in the Application. The Tribunal [J6] misdescribed and delimited too narrowly the matters the Tribunal needed to consider to decide the Application (and in fact did too narrowly decide), leading to the Tribunal erring in law by acting upon wrong principle, allowing extraneous or irrelevant matter to guide or affect the reasoning, leading to factual errors that were unreasonably arrived at and clearly mistaken on inter alia the following matters:

17 Those words were followed by five pages of details said to support that ground of appeal.

18 The second ground of appeal is set out below.

> The Tribunal has not given adequate reasons in the Principal judgment on why it has not identified, not addressed and not accepted the extensive specific Applicant's submissions (as raised above) on matters of fact and law central to the Tribunal's decision, which are material matters on material issues raised and submitted by the Application before the Tribunal.

19 Leave to appeal was also sought on two grounds: (1) that the decision was not fair and equitable, and (2) that the decision was against the weight of evidence.

Time to appeal

20 The challenged orders were made on 7 June 2023. As the Notice of Appeal was received on 3 July 2023, the appeal was commenced within the 28-day requirement of r 25 of the *Civil and Administrative Tribunal Rules 2014* (NSW).

Hearing

21 Unusually, a full day was allocated to the hearing of the appeal. Having identified the relevant documents, the Appeal Panel proceeded to hear oral submissions from the appellant until 12.50pm. When the hearing resumed, counsel for the respondent made submissions, followed by the appellant in reply, with the hearing of the appeal concluding at 4.15pm. As a result, each party had ample opportunity to speak in support of their case and to respond to the case of the other party.

Appellant's submissions

22 The matters contained in the written submissions of the appellant may be distilled in the following propositions:

(1) If a material issue has not been addressed or material evidence has been overlooked or if the Tribunal has failed to address and determine the issues, there is a constructive failure to exercise jurisdiction which is a question of law: *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [9]; *Goodwin v Commissioner of Police* [2012] NSWCA 379.

(2) Works required by s 106(1) of the SSMA do not require compliance with s 108: *Stolfa v Owners Strata Plan 35042* [2009] NSWSC 589.

(3) There was a failure to identify the "actual ingredients" of the dispute.

(4) The interpretation and application of ss 106, 108, 122, and 232 of the SSMA was not correct.

(5) There were deficiencies in relation to the application of by-laws 22.4, 33 and 44.

(6) There was a failure to address the applicant's claim for damages.

(7) The reasons provided were not adequate.

23 In oral submissions, when asked to summarise the contended errors of law at the outset of his oral submissions, the appellant nominated two matters. First, was the adequacy of the reasons provided at first instance.

24 Secondly, it was suggested that there were errors made in construing provisions in the SSMA, namely that (1) in relation to s 106, the decision in *Seiwa* (that is, *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157) was not applied, (2) that s 108 was incorrectly said to apply, and (3) that ss 110, 111, 122, 126, 127, 229, 232, 240 and 241 were misconstrued.

25 During oral submissions, a further question was identified as to the proper construction of by-law 44, which the appellant maintained authorised all of the works carried out by the appellant between December 2019 and May 2020.

26 We do not endeavour to summarise matters of detail in relation to factual aspects raised in the appellant's submissions because referring to some but not all may be incorrectly taken to mean that only some aspects of the appellant's case have been considered and that those not mentioned had been overlooked.

Respondent's submissions

27 After summarising the background to the proceedings and outlining the orders sought by the appellant, the findings at first instance were summarised, and the law in relation to internal appeals on a question of law and for leave to appeal was set out. The subsequent submissions may be summarised as follows:

(1) The appellant was disputing findings of fact, but a wrong finding of fact does not constitute an error of law: *Waterford v The Commonwealth* (1987) 163 CLR 54; [1987] HCA 25.

(2) There is no obligation to address every argument or trawl through the evidence: *Conroy's Smallgoods Pty Ltd & Anor v Channel Seven Adelaide Pty Ltd* [2007] SASC 76; 97 SASR 14 (*Conroy's*) at [367].

