



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners – Strata Plan No. 12185 v Brown

Medium Neutral Citation: [2025] NSWCATAP 51

Hearing Date(s): 10 December 2024

Date of Orders: 13 March 2025

Decision Date: 13 March 2025

Jurisdiction: Appeal Panel

Before: J Redfern PSM, Senior Member
G Burton SC, Senior Member

Decision: (1) Leave to appeal (to the extent, if any, that leave is required) is refused.

(2) The appeal is dismissed.

Catchwords: REAL PROPERTY – STRATA MANAGEMENT –
challenge to air conditioning by-law – Strata Schemes
Management Act 2015 (NSW) s 149

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 NSW
Strata Schemes Development Act 2015 (NSW)

Cases Cited: Alexandria Landfill Pty Ltd v Transport for NSW (2020)
103 NSWLR 479; [2020] NSWCA 165
Barefoot Timber Pty Ltd v Wright [2024] NSWCATAP
252
Bimson, Roads & Maritime Services v Damorange Pty
Ltd [2014] NSWSC 734
Bruce v Knight [2021] NSWCATAP 224
BZE v NSW Public Guardian [2015] NSWCATAP 64
Capcelea v The Owners – Strata Plan No 48887 [2019]
NSWCATCD 27

Collins v Urban [2014] NSWCATAP 17
 Donohoe v Albulario [2025] NSWSC 9
 Dranichnikov v Minister for Immigration and Migration
 Affairs [2003] HCA 26
 FVA v Commissioner for Police, NSW Police Force
 [2024] NSWCATAP 127
 Gelder v The Owners – Strata Plan No 38308 [2020]
 NSWCATAP 227
 Hannaford v Commonwealth Bank of Australia [2014]
 NSWCA 297)
 House v The King [1936] HCA 40;(1936) 55 CLR 499
 Hungry Jack's Pty Ltd v Fourtounas [2020] NSWCA
 325
 John Prendergast & Vanessa Prendergast v Western
 Murray Irrigation Ltd [2014] NSWCATAP 69
 Khan v Kang [2014] NSWCATAP 48
 Knight v The Owners- Strata Plan 208 [2022]
 NSWCATCD 170
 Kostas v HIA Insurance Services Pty Ltd (2010) 241
 CLR 390; [2010] HCA 23
 Raslan v Pan [2015] NSWCATAP 12
 Re Minister for Immigration and Multicultural Affairs; Ex
 parte Lam (2003) 214 CLR 1
 Secretary, Department of Family and Community
 Services v Smith (2017) 95 NSWLR 597; [2017]
 NSWCA 206
 Stead v State Government Insurance Commission
 (2008) 161 CLR 141
 The Owners – Strata Plan No 12289 v Donaldson
 [2019] NSWCATAP 213
 The Owners- Strata Plan No 69140 v Drewe [2017]
 NSWSC 845
 Unique Commercial Group Pty Ltd v Cusumano [2024]
 NSWCATAP 204

Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan No. 12185 (Appellant) Lisa Brown (Respondent)
Representation:	Self-representation, L Bowen-strata manager (Appellant) Solicitors:

Jane Crittenden Lawyers (Respondent)

File Number(s): 2024/00353553

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: [2024] NSWCATCD

Date of Decision: 2 September 2024

Before: D Bluth, Senior Member

File Number(s): 2023/00435452

REASONS FOR DECISION

Introduction

- 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 on 2 September 2024.
- 2 The decision relates to an application made by the registered proprietor of Lot 4, Strata Plan No 12185 under s 149(1) of the Strata Schemes Management Act 2015 NSW (SSMA) for approval of a by-law to permit the installation of an air conditioning system to service Lot 4. The proposed air conditioning system comprised two internal air-conditioning units and two external condensers to be affixed to the outer wall of Lot 4. The external walls are part of the common property of the strata scheme and the proposed installation required approval. The Owners - Strata Plan 12185 (the Owners Corporation) refused to approve the by-law at an annual general meeting (AGM) held on 6 July 2023. The owner of Lot 4, Lisa Brown, lodged an application on 17 November 2023 for an order from the Tribunal to approve the by-law. The Owners Corporation opposed the application.

- 3 The proceedings came before the Tribunal on hearing on 27 May 2024. In its orders made 2 September 2024 with written reasons the Tribunal made the requested by-law and further ordered the Owners Corporation to do all things necessary to register the by-law pursuant to s 246 of the SSMA. There is no dispute, and we confirm the implicit finding, that the Tribunal had jurisdiction to deal with the matter under the SSMA.
- 4 The Owners Corporation lodged an appeal, within time, against the decision on 24 September 2024 and applied for a stay of the orders. The Appeal Panel granted a stay on 9 October 2024 and made directions about the conduct of the appeal. Lisa Brown is the respondent to this appeal, and we refer to her in these reasons in that capacity – she of course was the applicant in the primary proceedings. She was legally represented on the appeal and the Owners Corporation was represented by its strata manager and two of its committee members.
- 5 We have refused leave to appeal and otherwise dismissed the appeal. Our reasons follow.

Background

- 6 The Owners Corporation is the body corporate of a strata scheme comprising seven lots and common property at Coogee, an eastern suburb in Sydney, NSW. The strata scheme came into existence on 4 August 1977 with the registration of Strata Plan No 12185.
- 7 The respondent sought approval of a common property rights by-law pursuant to the SSMA to permit her to install two air conditioning units, with the condenser units to be affixed on the external western wall of Lot 4. Approval of a common property rights by-law must be by special resolution at a properly convened general meeting. The motion for approval came before the AGM of the Owners Corporation on 6 July 2023. There is no dispute that the AGM was properly convened or that approval sought was outlined in a motion that related to a common property rights by-law for the purposes of the SSMA. All owners attended the AGM.
- 8 The respondent voted in favour of the motion. The owners of lots 2, 5 and 6 voted against the motion and the owner of lot 3 abstained from voting. The

owners of Lot 1 are recorded as having voted against the motion at the meeting; however, because there is subsequent email correspondence that suggests this may not be the case, this issue is not entirely clear. Ultimately, this is not material as there is no dispute that the motion was not approved because more than 25% of the owners present voted against the motion.

- 9 The parties participated in mediation through NSW Fair Trading on 28 September 2023, which was not successful. On 17 November 2023, the respondent made an application to the Tribunal under s 149(1) of the SSMA, contending that the refusal of the Owners Corporation to make the by-law was unreasonable in the circumstances. As noted, the Tribunal made the requested by-law by order made on 2 September 2024.
- 10 The Owners Corporation appealed the decision; the appeal was lodged 22 days after notification of the decision, which was well within the prescribed period under reg 25(4) of the Civil and Administrative Rules 2014 (NSW), being 28 days. As such, even though the Notice of Appeal states that an extension of time is requested, no such extension is required.
- 11 The Notice of Appeal states that the Owners Corporation appeals in respect of what it is claimed are “inconsistencies” in the decision. It is unclear from the Notice of Appeal whether the Owners Corporation appeals as of right on a question of law, whether leave is sought or whether both claims are made. The Owners Corporation was not legally represented and has not specifically addressed these issues or the requirements for leave in the Notice of Appeal.
- 12 The appeal was listed for call-over on 9 October 2024 and the parties were directed to lodge with the Appeal Registry and to give to the other party all evidence given to the Tribunal at first instance on which that party intended to rely on the appeal and any evidence not provided to the Tribunal at first instance on which the party intended to seek leave to rely at the appeal. The parties were also directed that, if what happened at the hearing at first instance was being relied on in the appeal, a typed transcript of the relevant parts of the hearing, together with the sound recording of the entire hearing, was to be provided.

- 13 The nature and scope of an internal appeal, and whether leave was required or sought, was discussed with the parties at the hearing of the appeal.

