Civil and Administrative Tribunal

New South Wales

Case Name:	Ashlin v The Owners-Strata Plan No 50705
Medium Neutral Citation:	[2021] NSWCATAP 413
Hearing Date(s):	23 November 2021
Date of Orders:	21 December 2021
Decision Date:	21 December 2021
Jurisdiction:	Appeal Panel
Before:	The Hon Cowdroy AO QC ADCJ, Principal Member G Sarginson, Senior Member
Decision:	(1) Leave to appeal the decision of the Tribunal is refused. (2) The appeal is dismissed.
Catchwords:	APPEALS - Land law - Strata titles - Owners corporation - Duty to repair common property - Whether duty breached - Whether decision fair and equitable
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2016 (NSW)
Cases Cited:	Allianz Australia Insurance Ltd v Cervantes [2012] NSWCA 244; (2012) 61 MVR 443 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578 (Full Ct); [2000] FCA 1343 Colchester v Peck (1926] 2 KB 366 Collins v Urban [2014] NSWCATAP 17 Craig v State of South Australia (1995) 184 CLR 163 [1995] HCA 58 Eadie v Harvey [2017] NSWCATAP 201 House v The King (1936) 55 CLR 499 at 505; [1936]

	HCA 40 Johnson v Johnson [1900] P. 19 Lawless v R (1979) 142 CLR 659 Legal Profession Complaints Committee v Rayney [2017] WASCA 78 Mifsud v Campbell (1991) 21 NSWLR 725 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332 at 364; [2013] HCA 18 Pilbara Infrastructure Pty Ltd v Economic Regulation Authority [2014] WASC 346 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 R v Kelly 1965 1 WLR 730. Rodger v De Gelder; [2015] NSWCA 211; (2015) 71 MVR 514 Siewa Pty Ltd v The Owners Strata Plan 35042 [2006] NSWSC 1157 The Owners Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 The Owners Strata Plan SP 20211 v Rosenthal; Rosenthal v The Owners Strata Plan SP 20211 [2018] NSWCATAP 243 Wehi v Minister for Immigration and Border Protection [2018] FCA 1176
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Geoffrey Eric John Ashlin (Appellant) The Owners-Strata Plan No 50705 (Respondent)
Representation:	G. Ashlin (Self-represented-Appellant) R. Spencer and I. Hurrell (Strata committee members-Respondent)
File Number(s):	2021/00268012
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division

Citation:	N/A
Date of Decision:	27 August 2021
Before:	G Ellis SC, Senior Member
File Number(s):	SC 21/18684

REASONS FOR DECISION

1 By Notice of Appeal filed on 20 September 2021 the appellant appeals a decision of the Tribunal delivered on 24 August 2021.

2 The decision of the Tribunal dismissed the appellant's application for orders under ss 106 and 232 of the *Strata Schemes Management Act 2015* (NSW) ('the SSMA') that the Owners Corporation was in breach of its duty under s 106 of the SSMA in respect of the condition of a common property balcony in the strata building.

3 Mr Spencer and Mr Hurrell, strata committee members, represented the respondent at the Appeal Panel hearing which took place by telephone conferencing on 23 November 2021. The appellant appeared self-represented.

4 Strata Plan 50705 comprises 109 strata units, in a 17 level building.

5 The Strata Plan includes three penthouses located on the top floor of the building which has a concrete slab roof.

6 The appellant, who has been the owner of unit 1402 in the strata plan for approximately 26 years, sought an order in the Tribunal for the waterproofing of the balcony of unit 1501 which is located above his unit which is number 1402.

7 The balcony of unit 1501, which is owned by Mr Hurrell, extends over the living room of unit 1402. Unit 1501 is one of the penthouse units.

8 In about December 2019, there was a water leak into unit 1402 that caused water damage to the gyprock ceiling of the living room. The Owners Corporation engaged a licensed builder, Metro Commercial Maintenance Pty Ltd, to perform an inspection and make recommendations. The inspection

occurred. Metro Commercial Maintenance Pty Ltd was then engaged by the Owners Corporation to conduct repairs.

9 The repairs occurred in April 2020. The repairs involved installation of a collection tray in the living room ceiling of unit 1402 to pick up any water penetrating through the concrete slab and have it discharge into stormwater pipes located in the ceiling with a non-return valve.