(3) "The grounds of appeal and submissions filed in support of them are prolix and do not identify the errors of law with any precision."

(4) The appellant does not appear to dispute the finding that there must be a refusal of a motion put to a general meeting of the respondent for s 126 of the SSMA to apply.

(5) Where the works carried out go beyond the repair of common property, s 126 cannot be used to override s 108: *Endre v The Owners – Strata Plan No 17771* [2019] NSWCATAP 93; *Thomson v The Owners – Strata Plan No 87812* [2020] NSWCATAP 132.

(6) The appellant does not appear to dispute the finding that the Tribunal does not have the power to make declarations, other than under s 127, which is limited to "cosmetic work" (s 109) or "minor renovations" (s 110), and the subject work cannot be considered to involve minor renovations.

(7) The appellant does not appear to dispute the defeat of proposed by-laws 55 and 56 at the AGM held on 14 December 2020.

(8) The appellant's claim for damage to lot property when repairing common property is unclear as no claim can arise from the demolition of common property and the appellant did not lead evidence quantifying his loss.

(9) Likewise, the claims for damages under s 106(5) and for nuisance are also unclear, there was no evidence of any breach of s 106(1), and no evidence quantifying the appellant's loss was led.

(10) Since r 38A(2) of the *Civil and Administrative Tribunal Rules* required the Appeal Panel to apply the cost provisions applicable at first instance, the appellant should be ordered to pay the respondent's costs of this appeal.

28 In oral submissions, after referring to documents that were said to be key documents, reference was made to the statutory regime contained in ss 108-

111 of the SSMA. It was then submitted that s 126 of the SSMA has requirements which must be met before the Tribunal can make an order and that those requirements had not been met. That was said to have been the conclusion at first instance and no error in relation to that conclusion had been shown.

29 Further, it was observed that the suggestion that by-law 44 validated all work as at the date of registration was dealt with (at [165]-[167]) and submitted that the heading of that by-law "Past works roofing" could and should be used in the interpretation of that by-law. Submissions were also made as to the operation of s 127 and it was contended that the subject works were not minor renovations but, if they were, there was no evidence of compliance with by-law 33, which, as stated in its preamble"

> "… provides a programme for an Owner to seek approval from the Owners Corporation to carry out works to their Lot and regulate their maintenance, repair and replacement. ..."

30 As to the claim for damages, it was said that (1) the evidence of costs incurred was inadequate, (2) that decisions such as *The Owners – Strata Plan 32735 v Heather Lesley-Swan* [2012] NSWSC 383 and *The Owners – Strata Plan No 63607 v Kinsella* [2022] NSWCATAP 184 established that a lot owner cannot make a claim in respect of work done by the lot owner on common property, and (3) that there was insufficient evidence that there was work needing to be done on common property.

Submissions in reply

31 It is difficult to summarise the 13-page written submission in reply: (1) reference was made to aspects of the evidence, (2) matters raised in the earlier written submissions were repeated, and (3) there were detailed responses to various paragraphs in the respondent's written submissions.

32 In oral submissions in reply, it was contended that a by-law, once made, confirmed, and published became binding and could only be altered by other by-laws. Reference was made to *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; 70 NSWLR 344 at [44]. The appellant maintained that a by-law meant what it said and applied unless and until changed.

33 A submission was also made that work required by s 106 of the SSMA does not require authorisation under s 108 with the contended result that, once s 106 applies, s 108 is no longer relevant. Reference was made to the decision in *Endre v The Owners – Strata Plan No. 17771* [2019] NSWCATAP 93.

Consideration

34 It is necessary to first examine the reasons which are the subject of challenge in this appeal. Those reasons, which span 68 pages, briefly set out the context of the dispute and then detail the evidence over the first 35 pages. That is followed by a summary of each of the orders sought by the applicant. After considering what is common property and what is lot property, the relevant statutory provisions are set out, together with reference to the relevant case law. From page 57 (para [168]), the reasons set out the decision in relation to the various claims made and orders sought before concluding, at page 66 (para [220]), that the applicant had failed to establish any of the causes of action raised in the proceedings.