Relevant law

- 14 The SSMA provides for the management of strata schemes and the resolution of disputes arising from strata schemes. The owners corporation has the principal responsibility for management of the scheme (s 9 of the SSMA).
- 15 Common property in relation to a strata scheme means any part of a parcel that is not comprised in a lot (s 4 of the SSMA and s 4 of the *Strata Schemes Development Act 2015* (NSW)).
- 16 Section 108 provides that changes may be made to common property of the strata scheme, including alterations or additions, if the changes are approved by special resolution made by the owners corporation specifically authorising the taking of the particular action proposed. Changes to common property are given effect through changes to the by-laws for the strata scheme as provided for in ss 141 to 143 of the SSMA.
- 17 Section 141 provides that an owners corporation may, by special resolution, change the by-laws for the strata scheme. Section 142 provides that a “common property rights by-law” is a by-law that confers on the owner or owner of specified lots in the strata scheme a right of exclusive use of the whole or any specified part of the common property or special privileges in respect of the whole or any specified part of the common property. Section 143 sets out the requirements and effect of common property rights by-laws.
- 18 Section 5(1) relevantly provides that a resolution of an owners corporation is a “special resolution” if it is passed at a properly-convened general meeting and not more than 25% of the value of votes cast are against the resolution.
- 19 If the owners corporation refuses to approve a proposed common property rights by-law, the lot owner may apply to the Tribunal under s 149 of the SSMA for the Tribunal to make an order approving the change.
- 20 The power under s149 of the SSMA is discretionary and provides as follows:

(1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds--

(a) on application made by an owner of a lot in a strata scheme, that the owners corporation has unreasonably refused to make a common property rights by-law, or

(b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or

(c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.

(2) In considering whether to make an order, the Tribunal must have regard to-

(a) the interests of all owners in the use and enjoyment of their lots and common property, and

(b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

(3) The Tribunal must not determine an application by an owner on the ground that the owners corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.

(4) The Tribunal may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.

(5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).

(6) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

- 21 In *Gelder v The Owners – Strata Plan No 38308* [2020] NSWCATAP 227 at [27] (*Gelder*), the Appeal Panel noted that the exercise of this power involves a “two-stage” process. First, there must be a determination on whether the grounds in s 149(1) are established and, if so, the Tribunal must then decide whether an order should be made.
- 22 Given the application the subject of the appeal was made pursuant to s 149(1)(a), the threshold question is whether the refusal to approve an amendment to a common property rights by-law was unreasonable.
- 23 In *Capcelea v The Owners Strata Plan No 48887* [2019] NSWCATCD 27 (*Capcelea*), the Tribunal adopted an integrated approach to be taken when considering whether an order should be made under s 149(1):

55.By the phrase "must have regard to" the NSW legislation explicitly brings into the assessment of unreasonableness the requirement in s 149(2) to have regard to what are potentially competing sets of interests and rights or expectations and to accord those competing sets no inequality of status or consideration.

56. The fundamental assessment, on which the challenging owners bear the onus of proof as further discussed below, is whether or not, taking into account those interests, rights and expectations, the decision to refuse the proposed by-law was unreasonable.

57. But the exercise required by s 149(2), unlike the exercise in *Ainsworth*, requires not only the consideration of an objective rational basis for refusal taking into account the interests of all owners in their lots and the common property but, also, an assessment of that basis by taking into account the rights and expectations of the owners propounding the by-law and anticipating a benefit from them.

58. It is not a simple balancing exercise to test for reasonableness of the proposal being rejected, as the adjudicator engaged in and the Queensland Court of Appeal endorsed, in *Ainsworth*.

59. But it is an exercise in which the unreasonableness of a refusal is assessed by, not only the interests of the refusing owners in their perception and expression of the status quo property rights, but also by the rights and reasonable expectations of the proponent owners that the refusing owners ought (to avoid acting unreasonably) have taken into account in coming to a decision. The Tribunal intrudes into the decision because it is required by the wording of s 149(2) to have regard to the matters in s 149(2) as they presented at the time of the refusal, and on an objective basis, in assessing the quality of the decision made by the refusing owners.

24 Accordingly, *Capcelea* recognises that the Tribunal must first find the refusal is unreasonable before considering the exercise of discretion whether to make an order and, in making the assessment of unreasonableness (or otherwise), the Tribunal must have regard to the factors in s 149(2).

25 Thus, when considering whether to make an order under s 149(1), the Tribunal must engage in two processes; the first involves making a finding of fact; the second involves the exercise of a discretion. The Tribunal must consider the matters in s 149(2) but there is no reason that the Tribunal is confined to those matters when exercising the discretion provided that what is considered is within the limits of the circumstances that can be considered, as described at [37]-[39] and [112]-[113] below.

The proceedings and decision at the primary hearing

26 The respondent was legally represented at the primary hearing by Ms J Crittenden, solicitor. The Owners Corporation was represented by Mr Luke

Bowen, the strata manager. Members of the strata committee of the Owners Corporation participated in the hearing, including the Chair of the committee, Ms Josephine Whyte, and Mr Patrick Whyte, her partner; also made oral representations on behalf of the Owners Corporation.

- 27 On 2 September 2024, the Tribunal made the common property rights by-law tabled by the respondent at the AGM held on 6 July 2023. The Tribunal provided written reasons for the decision dated 2 September 2024. The Notice of Appeal makes submissions by reference to many of the numbered paragraphs in the decision and it is therefore convenient to outline the findings of the Tribunal in detail by reference to those critical paragraphs of the primary reasons.
- 28 The Tribunal summarised the contentions made by the respondent at [5] of the primary reasons. Those contentions were to the effect that three owners voted against the motion, there were no reasons given at the meeting for the owners of the three lots in voting against the motion, the minutes did not set out the reasons for the refusal, no one at the meeting asked questions about the motion and the refusal was unreasonable in circumstances where the terms of the proposed by-law were reasonable. The Owners Corporation and other owners and occupiers of the units were protected because, amongst other things, the work was clearly defined, it was to be carried out in accordance with certain building standards, it required a complying development consent, licensed contractors were to be used, home owners warranty would be obtained and the owner of Lot 4 was required to repair any damage caused to common property and to indemnify the Owners Corporation in respect of any loss or damage.
- 29 The Tribunal noted at [6] that the motion specified the proposed location of the condenser units and provided a description of the work required to affix the units, including the use of trunking enclosing pipes and wires, the location of core holes in the rear wall of Lot 4 and arrangements for draining condensation from the air conditioning unit into the existing drains.
- 30 The primary decision set out the evidence before the Tribunal at [12]-[13]. This comprised, on behalf of the respondent, an affidavit from Lisa Brown sworn 30

January 2024, an affidavit of the owner of Lot 3, Christine Brenna, sworn 6 February 2024, and a report from consulting civil/structural engineer, Raphael Balas, dated 7 May 2024. The Owners Corporation relied on a joint statement of three of the strata committee members, Josephine Whyte, Margret Egger and Elizabeth Herbert, dated 15 March 2024. The respondent provided a statement dated 20 May 2024 in response to the joint statement and attached to her statement the engineer's report dated 7 May 2024.

- 31 The Tribunal noted that a further statement was provided by Ms Whyte on 27 May 2024, after the proceedings were closed and, as such, could not be considered. However, it was also noted at [14] that the submission from Ms Whyte,

“...does not go to anything of relevance but repeats the position of the [Owners Corporation] that it stands by the decision to refuse the by-law due “to the reasons outlined at the AGM and in following discussions”.

- 32 The Tribunal noted at [17] that the parties settled a statement of “agreed” Facts in Dispute and Issues in Dispute. The Owners Corporation disputes that this statement was agreed. However, because the Tribunal used this statement as the basis for dealing with what was identified as the determinative issues as between the parties, it is apt to set out this statement in its entirety as follows:

- (1) Whether the rear wall of the building (on which the motion proposes the condenser units would be fixed) has the structural capacity or adequacy to hold the weight of the condenser unit without causing structural damage to the building?
- (2) Whether the proposed location of the condenser units, having regard to existing fixtures attached to the building, is an inappropriate location for the condenser units?
- (3) Whether potential evaporation from the condenser units is a reasonable basis for not approving the by-law?
- (4) Whether there are frequent complaints to Randwick Council about noise from air conditioners within the local council area, and if so, whether that is a reasonable basis for not approving the applicant's by-law?
- (5) Whether the possibility that other owners will want to install air conditioners if the applicant's by-law is approved is a reasonable basis for not approving the by-law?
- (6) The agreed issue in dispute was whether the respondent has unreasonably refused to make a common property rights by-law having

regard to the interests of all owners in the use and enjoyment of their lots and common property?

- 33 The Tribunal referred to the engineer's report of Mr Ballas provided by the respondent and extracted his opinion at [19] as follows:

In our opinion the west facade of the units at 140 Beach St, Coogee is structurally adequate to support the load from two Daikin outdoor air conditioning condenser units mentioned above which weigh 30kg each provided the following work is carried out:

- (a) The two units to be installed at least two brick courses under the window sills of the two ensuite windows of unit 4 – refer Photo 1(which shows the site of the proposed brackets and condenser units).
- (b) The two units to be spaced at least 300mm apart.
- (c) The units were to be mounted on a standard KIRBY galvanised bracket C-KZG-L which is to be fixed to the external brick skin via three (3) Dynabolts with 90 mm embedment each. The Dynabolts are to be drilled in the middle of the bricks -refer to Appendix "C" (which describes the positioning of the bolts and bracket).
- (d) The work is to be carried out by licenced tradesmen.

- 34 The Tribunal referred at [20] to the joint statement of the three owners for the Owners Corporation, which was summarised by the Tribunal as follows:

- (1) The applicant has lived in the building, renting other apartments before purchasing her apartment, for many years and did not complain about needing air conditioning.
- (2) At the AGM a seven-person conversation took place amongst the committee in discussing various aspects of the application by the applicant and whether they might be resolved.
- (3) The Owners Corporation is concerned with the following issues:
 - (a) the changing of the outward appearance of an historic federation building.
 - (b) the location of the condensers above the building's rear small courtyard will be visible to all residents and visitors to the courtyard.
 - (c) the noise from the condensers would diminish the peaceful enjoyment of anyone using the courtyard and the neighbours due to the proximity of buildings in a built-up area. There was referenced that frequent noise complaints are made to Randwick Council.
 - (d) structural pressures, such as each condenser weighs 30kgs attaching to walls and the age of the walls of approximately 90 years.

- (e) potential damage to walls the building structure of which have a history of water ingress, failed brick ties and anterior water. Building problems were addressed in the years 2005, 2007, 2011 2018 and 2022.
- (f) damp and evaporation issues around the whole building.
- (g) a precedent being set with other owners indicating that they may wish to follow with applications for air-conditioning condensers.

35 The Tribunal also at noted at [21] that the Owners Corporation had provided an email from a neighbour objecting to the proposal of the owner of Lot 4 to install air conditioners.

36 At [25]-[29] the Tribunal set out the approach to be taken when considering an application under s 149(1) of the SSMA.

37 The Tribunal referred to the principles to be applied as summarised at [53] by the Appeal Panel in *Bruce v Knight* [2021] NSWCATAP 224 as follows:

- (1) The reasonableness of the refusal must be assessed by reference to circumstances known at or prior to the passing of the resolution;
- (2) The determination of whether a refusal is unreasonable depends on the conduct of the owners corporation and all the relevant circumstances;
- (3) "Circumstances" are different to "material" and subsequent evidence or material which goes to the circumstances existing at the time of the meeting is admissible;
- (4) The Tribunal is not confined to examination of the material before the meeting; and
- (5) Individual owners can provide evidence of their reasons.

[case citations omitted]

38 The Tribunal also noted that the burden of proof in demonstrating that an Owners Corporation's reasons for refusing a by-law were unreasonable lay with the lot owner (*The Owners- Strata Plan No 69140 v Drewe* [2017] NSWSC 845).

39 The Tribunal referred, with apparent approval, to the decision of SM Ellis in *Knight v The Owners- Strata Plan 208* [2022] NSWCATCD 170 at [74]-[77] and adopted the reasoning in the decision of SM Ellis at [77] as follows:

A lot owner may after the meeting, perhaps with the assistance of a lawyer, present all manner of reasons for opposition to a proposed by-law but it is only those accepted by the Tribunal as being a reason taken into consideration at

the relevant meeting which can go to the question of whether the proposed by-law was unreasonably refused at that meeting. Of course, it must be observed that a lot owner can also provide evidence relevant to what may be called the s 149(2) matters.

40 We note that this is to be read, in its reference to “a reason taken into consideration at the relevant meeting”, consistently with what the Appeal Panel in *Knight* said about “circumstances” and the distinction drawn by the Appeal Panel between “circumstances” and “material”, a matter to which we have referred at [23]-[25] above and refer to further at [112]-[113] below.

41 The Tribunal then considered the available evidence about the reasons for the refusal at [30] and [31] as follows:

30. The minutes of the AGM held on 6 July 2023 show that Motion 17 being the proposed bylaw this subject of these proceedings was defeated. There is no record as to what the owners said regarding the by-law. Hence the affidavits from the applicant and Ms Brennan and the joint statement on behalf of the Respondents. Each tries to recall what was said and by whom and how owners voted, often contradicting each other.

31. It seems to me from noting the comment and the joint statement that a seven person conversation took place amongst the committee all discussing various aspects of the application by the Applicant and whether they might be resolved that there can be no sense in trying to ascertain what happened at the meeting.

42 Having found that it was unable to ascertain the reasons for the refusal because of the paucity of the evidence about this, the Tribunal stated at [32]:

Therefore I will rely on the issues of concern outlined in the joint statement as forming the reasons why the respondent did not approve the by-law and make findings regarding the Facts In Issue.

43 The Tribunal then proceeded to consider each of the Facts in Dispute as recorded in [17] of the reasons.

44 In relation to the first Fact in Dispute, the Tribunal found at [33]-[34]:

33. The first fact is whether the rear wall of the building (on which the motion proposes the condenser units would be affixed) has the structural capacity and adequacy to hold the building of the condenser units without causing structural damage to the building?

34. I note the concerns of the Respondent on this fact. The Respondent relied on the need for brickwork to be undertaken some years ago, especially in relation to a wall on the adjacent building within the scheme. There is no doubt that walls of some 90 years of age will require repointing and rectification overtime. However, the applicant produced an Engineer report who had inspected the site and deemed at the structure of the wall was to support the

loads of the condensers. I find that the wall has the structural capacity and adequacy to hold the weight of the condenser units.

- 45 In relation to the second Fact in Dispute, the Tribunal found that the proposed site was not an inappropriate spot for the condensers and noted that there was no evidence given as to what the condensers would look like and whether they could be seen in part or in whole from the courtyard below [37]. The Tribunal also noted, in coming to this conclusion, that there was no suggestion the condensers would be affixed on the front of the building, nor was it proposed that the condensers would be placed on the ground in the passageway which already looked clogged up [36].
- 46 In relation to the third Fact in Dispute, the Tribunal considered the concern raised was based on an internet question and answer from a heritage consultant but noted there had been no inspection and the question was general. The Tribunal was therefore not satisfied that there was sufficient evidence to suggest that there would be a problem with potential evaporation from the condenser units [39].
- 47 In relation to the fourth Fact in Dispute, the Tribunal found that there was no evidence as to any complaints about noise from air conditioners to Randwick Council and there was no acoustic report provided by the Owners Corporation to support the contention that condensers would make a noise which would breach the noise regulations and cause complaint. The Tribunal noted the letter from the neighbouring strata scheme was only a general supposition that the condensers would be noisy and that the focus of s 149(2) was on the interests of the owners and not on a neighbour's use and enjoyment. As there was no evidence of frequent complaints, the Tribunal found that this was not a basis to refuse the by-law: [40]-[42].
- 48 In relation to the fifth Fact in Dispute about whether other owners would want to install air conditioners if the applicant's by-law was approved, the Tribunal noted an email from the owners of lot 4 attached to an affidavit from the respondent which stated that one of their concerns was that the two condensers not be placed on the footpath outside their unit. The email, which was extracted in the decision, also noted:

I understand all the concerns that have been raised by other owners on the issue but consideration also needs to be given that all modern and renovated dwellings now incorporate air conditioning.

- 49 The Tribunal also referred to an email from a neighbouring property who objected to the air conditioner and who referred to the reality of climate change in the context of the importance of not using power. It is in this context that the Tribunal noted that “climate change is a reality” with more extreme weather events and that no doubt Ms Brown, and a lot of other people (and by implication the other owners of the strata scheme), require air conditioning. The Tribunal concluded at [47]:

And in the circumstances of climate change I find that by allowing this by-law to install condensers may see further applications for by-laws but this was not a reason for the Owners Corporation to reject the by-law.

- 50 On the critical question of whether the Owners Corporation had unreasonably refused to make a common property rights by-law (referred to as the agreed Issue in Dispute), the Tribunal found:

49. The Tribunal is satisfied that the six-page wording of the proposed by-law, when combined with the photo showing the proposed site, is sufficiently specific as to the common property affected by the proposed works. Again, the Tribunal is satisfied that the proposed by-law, if made and registered, would provide sufficient clarity not only for existing lot owners but also for future lot owners. The Tribunal notes the consent of the applicant.