35 Before considering the appellant's challenge to those reasons, three matters need to be noted.

36 First, that an appeal to an Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. That point is made clear by the Tribunal's Guideline 1, Internal Appeals (which can be found on the Tribunal's website) which includes the words: "an appeal is not an opportunity to have a second go at a hearing".

37 Secondly, that it is not sufficient for an appellant to disagree with the outcome and to contend that there should have been a different outcome: an appellant must demonstrate either that an error was made on a question of law or that there is a basis warranting a grant of leave to appeal.

38 Thirdly, that a court or tribunal is not obliged to refer to every piece of evidence or to respond to every submission made by a party. As Allsop P (as he then was) observed in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2]:

> [A] judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving

> the overall controversy. The need for coherent and tolerably workable reasons sometimes requires a truncation of reference and expression. Judgment writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved …

39 As was observed by Gleeson CJ, McHugh, and Gummow JJ in *Whisprun v Dixon* [2003] HCA 48 at [62]:

> A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue.

40 In *Conroy's* at [367], after considering the relevant authorities, Perry J summarised the position as follows (citations omitted):

> In his or her reasons, the trial judge does not have to deal with every item of evidence, every issue raised and every argument.
>
> The judge should make findings of fact which are sufficient to support the conclusions which are ultimately reached. Where those findings depend upon demeanour of witnesses, the judge should indicate this plainly to be so, but at the same time he or she should strive to buttress any such findings by reference to objective features of the evidence or objective reasoning.
>
> A trial judge is not obliged to trawl through the evidence and arguments advanced by the losing party and explain why it has been rejected.
>
> However, if there is a body of evidence, or even the evidence of a single witness, advanced by a party on an important issue and a different body of evidence or different evidence given by a single witness by an opposing party, the trial judge should explain why one has been preferred over the other.
>
> At the end of the day, the most important consideration is that the reader should not be left to speculate as to which of a number of possible "routes have been taken to the conclusion expressed".

41 The applicable test for the adequacy of the reasons provided at first instance was set out in *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231; 100 NSWLR 578 at [66] which indicates that it is necessary to consider not the optimum level of detail but "a minimum acceptable standard". At [71], that minimum acceptable standard was said to require:

> (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
>
> (b) the Tribunal's understanding of the applicable law, and
>
> (c) the reasoning processes that lead the Tribunal to the conclusions it made.

42 It is clear the reasons challenged in this appeal follow that sequence of considering the evidence, then the relevant law, before indicating conclusions and providing reasons for those conclusions.

43 The appellant took umbrage at the reasons saying, at [4], that the orders sought, evidence, and submissions were set out in a "prolix, convoluted and confusing manner". Our review of those documents, and the submissions made in support of this appeal, suggest that description is accurate. It is necessary to acknowledge that proposition because it was under the difficulty thereby created that the first instance reasons had to be prepared.

44 The reasons clearly meet the acceptable standard and reflect the industry and diligence required by Tribunal members when confronted with a significant volume of documents and a multiplicity of issues which were not presented in a concise manner. We are satisfied that the reasons adequately set out the Tribunal's reasons for decision on the issues which dictated the outcome of the application.

45 Once a conclusion has been reached that there was no failure to provide adequate reasons, any attempt to delve into the factual aspects would involve a reassessment of the case put at first instance which is not appropriate.

46 To the extent that the reasons deal with questions of statutory construction, we are unable to discern any error of law. Notwithstanding that the appellant asserted that the Tribunal had misconstrued the provisions of the SSMA, the appellant did not identify in any coherent way any respect in which the Tribunal had misapplied or misconstrued any provision of the SSMA and there is no error apparent to us.

47 In particular, we do not accept that the Tribunal misunderstood or misapplied ss 106 and 108 or the respective circumstances in which each of those provisions applied. The propositions set out at [22(2)] and [33] above are not controversial. However, those propositions do not assist the appellant's case.