50. In such circumstances as determined by the Tribunal on the Facts in Dispute the Tribunal considers the by-law proposed at the 6 July 2023 AGM was unreasonably refused in that it was not guided by reasonable good sense and was not based on or in accordance with reason or sound judgement.

51. Having determined that the by-law proposal was unreasonably refused, is necessary to consider the matters set out in section 149(2) of the SSMA. As to the interests of all lot owners, the work proposed (namely to erect 2 condensers on the side wall) would only have a minor impact on other lot owners as found by the Tribunal.

52. In relation to the rights and reasonable expectations of the Applicant as the owner of Lot 4, the gaining of air conditioning including the condensers situated as proposed are proposals which carry a reasonable expectation of approval, especially when the proposed by-law includes protections for the owners corporation and other lot owners, including an indemnity, and compliance with council requirements and an obligation on the part of the owner of lot 4 to maintain and repair the installation and any damage to the common property.

53. Having regard to those matters, the Tribunal is satisfied that the applicant is entitled to have an order made in her favour under s 149(1) in relation to the by-law that was proposed by her at the AGM held on 6 July 2023.

54. It remains to consider the exercise of the Tribunal's discretion as to whether an order should be made, which arises because of the inclusion of the word "may" in s 149(1). Having decided that there has been unreasonable refusal of a common rights common property rights by-law and having decided that a consideration of the matters set out in s 149(2) favours an order being made, the Tribunal is unable to discern any reason why an order should not be made in favour of the applicant.

- 51 The Tribunal noted at [55] that, for the reasons indicated above, the Tribunal made the common property rights by-law tabled by the respondent at the AGM of the Owners Corporation held on 6 July 2023.

Nature of internal appeals

- 52 Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides that a party to an internal appeal in respect of a final decision may appeal as of right "on any question of law". The party may also seek leave to appeal on any other grounds.

Questions of Law

- 53 In *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) the Appeal Panel considered what constitutes a question of law and formulated a non-exhaustive list of those matters. Since that time there have been several important cases relevant to the construction of s 80 of the NCAT Act. These were recently referred to in *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 (*Unique Commercial*).
- 54 In *Unique Commercial*, the Appeal Panel summarised at [25] the propositions that arise from those authorities. The propositions include the following:
- (1) A question of law should be articulated with precision;
 - (2) Absent leave to appeal, the question of law is the subject of the appeal;
 - (3) A question of law means a "pure question of law" which is not dependent on facts not found and is not dependent on the answer to the question;
 - (4) A party contending that a question of law was wrongly decided must identify the question in abstract terms;
 - (5) A mixed question of fact and law is not a question of law, and a question of law must not be hypothetical or arid;
 - (6) A question of law must be capable of affecting orders the subject of the appeal, not purely the reasons; and

- (7) There may be disclosed an error of law but this of itself does not necessarily raise a question of law.
- 55 The Appeal Panel found that *Prendergast*, which identified some sources of questions of law, was “overly reductive” [31]. Relevantly, the Appeal Panel identified further questions of law [32] including: whether the Tribunal drew inferences that were not available from the facts found; whether the construction of a statute or contract arrived at by the Tribunal at first instance was wrong in some identified way; whether the decision was vitiated by bias, or a reasonable apprehension of bias, raising a procedural fairness question; whether the Tribunal failed to respond to substantial, clearly articulated arguments based on established facts which may constitute a failure to accord natural justice or, alternatively, a constructive failure to exercise jurisdiction; whether the facts found necessarily satisfied the statute or did not and whether the Tribunal made a jurisdictional error.
- 56 Examples of questions of law include:
- (1) Denial of procedural fairness (*Prendergast* at [13](4)); *FVA v Commissioner for Police, NSW Police Force* [2024] NSWCATAP 127 at [83]-[84]).
 - (2) A failure to exercise jurisdiction, which includes the failure to consider and address a material issue raised by a party in the proceedings that is within the jurisdiction of the Tribunal to determine (*Dranichnikov v Minister for Immigration and Migration Affairs* [2003] HCA 26; *Alexandria Landfill Pty Ltd v Transport for NSW* (2020) 103 NSWLR 479; [2020] NSWCA 165 at [8]-[12] and [413]). This category of error may also constitute a failure to accord procedural fairness.
 - (3) Applying the wrong legal principle which materially affected the outcome (*Bimson, Roads & Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [38]-[53]).
 - (4) No evidence to support a factual finding (*Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 23 at [91]).
- 57 Recently in *Donohoe v Albulario* [2025] NSWSC 9, Basten AJ identified that when a question of law arises as to whether proceedings were procedurally fair it may be appropriate and necessary, on appeal, to make findings about what occurred at the hearing. His Honour noted at [33] (footnotes omitted):

To the extent that there is a fact/law dichotomy, the facts which are not to be reviewed by the appeal court dealing with a question of law are the facts relevant to the matter in dispute. There is a categorical distinction between the

Facts in Dispute (what part of the building was completed?) and facts relating to the composition or conduct of the Tribunal.”

- 58 Where the ground of appeal does not raise a pure question of law, the appellant may seek leave to appeal.

Principles regarding leave to appeal

- 59 The principles governing an application for leave to appeal under the NCAT Act are well-established and are repeated in many decisions of the Appeal Panel, often quoting *Collins v Urban* [2014] NSWCATAP 17 at [84]. They are the same principles applied by the courts in exercising the discretion to grant leave to appeal. As observed by Gleeson JA (on behalf of the bench) in *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28]:

Only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily, it is only appropriate to grant leave where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable. It is well established that it is not sufficient merely to show that the trial judge was arguably wrong.”
(Citations omitted)

- 60 Further, as Basten JA said (White JA agreeing) in *Hungry Jack's Pty Ltd v Fourtounas* [2020] NSWCA 325 at [9]:

“... more is required than identification of error on the part of the trial judge, even if it can be said that the error is reasonably clear. Generally, the court will also need to be satisfied that there is a matter of some public importance engaged and that the costs of further litigation are not disproportionate to the amount in issue. Further, it should be established that, to leave any putative error uncorrected, would give rise to a substantial miscarriage of justice.”

(Citation omitted)

- 61 As a gateway to the exercise of discretion, where there is an appeal from a decision of the Consumer and Commercial Division, the circumstances in which Appeal Panel may grant leave to appeal are limited to those set out in cl 12(1) of Sch 4 to 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).

62 In *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 owners corporation 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.

63 Accordingly, in an appeal of a decision of the Consumer and Commercial Division, the appellant must satisfy the requirements of cl 12(1) of Sch 4 and, if so, the Appeal Panel must also then consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

Grounds of Appeal

64 In the Notice of Appeal, the Owners Corporation does not identify that the decision under appeal is a decision of the Consumer and Commercial Division. The Owners Corporation states that it is seeking leave to appeal in section A of the Notice but does not address section B, which is directed to applications for leave to appeal from a decision of the Consumer and Commercial Division.

65 In section A of the Notice of Appeal, where the Owners Corporation indicates that it is seeking leave to appeal, the Owners Corporation identifies the following issue:

We believe there is an issue of principle with many inconsistencies in the end NCAT Tribunal reasons for the decision that was arrived at which, if corrected, may lead to a different decision. The inaccuracies are outlined in the attached report "Corrections and concerns re case order 2023-00435452".

66 This report is attached to the Notice of Appeal. The attachment considers certain paragraphs of the decision and identifies alleged errors or concerns in respect of that paragraph. The following is a summary of the matters identified:

- (1) The decision includes inaccurate statements at [5], namely, that the owners of Lots 1 and 3 voted in favour of the motion and the owners of Lots 2, 5 and 6 voted against the motion, whereas the owners of Lot 1

voted against the motion and the owner of Lot 3 abstained. It also stated that no reasons were given at the meeting for owners of the three lots voting against the motion and no reasons were set out in the minutes of the AGM. It is asserted that this is inaccurate because there were in depth discussions that occurred at the AGM as to why the four lots were against the positioning of the air conditioning condensers on the west wall. The decision also states at [5] that no owner or person present at the AGM asked any question about the motion or requested any additional plans, drawings, reports or information about the air conditioning units. It is contended by the Owners Corporation that many questions were asked, in particular the feasibility of other locations and the concern that, if other owners wanted air conditioning units, it would be best to decide on a location that would have a minimum impact on residents and neighbours.

- (2) In relation to [6] the Tribunal makes findings that the motion specified the proposed location of the condenser units and provided a description of how the condensers were to be fixed and arrangements for draining condensation. The Owners Corporation does not dispute this finding but raises a concern that the respondent has previously not complied with sections of the by-laws regarding drainage.
- (3) At [8] the decision refers to the location of the condensers on the rear wall, noting that this was the location proposed by the respondent's consultant as being the most appropriate place and that there was already a gas heater in the courtyard of the property servicing Lot 2 even though there was no by-law in place to permit the heating unit to sit on the common property. The Owners Corporation does not dispute this but contends the issue about the gas heater is irrelevant because it has been in place for over 30 years.
- (4) At [12] of the decision, it was noted that the Owners Corporation relied on the joint statements of three of the strata committee members dated 15 March 2024, but it is contended that this is incorrect because the Owners Corporation also relied on the "testimony" of Luke Bowen who was present at the AGM on 6 July 2023.
- (5) At [13] and [14], the Tribunal noted that Ms Whyte responded to a statement by the respondent dated 20 May 2024 on 27 May 2024, but this submission could not be considered because it was filed after the proceedings were closed. The Owners Corporation submits that it is unclear what this statement was but, if it was responding to the letter from the engineer which was presented on the day of the hearing, the Tribunal should have given leeway for the Owners Corporation to provide a contrary view. The Owners Corporation therefore raises concerns that the submission referred to at [14] was not considered. Related to this concern, the Owners Corporation takes issue with findings of the Tribunal at [19] and [34] (based on the conclusions and recommendations of Mr Ballas, the author of the engineering report) that the west facade of the units was structurally able to support the load of the proposed air conditioning condenser units. It is contended that the Owners Corporation "had no awareness of this before the

hearing and could not comment or provide an alternative view” and that, because the report was produced on the day of the hearing, the Owners Corporation was not able to counter the findings.

- (6) At [17], the Tribunal referred to the statement of “agreed” Facts in Dispute and Issues in Dispute. The Owners Corporation did not sign or agree to the statement of agreed Facts in Dispute despite attempts by the respondent's lawyer to pressure the strata committee into signing. The Owners Corporation further submitted that it is a serious concern that the decision has been based on an unapproved and unverified statement of Facts in Dispute.
- (7) At [20] the Tribunal summarised the joint statement of the three owners and, in particular, identified issues of concern referred to in the joint statement. The Owners Corporation asserts that “not all” of what the committee was concerned about was reported in this section of the decision, although no particulars are provided about those other concerns. The Owners Corporation notes that committee was concerned with the placement of the equipment, noting that if all owners wanted air conditioning units there could potentially be 18 units placed on common property walls along the north, south, east and west walls.
- (8) The Owners Corporation raises concerns about the statement made in the decision at [10] that the parties attempted mediation, which was unsuccessful, asserting that the respondent's lawyer attended via telephone but had no interest in looking at a solution that would not impact the other owners. The Owners Corporation also takes issue with the statement made by the Tribunal at [22] to the effect that generally what occurs in a mediation cannot be disclosed and therefore these matters had not been considered. The Owners Corporation submits that what occurred in the mediation is relevant to intent, or lack of goodwill in resolving other lot owners' concerns for the enjoyment of all.
- (9) The Owners Corporation raises concerns with how the Tribunal articulated and applied the law as referred to at [25] – [29] of the decision, stating, for instance, that the Tribunal appeared to cherry pick certain details. It is unclear what the Owners Corporation contends but the submission appears to be that the Tribunal was not limited in adjudging reasonableness by the material that was before the AGM and therefore was in error in failing to consider concerns about the proposed placement of the condensers and whether an alternative placement would have been more suitable.
- (10) At [42] of the decision, the Tribunal notes that the interest of the neighbours is not a relevant consideration but, rather, it is the interests of the owners that must be considered. The Owners Corporation disputes that the Tribunal took into account the interests of all owners given that it did not take into account the interests of the four owners voting against the condensers and the one owner abstaining at the time of the meeting.
- (11) The Owners Corporation take issue with findings at [44] – [47] about the position of the owners of Lot 1 and issues regarding climate change.

The complaint in relation to Lot 1 at [44] and [45] is about findings of fact made by the Tribunal about the attitude of the owners of Lot 1 to the motion. The Owners Corporation contend that the owners of Lot 1 voted against the motion at the time of the meeting, which may be the case, but it is apparent that the owners of Lot 1 may have changed their minds or softened their attitude since this time as evidenced by the contents of the email. This was a matter considered by the Tribunal member in relation to the fifth Fact in Dispute. The issue raised by the Owners Corporation in relation to [46] and [47] was that the climate change concern was taken out of context because one of the issues raised by the neighbour about the proposal was that it would contribute to climate change. As can be seen from [45] to [47] the issue of climate change was raised in the context of an acknowledgement that other owners may seek to install air conditioning units. This was in response to the fifth Fact in Dispute and concerns referred to by members of the committee in their joint statement.

- 67 In her Reply to Appeal, the respondent submits that the majority of the matters challenged are findings of fact and the Owners Corporation needs leave to appeal from these findings. She further submits that there was no statement filed and served by Luke Bowen and the engineer's report was attached to the respondent's witness statement dated 20 May 2024 which was served on 20 May 2024 and not at the hearing as alleged.
- 68 The Owners Corporation was not legally represented and, as observed in *Khan v Kang* [2014] NSWCATAP 48 at [14], where grounds of appeal were clearly not drafted by a person with legal training, it is appropriate for the Appeal Panel, having regard to its obligations under s 38(3) of the NCAT Act, to identify whether grounds of appeal can be discerned from the Notice of Appeal. This was also the approach in *Unique Commercial* where the Appeal Panel observed at [27] that "[w]here the party is not legally represented, a more generous approach is warranted" and "[w]hen dealing with self-represented parties, the Appeal Panel has in many instances considered for itself whether a question of law is raised" at [28].
- 69 The concerns raised by the Owners Corporation in the report attached to the Notice of Appeal, as summarised above at paras 66(2) and (3), relate to matters that were not the subject of evidence at the hearing. The issue referred to at para 66(4) above is misconceived as the strata manager representative, Mr Luke Bowen, did not file any evidence and, insofar as he made submissions at the oral hearing, this is not evidence and to have any

weight must be grounded in specified evidence. The issue referred to above at para 66(8) does not disclose any error by the Tribunal and, in any event, was not relevant to the issues in dispute. The ground referred to above at para 66(11) is unclear. As such, these matters do not require further consideration.

- 70 Grappling with the matters expressed in the report attached to the Notice of Appeal as best one can in the light of what the authorities that we have reviewed require, we have identified the following grounds from the matters raised in that attached report, which in our view raise questions of law. Those grounds are as follows.

Ground 1

- 71 One of the complaints made, as outlined in the attachment to the Notice of Appeal and which emerged more fully with development during oral submissions at the hearing of the appeal, was in relation to the Tribunal's reliance on the engineer's report attached to the respondent's statement in response dated 20 May 2024. The Owners Corporation contends that it did not receive this report until the day of the hearing, it did not have the opportunity to respond to this report, and the statement of Ms Whyte, which provided a "counter view" to the report, should have been considered even if it was submitted after the hearing. This is raised in para 66(5) in relation to the report attached to the notice of appeal and potentially raises an issue about procedural fairness, which is a question of law.

Ground 2

- 72 The Owners Corporation contends that the Tribunal was not limited in adjudging reasonableness by the material that was before the AGM and was in error in failing to consider concerns about the proposed placement of the condensers and whether an alternative placement would have been more suitable. The Owners Corporation does not accept that the Facts in Dispute were agreed and notes that the Tribunal used these facts as the basis for its consideration of whether the refusal was unreasonable. The Owners Corporation complains that the Tribunal did not consider all of the issues of concern, being concerns about the placement of the condensers, the impact on the building if all owners wanted air conditioning units and the possibility of an

alternative placement of the condensers. These concerns are summarised above at paras 66(6), (7) and (9).

- 73 This contention, in its expanded form, appears to raise the threshold question about the legal principles applied by the Tribunal in assessing whether there had been an unreasonable refusal under s 149(1), namely, whether the Tribunal should have considered the concerns raised at the later time of the mediation about an alternative proposed site or whether it was confined to the material before the Owners Corporation at the meeting, leaving aside for the moment the distinction between “circumstances” and “material” in the authorities to which we have earlier referred. Secondly, if the Tribunal was not so confined, should it have considered the alternative placement in deciding whether there was an objectively reasonable alternative placement available such that the refusal of the Owners Corporation was not unreasonable. These issues raise the question of whether the Tribunal applied the correct legal principles in assessing s 149(1) and whether the failure of the Tribunal to consider an alternative placement, which was objectively reasonable, constituted a failure to exercise jurisdiction by failing to consider a relevant and material claim. Both these issues raise questions of law.