48 Nor do we accept the proposition, which the appellant appeared to rely upon in his oral submissions, that s 232(2)(b) of the SSMA has the effect that a request for approval to minor renovations pursuant to s 110, or for the passing of a

special resolution authorising changes to common property pursuant to s 108, is, for the purposes of s 126, deemed to have been refused after two months.

49 Section 232(2) provides:

> (2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

50 That provision has effect "for the purposes of" s 232. It has no operation in relation to s 126.

51 It remains to consider the question whether the Tribunal misconstrued or misapplied by-law 44.

52 By-law 44, which, as we have noted, was approved by special resolution of the owners passed at a General Meeting on 3 December 2019 and registered on 29 May 2020, extends over six pages. It is headed "44 Past Works Roofing". It contains three parts and one schedule.

53 The first part is headed "Preamble". It consists of one clause, 1.1, which provides:

> 1.1 The purpose of this by-law is to:
>
> (a) Provide a programme for the seeking of approval from the Owners Corporation to the carrying out of Works to a Lot and to regulate the maintenance, repair and replacement of those Works retrospectively or otherwise.
>
> (b) Delegate to the Strata Committee the power to approve Minor Works applications.

54 Part 2 is headed "Definitions and Interpretation". Clause 2.1 contains definitions. Relevantly "Past Works" and "Works" are defined in paragraphs (k) and (m) of clause 2.1 (emphasis in the original):

> "(k) **Past Works** means any works undertaken to a Lot or the common property at the date of registration of this by-law, including but not limited to:
>
> (i) works listed in **Schedule 1**; and
>
> (ii) all ancillary works in relation to or in connection with the above.

…

(m) **Works** means Past Works."

55 Clause 2.2 contains interpretative provisions, which do not include any provision regarding the use of headings in the interpretation of the by-law.

56 Part 3 is headed "Conditions". Clause 3.1 provides:

> "**Past Works**
>
> The respective Owners have exclusive use and enjoyment of those parts of the common property occupied by the Past Works and special privilege to retain the Past Works subject to the provisions of this by-law."

57 Clauses 3.2 and 3.3 impose requirements regarding "Works" and clause 3.4 imposes "Specific Conditions" regarding Past Works. Clause 3.4.1 provides that a lot owner warrants that "to the best of their knowledge" the Past Works were carried out with due care and skill, and in compliance with the law, by persons who were properly qualified to carry out such works and are comprised of material which are good and suitable for the purpose. Clause 3.4.2 requires, among other things, the lot owner to maintain the Past Works and "any part of the common property affected by the Past Works" and to indemnify the Owners Corporation against "any costs or losses arising out of or in connection with the Past Works".

58 Schedule 1 is headed "Schedule of Past Works" and lists, in respect of 13 lots including Lot 147, "Roofing Works which covers open area of the lot". No other works are referred to.

59 The appellant maintained that any work on his lot or with respect to the common property, which he carried out before the registration of the by-law on 29 May 2020 and, relevantly for present purposes, after the meeting at which the making of the by-law was approved, was "Past Works" within the meaning of by-law 44 and therefore approved with effect from the date of registration of by-law 44 regardless that it could not have been in the contemplation of the lot owners at the time they passed the resolution approving by-law 44.

60 The respondent submitted that by-law 44 should not be construed as intended to confer upon lot owners, from 3 December 2019 until the by-law was registered, carte blanche to carry out any work on lot property or common property without obtaining the approval of the owners corporation. The

respondent submitted that the by-law should be construed by reference to the heading “Past Works Roofing” and its retrospective effect in approving alterations to lots and common property should be limited to the roof works listed in schedule 1 to the by-law and similar works which may have been carried out before the meeting at which the by-law was adopted.