Ground 3

- 74 The issue summarised above at para 66(10) appears to raise the concern that the Tribunal did not, in considering exercise of discretion taking into account the matters in SSMA s 149(2), give enough weight to how the owners voted because all owners, except for the respondent and the owners of Lot 3 (who abstained), voted against the motion. Although framed as a matter of insufficient weight, the contention raises the question of whether the Tribunal failed to take into account a mandatory consideration or whether (and this issue was not articulated but we have taken a generous approach to discerning the ground) the exercise of the discretion miscarried along the lines of the principles in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 at 504-505. This ground in one respect requires a similar characterisation to Ground 2, in that one aspect of the question which arises is, if the alternative placement of the condensers was not one of the reasons for refusal at the EGM, is this

nevertheless a matter that can or should be nonetheless considered in the exercise of the discretion. As such, the issue raises a question of law.

Consideration

Material before the Appeal Panel

- 75 The Owners Corporation provided a transcript of the hearing which comprised 72 pages. The transcript was incomplete and, in many sections, incomprehensible. For instance, on page 14 of the transcript the transcription of the hearing is recorded as follows:

Yes, but if you look at the size of it on page 19. He's put the unit Ottomans 2 out of 200. Seems very unusual. Write for an application to vary unit entitlements of the report.

.....

Interesting as well. It was an old badge factory and that unit is responsible for its own building. Tony done on.

NCAT official

That in the bottle. So that makes sense that well.

- 76 This is but one example of the quality of the transcript. It was nonetheless possible to discern some of the matters discussed at the hearing with a moderate level of confidence and, where possible and relevant to the appeal, we have referred to this in our reasons. However, given the terms of the specific orders made by the Principal Member at the call over of the Appeal and the issues raised by the Owners Corporation about the conduct of the hearing, there was not satisfactory compliance with those orders. This has a consequential but self-inflicted effect on the Owners Corporation's presentation of its appeal.
- 77 The Owners Corporation also provided an email dated 17 October 2024 from a representative from a company referred to as Alliance Climate Control. The email stated as follows:

Following a conversation earlier today there are basically two options to move forward with the installation. Putting the condenser units above the laundry and storage rooms won't be a problem. However there are two options with running services.

We can either set up a scaffold and do everyone (sic) apartment at once to save costs on installing and dismantling the scaffolding every time someone wants to install an air conditioner.

Option 2 is running the services through the back stairwell. This would not require a scaffold however depending on what each owner would like, it may require internal trunking to get the pipes to this location before running the services through the stairwell to the condenser location.

- 78 There was no evidence about why this email was sent and its relevance, nor how it could satisfy the requirement (noted earlier) for further evidence not reasonably available at time of hearing. The email was not before the Tribunal at first instance and the respondent objected to its tender in the appeal. We have not considered it further.
- 79 The only other material before the Appeal Panel was the Notice of Appeal, Reply to Appeal and submissions of the parties.

Ground 1 – Procedural fairness

- 80 The Owners Corporation contends that it was not provided with the engineer's report until the day of the hearing and should have had the opportunity to respond by having the material provided by Ms Whyte in her statement of 27 May 2024 taken into account.
- 81 We accept that the engineer's report was material evidence that was relied on by the Tribunal in making its findings. On the face of it, this ground raises a question of law which permits an appeal as of right.
- 82 Section 38(2) provides that the Tribunal is subject to the rules of natural justice, otherwise referred to as procedural fairness.
- 83 As noted by the Appeal Panel in *Raslan v Pan* [2015] NSWCATAP 12 at [28] (citing Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13 [37]; [2003] HCA 6) the focus of an inquiry about procedural fairness is not on unfairness in an abstract sense but, rather, on avoiding "practical injustice". In dismissing the application because the appellant was unable to show practical injustice, Gleeson CJ stated at [37]:

A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. *Attorney-General (Hong Kong) v Ng Yuen Shiu* was such a case. So, according to the majority, was *Haoucher v Minister for Immigration and Ethnic Affairs*. A particular example of such detriment is a case where the statement of intention has been relied upon and, acting on the faith of it, a person has refrained from putting material before a decision-maker. In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is

essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

(Footnotes omitted)

- 84 It is relevant to consider whether the alleged breach of procedural fairness would have made any difference to the outcome of the case: *Stead v State Government Insurance Commission* (2008) 161 CLR 141 at 145; [1986] HCA 54 (*Stead*). Materiality is relevant and for the question of law to arise “on” the appeal, any error on that question of law must be capable of affecting the outcome of the appeal (*Barefoot Timber Pty Ltd v Wright* [2024] NSWCATAP 252 at [30]-[31])
- 85 The respondent denies that there was a breach of procedural fairness and contends that the engineer’s report was attached to her statement in response dated 20 May 2024, which was served by email on 21 May 2024. It is further submitted that this report was in reply to issues raised by the Owners Corporation about the structural issues of affixing the condensers to the west wall and whether there would be problems.
- 86 The difficulty with this ground is that there is no evidence from the Owners Corporation before us to support the Owners Corporation’s contention and, understandably, the respondent did not file and serve any evidence responding to this issue in the absence of evidence from the Owners Corporation. This means that the Tribunal is now left with a contentious debate about the service of a document that cannot properly resolved by oral submissions or untested statements made at the appeal hearing.
- 87 The absence of evidence was compounded by the fact earlier referred to, namely, that the Owners Corporation has not provided the Tribunal with a transcript that is comprehensible and comprehensive, particularly on the engineer’s report.
- 88 The transcript, as imperfect as it is, includes the submissions made by Ms Crittenden at the hearing as recorded on page 20 of the transcript, where she is discussing the issues that had been raised by the Owners Corporation as follows:

...Potential damage to walls because of the building structure, now in relation to that issue, the Owners Corporation has got no engineering evidence that

the walls can't support these condenser units, but after that was that issue was raised in the evidence, the applicant went to the effort of getting an engineers report. And she obtained a report from Rafael Ballas, which is at pages three to five of her statement dated 20 May 2024. And relevantly Senior Member on page 4 of Mr Ballas' report, he says that in his opinion, the West facade, which is the rear facade of the block of units at 140 Beech St is structurally adequate to support the loads from 2 day and (sic) outdoor air conditioning condenser units, which weigh 30 kilos each, provided.....

- 89 Ms Crittenden then proceeds to summarise the effect of the rest of the report which sets out the conditions identified by Mr Ballas for affixing the condensers. The reference to the report appears at [19] of the primary decision. We also note that the reference in the transcript to “2 day and” is likely to be a reference to “two Daikin” which was the name of the air conditioning units proposed to be installed by the respondent.

- 90 The transcript records at page 20 that Mr Bowen said:

Senior member we don't appear to have the engineer report that's been referred to. Really

- 91 The Tribunal member asked Ms Crittenden about this, and she said that it was served. The transcript following this comment on page 21, being the exchange between the senior member, Ms Crittenden and Mr Bowen about this, is nonsensical. We therefore cannot fully discern the matters discussed at the hearing on this topic. However, it is recorded at the bottom of page 21 of the transcript that Ms Crittenden states:

It was served on the 21st of May and in response my friend sent an email in reply asking me to stop serving documents on him.

- 92 Because the quality of the transcript is poor, it is difficult to form conclusions about how this issue was resolved. However, it appears that the Tribunal member gave copies of the report to Mr Bowen (at 21-22) and said to Ms Crittenden that she “better do this again” so that the Owners Corporation have the “benefit of actually looking at the engineers report” during her submissions (at 22). Ms Crittenden then proceeds to repeat the submissions she had previously raised about the engineer’s report.
- 93 When it came to the time for the Owners Corporation to put forward its case, Mr Bowen advised that Mr Patrick Whyte was going to run the case (at 27). So far as can be determined from the transcript provided, neither Mr Bowen nor Mr Whyte raised any issue about the engineer’s report after this exchange,

although Mr Whyte does raise a concern about structural integrity of the building given there had previously been a collapse of the side wall near unit 7. He says:

So there there is cause concern about the structural integrity and whether the... Now I'm sure structurally engineers can. Can do what they need to do, but it's obviously important to be aware that. It is a valid concern and we have had actual collapse...