61 In considering the operation of by-law 44, the Tribunal set out, at [165] of the reasons, the heading to by-law 44 and the preamble. The Tribunal held at [166] – [167]:

> “166 However, the substance of the by-law (although there is a "schedule of past works, which includes "roofing works which covers open area of the lot") does not specify what works are purportedly approved, and cannot be interpreted as an automatic approval of all past works done by a Lot owner to the area identified in the schedule. In any event, the by-law is subject to a number of conditions. The generic description "roofing works" does not engage with the extent and magnitude of the alterations to Lot property that are the subject of this dispute.
>
> 167 Further, the single sentence "delegate to the Strata Committee the power to approve Minor Works applications" cannot contradict the provisions of the SSM Act previously referred to. There is also no definition in the by-law as to what "Minor Works" are. Even if the owners corporation had the power under s 10 of the SSM Act to delegate to the strata committee the power under s 110 to consent to "minor renovations" without a resolution being passed at a general meeting (which is highly doubtful, considering the limits of delegation of powers under s 10 (2) of the SSM Act) no delegation can occur in respect of any matter that requires a special resolution passed at a general meeting, such as works under s 108 (1) of the SSM Act; and a common property rights by-law under s 142 of the SSM Act), Clause 1.1 (b) is meaningless because there is no definition of "Minor Works".”

62 Section 35 of the *Interpretation Act 1987* (NSW) relevantly provides:

> **35 Headings etc**
>
> (1) Headings to provisions of an Act or instrument, being headings to—
>
> (a) Chapters, Parts, Divisions or Subdivisions into which the Act or instrument is divided, or
>
> (b) Schedules to the Act or instrument,
>
> shall be taken to be part of the Act or instrument.
>
> (2) Except as provided by subsections (3) and (4)—
>
> (a) a heading to a provision of an Act or instrument (not being a heading referred to in subsection (1)),
>
> (b) matter within a provision of an Act or instrument (being matter in parentheses that merely sets out a heading to or describes the effect of some other provision of the Act or instrument or of some other Act or instrument), or

(c) a marginal note, footnote or endnote in an Act or instrument,

shall be taken not to be part of the Act or instrument.

…

(5) This section does not limit the application of section 34 in relation to the use of any heading, marginal note, footnote or endnote in the interpretation of the provision to which the heading, marginal note, footnote or endnote relates.

63 "Instrument" is defined in s 3(1) of the *Interpretation Act* as:

(1) In this Act—

instrument means an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.

64 In *YBOS Pty Ltd t/as BIG4 Tweed Billabong Holiday Park v Creek* [2020] NSWCATAP 284, the Appeal Panel held that a Community Rule adopted by a Residential Community established under the *Residential (Land Lease) Communities Act 2013* (NSW) (the RLLC Act) was a "rule or other instrument" made under the RLLC Act within the meaning of s 54(1)(b) of the *Anti-Discrimination Act 1977* (NSW) (the ADA). Section 54(1) of the ADA excludes from the operation of that Act:

anything done by a person if it was necessary for the person to do it in order to comply with a requirement of—

(a) any other Act, whether passed before or after this Act,

(b) any regulation, ordinance, by-law, rule or other instrument made under any such other Act,

65 The Appeal Panel noted that in *Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207, the Court of Appeal had considered whether by-laws of a strata scheme under the *Strata Titles Act 1973* (NSW) were "instruments" subject to the rules of construction applicable to statutory provisions and concluded:

"72. The question of whether the by-laws constitute delegated legislation or a statutory contract was not fully argued. As the foregoing discussion reveals, the decision on their characterisation may be a distinction without a substantial difference from the interpretative perspective. It is not appropriate to express a final view on these issues. It is sufficient to say that on either approach the interpretation of Special By-Law 21 had to be approached on a basis which was consistent with the statutory scheme and that caution had to be exercised in considering surrounding circumstances."

66 The Appeal Panel stated:

"94 Although the decision in *Tate* did not definitively determine that a strata scheme bylaw was delegated legislation rather than a statutory contract, it is

> our view that the decision gives guidance on the characteristics that a rule (or bylaw) would ordinarily require to achieve the status of delegated legislation or an instrument "made under" an Act."

67 The Appeal Panel referred to the Court of Appeal decision in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250; 103 NSWLR 160, at [56], where Basten JA (with whom Macfarlan JA and Fagan J generally agreed) referred to a by-law as being the result of a "statutory conferral of power".