- 94 The issue about engineering evidence is referred to later in the hearing (at 44) when there is a discussion about whether an alternative location should be considered. The discussion is recorded as follows:

Crittenden:.....the position of my client is that she has proposed a location. She's obtained and engineers which says it's a structurally adequate location. The owners corporation notwithstanding that engineering evidence and without engineering events of its own to suggest otherwise, I simply proposing alternative locations. In my respectful submission, it's the role of this problem (sic) to decide whether the location proposed by my client. Was unreasonably refused not to consider the pros and cons of alternative locations, of which there may be hundreds.

- 95 Mr. Whyte is recorded as responding, also (at 44):

The building has collapsed. It's more than just a concern. There is a noise issue. It's more than just a... you know there's already been complaints with other items and. There is we submit evidence that other people do want to put in these units, so it's not...it's not just a flippant thought that someone may, ... we've recorded that it is reasonable to suggest other locations...

- 96 While it is difficult to be confident because of the quality of the transcript provided, it appears the above extracts are the key references to the engineer's report in the transcript.
- 97 Having regard to the material before the Appeal Panel, we are not satisfied that there has been a denial of procedural fairness.
- 98 First, the parties were directed to file and serve evidence in the Tribunal at first instance, the Owners Corporation raised an issue in its evidence about structural integrity and the respondent obtained an engineer's report addressing this issue in reply. It is contested by the representative of the Owners Corporation about whether he received the expert's report, which was said to be attached to the statement of the respondent dated 20 May 2024. Ms Crittenden says she emailed this statement, which had the report attached, on 21 May 2024. Mr Bowen simply says he did not receive it.

- 99 The Appeal Panel was not provided with any evidence about this, other than the transcript which discloses that Mr Bowen did raise this during the hearing at first instance. For her part, Ms Crittenden responded that report document was attached to the statement and further observed, during the hearing at first instance, that if Mr Bowen had not received the report attached to the statement, he should have raised it because the report was referred to in the statement (at 21). There is a number of possibilities. Ms Crittenden may have mistakenly failed to transmit the attachment with the statement, Mr Bowen may have overlooked the attachment or there may have been some error in transmission. When this issue was raised during the hearing of the appeal, the Owners Corporation did not refer the Appeal Panel to any transcript reference indicating that an adjournment was sought to be raised, nor did it make a submission to this effect.
- 100 Given the state of the evidence before us and noting this was an issue that should have been properly raised by the Owners Corporation with supporting evidence both before the Tribunal and us, we are not satisfied that the Owners Corporation has made out its claim that it did not receive the engineers report until the day of the hearing.
- 101 Secondly, even if we were to be satisfied that the engineer's report was not received until the day of the hearing, there are a several matters that count against the contention that there was a practical injustice. The report was served in response to the evidence previously filed by the Owners Corporation in relation to concerns raised about the structural integrity of the building (and therefore this evidence is properly in reply). The Owners Corporation was provided with a copy of the report at the hearing and Ms Crittenden was asked to repeat her submissions in relation to the engineer's report, which she did. Neither Mr Bowen nor Mr Whyte requested an adjournment to consider the report or provide any evidence to dispute the findings. The transcript does not disclose any obvious protest about the content. Notably, Mr Whyte appeared to accept the engineer's report but raised concerns about the structural integrity of the building in circumstances where other owners may seek to install air conditioning units (at p 44). This was the basis for the submissions made about why an alternative location should be considered.

102 Thirdly, it is contended by the Owners Corporation that the statement of Josephine Whyte, which was apparently served after the hearing had finalised, should have been considered in these circumstances. However, it is unclear how Ms Whyte's statement would have addressed the issues raised in the engineer's report. Nor did the Owners Corporation make submissions about why it was disadvantaged and in what respects the outcome would have been different.

103 We are therefore not satisfied that the Owners Corporation was denied procedural fairness or that it was deprived of the opportunity to present its case.

104 Accordingly, Ground 1 is not made out.

Ground 2 – Alleged failure to consider relevant circumstances, including after the refusal to make the by-law

105 The Owners Corporation contends that the Tribunal wrongly used, as the basis for consideration of whether the refusal was unreasonable, the Facts in Dispute document which was not agreed.

106 The respondent accepts that the statement of Facts in Dispute was not agreed but contends, in the absence of minutes which clearly record the reasons for refusal, that it was appropriate for the Tribunal to have regard to the Facts in Dispute, which was broadly consistent with the concerns raised in the joint statement made by three of the committee members of the Owners Corporation.

107 Related to this contention is the submission that the Tribunal was in error in failing to consider concerns raised by the Owners Corporation in the proceedings at first instance which were not before the meeting on 6 July 2023. The Owners Corporation further contends that the Tribunal should have made the assessment on whether the refusal was unreasonable by reference to other material, notably, the concerns about whether there was a more suitable alternative placement available. The Owners Corporation contends that when making this assessment the Tribunal is not confined to the material before and/or reasons given by the Owners Corporation at the meeting on 6 July 2023 and in this regard, relies on *The Owners- Strata Plan No 12289 v Donaldson*

[2019] NSWCATAP 213 (*Donaldson*). The inference is that the Tribunal wrongly construed the legal principles that apply to the assessment of whether a refusal is unreasonable for the purposes of s 149(1) of the SSMA.

108 We reject this submission.

109 In our view, this submission misunderstands the rationale behind the reasoning at [25]-[29] of the Tribunal's reasons, the findings in *Donaldson* and the principles to be applied

110 Section 149(1) provides that the Tribunal may make an order prescribing a change in a by-law if the Tribunal finds that the owners corporation has unreasonably refused to make the common property rights by-law. Broadly speaking, this requires analysis of the reasons for the refusal at the time of the refusal because the task of the Tribunal is to look at whether the owners corporation *has* unreasonably refused the by-law. This is not a case, akin to administrative review, where the Tribunal stands in the shoes of the decision-maker and makes the correct and preferable decision based on the material available at the time of the review.

111 In circumstances where there is no detailed written record of what was discussed at the AGM or a record of the reasons for the refusal, the Tribunal is entitled to take into account other material to form a view about what those reasons comprised.

112 As observed in *Capcelea* at [36]-[37] (cited with approval in *Bruce v Knight*):

36. In determining what the owners corporation or particular owners had in mind at the relevant time as the grounds for their decision, there may be the evidence in the minutes of the relevant meeting if they record debate and reasons, but such a record raises questions as to adequacy and completeness if it is anything less than an approved transcript of relevant deliberations prior to the taking of the decision.

37. In addition to that source, individual owners can provide evidence of their reasons and, on the view expressed in *Milman v Owners SP 1389* [2005] NSWCTTT 196, should do so, in order to assist in the type of inquiry in these proceedings.

113 However, as stated in *Capcelea* at [59], the task of the Tribunal is “to have regard to the matters in s 149(2) as they presented **at the time of the refusal**, and on an objective basis, in assessing the quality of the decision made by the

refusing owners." [emphasis added] This is consistent with the established authority cited in *Capcelea* at [35].

- 114 The Tribunal correctly outlined the relevant law at [25] to [29]. It had regard to the joint statement of the committee members, which it was entitled to do in the absence of clear records evidencing those reasons. This was explained in the Tribunal's reasons at [30] and [31]. It was not open to the Tribunal, as submitted by the Owners Corporation, to consider new reasons formulated *after* the refusal to decide whether the refusal was unreasonable at the time the decision was made.
- 115 The Tribunal took into account evidence about the underlying reasons for the refusal based on the evidence given by the committee members in their joint statement. For instance, all of the concerns referred to in the joint statement - changing the outward appearance of an historic federation building, the location of the condensers above the courtyard, the noise from the condensers, structural pressures and potential damage to the walls, damp and evaporation issues and the impact of this precedent on other owners wanting to instal air conditioners - were considered by the Tribunal within the categories of matters encompassed by each of the Facts in Dispute.
- 116 Insofar as the Owners Corporation attempted to introduce new concerns in submissions made during the hearing at first instance, without evidence, such as the respondent's alleged history of non-compliance and other issues relating to gas heaters, the Tribunal properly disregarded these new claims.
- 117 The principal contention appears to be, so far as we can discern from the written submissions, that the Tribunal did not consider the alternative placement of the condensers on, for instance, the roof or some other location that would be considered suitable to accommodate the possibility that other owners may also wish to install air conditioning units.
- 118 There is no dispute that one of the concerns of the Owners Corporation was the precedent that would be set by agreeing to the by-law and the impact this may have on the building. These matters are referred to in the joint statement of the committee and in the Facts in Dispute document. The question is whether relocating the condensers onto the roof (or some other specified

location) was an objectively reasonable alternative that was one of the reasons for the refusal. If it was and it was not a matter considered by the Tribunal, this may constitute legal error, which would be a question of law. In other words, if there was a failure by the Tribunal to engage with a clearly articulated argument based on established facts that were material to the claim, this would be a failure by the Tribunal to exercise its statutory function and therefore jurisdiction.