68 The Appeal Panel concluded that the Community Rule was a rule or other instrument made under the RLLC Act.

69 We do not find it necessary to determine whether by-law 44 is an "instrument" for the purposes of the *Interpretation Act.* In our view, if s 35 of the *Interpretation Act* is applicable to by-law 44, the heading "Past Works Roofing" would form part of the by-law pursuant to s 35(1). By-law 44 is a separate and independent part or sub-division of the by-laws, itself divided into three Parts.

70 If s 35 of the *Interpretation Act* is not applicable to by-law 44, there is no reason to ignore the heading when interpreting the by-law.

71 In our view, to the extent that the by-law expresses the owners corporation's approval of pre-existing works by lot owners it should be narrowly construed as limited to the past works identified in the schedule, that is the roofing works covering open areas of the 13 lots listed in the schedule. Even if it were open to the owners corporation to enact a by-law which provided general approval to unspecified works which had yet to be constructed, it would require the clearest and most unambiguous wording to effect that result. By-law 44 is neither clear nor unambiguous.

72 The appellant contended that by-law 44 applied to "any work undertaken to a Lot" prior to the date of registration. That construction adopts the broadest and most literal interpretation of the definition of "Past Works" and ignores the context and apparent intention of the by-law. It also ignores the extraordinary consequences of that interpretation, which are unlikely to have been intended by the lot owners when approving by-law 44.

73 To treat by-law 44 as applying to work that was undertaken but never approved, merely because that work was completed prior to the registration of

by-law 44, would be contrary to the clear intent of the by-law which is, as the Preamble indicates, to provide an approval process. Thus, we consider that by-law 44 is confined to work covered by the words “Past Works Roofing” or which has been approved by either the owners corporation or the strata committee and not merely completed prior to the date of registration of that by-law.

74 As we agree with Tribunal’s conclusion that by-law 44 does not have any operation in relation to the works carried out by the appellant the subject of the proceedings, no error with respect to a question of law has been established in relation to the application of by-law 44.

75 As the appellant’s assertions, that the decision was not fair and equitable, and was against the weight of the evidence, involved the same arguments in a different guise, they do not require further consideration.

76 The appellant also sought to challenge the first instance costs order made on 2 August 2023. However, as the appeal has not been successful, there is no basis for disturbing that order.

77 In relation to the costs of the appeal, an application of r 38A(2) of the *Civil and Administrative Tribunal Rules* suggests that the respondent is entitled to an order that the appellant pay its costs of the appeal. However, as submissions as to costs were dependent on the outcome of the appeal, the practical course is to make an order but provide an opportunity for either party to seek a different order in relation to costs should they so desire.

78 The appellant sought an order that he be shielded from any levy relating to the respondent’s costs of this appeal. This claim was obviously based on the provisions of s 104 of the SSMA. Decisions such as *The Owners - Strata Plan No 80412 v Vickery (No 2)* [2019] NSWCATAP 97, at [25], suggest that s 104 operates without the need for any order by the Tribunal. In any event, the appellant is not entitled to such an order as he has not been a successful party in this appeal.

79 **Orders**

80 For the reasons set out above, the orders that will be made are as follows:

(1) Leave to appeal is refused.

(2) The appeal is dismissed.

(3) Subject to order (4), the appellant is to pay the respondent's costs of the appeal, on the ordinary basis, as agreed or assessed.

(4) If either party wishes to contend that a different costs order should be made, order (3) ceases to have effect and the following orders apply:

81 (a) Any application for a different costs order is to be provided, to the Tribunal and the other party, supported by submissions (not exceeding five pages in length) and evidence, within 14 days of the date of these orders.

82 (b) Any submissions (not exceeding five pages in length) and evidence in response are to be provided, to the Tribunal and the other party, within the following 14 days.

83 (c) Any submissions (not exceeding two pages in length) and any evidence in reply are to be provided, to the Tribunal and the other party, within the following 7 days.

84 (d) Each party's submissions should indicate whether it is agreed that costs should be determined on the papers, without the need for a further hearing.

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