119 To understand this issue, it is helpful to consider what happened at the hearing by examining the transcript provided, albeit incomplete and imperfect.

120 It is clear from the transcript that this was an issue discussed at the hearing before the Tribunal at first instance.

121 At page 38 of the transcript, Mr Whyte said:

... you know, one of the reasons that it was rejected was just the location of the units where they were going to be from a noise an aesthetics and everything, an alternative location was actually suggested for that. It was rejected as up on the roof.

122 Mr Whyte then raised the concern about other unitholders wanting to install these units as well and Mr Bowen pointed out that the concern related to the domino effect down the track. In response to this the Tribunal asked, as recorded at page 40:

Practicals (sic) are putting on the roof. I mean, have you had any engineering report about that or was it just a.... ?

123 Mr Bowen responded that there was access to the roof and there were contractors who could install the units on the rooftop, having the units serviced in one location. He did not mention an engineer's report. In response, Ms Crittenden said that there was a common property laundry and storeroom on the roof.

124 It is apparent from the transcript that this alternative location was apparently the subject of discussion at the mediation as the Owners Corporation made this proposal in an email from Mr Bowen after the mediation. This is referred to at the bottom of page 40. Ms Crittenden notes at page 41 of the transcript as follows:

So in paragraph 2, it says the roof itself is not a suitable location, but then it goes on to refer to the roof of the laundry and storeroom. But it says it's a requirement that you obtain an engineer to seek verification, that it can go there. Well, in fact, the owners corporation already had engineering evidence about the problems with the store room and the roof and you can see those reports on page 68 of Miss Brown's affidavit. You'll see the photography of the laundry. That's a common property. Roof laundry. Reference fracking in the walls.

- 125 Mr. Whyte told the Tribunal that the key point was that there could be alternative locations. The Tribunal noted that there was a question as to a viable alternative location and Ms Crittenden responded to the effect that there was evidence in the respondent's affidavit that this location was not suitable. It was as part of this exchange that Ms Crittenden made the submissions referred to above as recorded on page 44 of the transcript about the role of the Tribunal. After an extensive discussion about alternative locations, Ms Crittenden submitted that it was not the role of the Tribunal to consider alternative placements for the condensers but, rather, to consider the proposal put before the Owners Corporation at the AGM and whether that proposal was unreasonably refused. Ms Crittenden further submitted that there was no evidence the respondent would consent to an alternative proposal and such a consideration was irrelevant. This submission was apparently accepted because the Tribunal did not refer to this contention or make an assessment about whether the Owners Corporation's refusal was not unreasonable in these circumstances. Nor did the Tribunal raise this issue in the exercise of the discretion.
- 126 The position is that, while there was a submission made about an alternative placement during the hearing at first instance, it is apparent that this proposal was not sufficiently advanced to enable a proper assessment to be made about its viability. Mr Whyte, seeking to giving evidence as part of his oral submissions, says the proposal was discussed at the AGM. However, this reason was not expressly included in the joint statement. Nor does the Owners Corporation point to any evidence before the Tribunal at first instance to establish that the alternative placement of the condensers was specifically discussed at the AGM or that a viable alternative location had been identified at that time.

- 127 We are therefore not satisfied that the question of whether there was an objectively reasonable alternate placement available was discussed at the AGM as one of the reasons for refusal or was a circumstance known at the time of the AGM. At best, there is evidence that the possibility of an alternate placement for the air conditioning condensers was discussed at and after the later mediation. Even if that could be taken into account (for instance, in the exercise of discretion to make a by-law that differed in location from the refused by-law where the refusal was found to be unreasonable), s 149(3) of the SSMA provides that the Tribunal must not make an order prescribing the making of a by-law in terms to which the applicant is not prepared to consent and it was clear that the respondent did not consent to that alternative location. This was consistent with the submission made by the respondent through her legal representative, Ms Crittenden, in the primary hearing.
- 128 For the reasons outlined above, Ground 2 is not made out. The Tribunal did not misconstrue or apply the wrong legal principles.

Ground 3 – Alleged erroneous exercise of discretion and s 149(2)

- 129 One of the issues raised is that, given four of the six owners voted against the motion, the Tribunal did not give sufficient weight, in the exercise of its discretion taking into account the matters in SSMA s 149(2), to the interests of all owners. The specific concerns raised by the owners of Lot 1 were considered by the Tribunal at [45]. The Tribunal otherwise had regard to the interests of the owners at [47] and [51]-[54]. The fact that an owner voted against a change to the common property rights by-law does not compel the conclusion that the views of the owner who voted against the motion should prevail over the owner seeking approval or those who vote in favour of the motion or who do not vote against. Taking into account the interests of all owners involves an objective consideration of the matters that may impact the use and enjoyment of those owners of their lots and the common property. The primary decision discloses that the Tribunal undertook such consideration.
- 130 As noted in *BZE v NSW Public Guardian* [2015] NSWCATAP 64 at [15] (and the authorities cited, *House v King* [1936] HCA 40;(1936) 55 CLR 499 and *Hannaford v Commonwealth Bank of Australia* [2014] NSWCA 297), any attack

on a discretionary decision must fail unless it can be demonstrated the decision-maker made an error of legal principle, “mistakes the facts”, took into account an irrelevant matter, failed to take into account some relevant matter or arrived at a result so unreasonable or “plainly unjust” as to suggest other errors occurred.

131 In this case, we are not satisfied that the Tribunal made an error of legal principle or mistook the facts. There is no material before us to suggest that the Tribunal member took into account an irrelevant matter or failed to take into account a relevant consideration, being the interests of all owners. Nor is there evidence that the result was so unreasonable or plainly unjust as to suggest other errors occurred. For the reasons already outlined, we are not satisfied that not taking into account the possibility of an alternate placement of the condenser units was within these categories and so led to an erroneous exercise of discretion.

132 Accordingly, Ground 3 is not made out.

Leave to appeal

133 In the event that the grounds set out above are considered not to raise questions of law (as we consider they do) but, rather, require the grant of leave to appeal, we have considered that alternative.

134 In relation to Ground 1, we are not satisfied that the decision of the Tribunal, insofar as reliance was placed on the engineer’s report, was not fair and equitable or was against the weight of evidence, for reasons given when earlier discussing this ground. In essence, in the absence of a record of what was actually discussed at the AGM, the Tribunal took into account the evidence of the parties, and in particular the joint statement from the members of the strata committee, about the matters of concern that resulted in the refusal. The Tribunal considered and addressed each of the concerns raised. A fair reading of the decision discloses that the Tribunal made its assessment of whether the refusal was unreasonable having regard to the interests of all of the owners, the issues raised in the concerns and the rights and reasonable expectations of the owner who would derive or anticipate a benefit under the common property rights by-law in question.

135 Further, there is no submission that there is new evidence that was not reasonably available at the time of the primary hearing to counter the report, supported by the tender of such new evidence. The email from Alliance Climate Control does not address this issue and its relevance and genesis is unexplained. We are therefore not satisfied that the Owners Corporation has suffered a substantial miscarriage of justice under cl 12(1) of Sch 4 to the NCAT Act.

136 Leave to appeal on this ground is refused.

137 Nor are we satisfied that there is a basis for leave to be granted on either Grounds 2 or 3. Relevantly, we are not satisfied that the Owners Corporation has suffered a substantial miscarriage of justice under cl 12(1) of Sch 4 to the NCAT Act for reasons given earlier when considering these grounds.

138 Accordingly, leave to appeal in respect of these grounds is also refused.

ORDERS

139 For the reasons set out above, the following orders are made:

- (1) Leave to appeal (to the extent, if any, that leave is required) is refused.
- (2) The appeal is dismissed.

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

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