10 Since the works performed by Metro Commercial Maintenance in April 2020 there has been no water ingress into the appellant's unit.

11 However, there have been water ingress issues in other areas of the strata building. In particular, there has been water ingress into plant rooms; fire stairwells; corridors and some units from the roof of the strata building over a number of years.

12 An Extraordinary General Meeting ('EGM') of the Owners Corporation was held on 13th of August 2020. At the meeting consideration was given to measures to address water ingress issues, including water ingress affecting the 'penthouse' units from the roof of the strata building.

13 A Motion was passed at the EGM on 13 August 2020 that the owners corporation enter into a contract with a builder to perform significant works to common property. The works did not only involve waterproofing works to the roof. The contract amount was $856,460. Of that amount, $298,900 was for replacement of the waterproofing membrane in the roof of the strata building.

14 The Motion passed on 13 August 2020 did not involve any waterproofing work to the balcony of unit 1501; or any further work to the common property living room ceiling above unit 1402.

15 On 14 August 2020, the appellant wrote to the Secretary of the Owners Corporation, relevantly stating that the work that had been performed in April 2020 was *"band aid patching",* and that *"the Owners Corporation is obliged to provide waterproofing to the balcony of unit 1501 to the same standard for the roof that benefits the top floor".* The appellant sought that the waterproofing work to the common property roof (i.e. replacement of the waterproofing membrane) be extended to the balcony of unit 1501.

16 In November 2020 there was an Annual General Meeting ('AGM') of the Owners Corporation. The appellant had proposed a Motion (Item 14.2) that the waterproofing works to the common property roof be extended to the common property balcony of unit 1501. The Motion was defeated.

17 In late January 2021 the Owners Corporation arranged for a water test to be conducted on the balcony of unit 1501 by Metro Commercial Maintenance Pty Ltd.

18 In a report dated 24 February 2021 addressed to the building manager, Metro Commercial Maintenance Pty Ltd relevantly stated:

> We recently were engaged to return to this repair to undertake water testing to the balcony of 1501 following concerns raised by the owner of 1402. The water testing was conducted in early February 2021 and following this testing and subsequent inspection in the ceiling space of Unit 1402, we did not see any water penetrating outside the collection tray installed. There was no visual evidence in the living room ceiling space of unit 1402 of any water seeping through the concrete slab after our testing.
>
> There may have been water seeping through the slab into the collection tray following our water testing, but we could not visualise this. If so, this would clearly suggest our collection tray is doing its job.
>
> As you are aware we have subsequently further discussed this whole matter with our structural engineer. We have reported to him with all that has been done in terms of inspections, collection tray installation and water testing. We have also gone through with him all photos taken of the concrete slab before and after the collection tray installation. We are awaiting his report and will have it to you soon.
>
> …

19 Leigh Backmann Structural Engineer Pty Ltd prepared a report dated 28 February 2021 addressed to the Owners Corporation. The report relevantly stated:

> In the past there has been an issue with the balcony slab of unit 1501 cracking, allowing water ingress into the tile screed then seeping through cracks and into the living areas of unit 1402 below. These cracks were repaired using and epoxy injection technique but over time some of these cracks have further opened up causing some more leaking.
>
> Metro Commercial Maintenance Pty Ltd then carried out water testing to determine the source of the water leaks, installed a fully sealed and drained collection tray which had been working well over the last few years. Metro Commercial Maintenance Pty Ltd have recently carried out more water testing and found that the installed system was still working with no evidence of new cracking or leaking.

> The owner of unit 1402 has expressed concerns that the dripping of water through cracks may eventually cause concrete cancer. The evidence to date is that this is unlikely, based on what we know. Refer to the attached recently taken photographs showing calcite leaching through the cracks which is caused by the free cement and other compounds in the concrete reacting with water. This reaction produces an alkaline protection around the reinforcing bars and while this is occurring concrete cancer cannot occur unless the environment becomes acidic. The first signs of concrete cancer would be rust staining on the underside of the slab and there is no indication of that to date and no indication that the seepage would become acidic enough to destroy the coating around the bars. Concrete cancer is a slow and insidious process and would give plenty of warning should this be a possibility.
>
> Following up on recent discussions, a Megaseal type external application will seal all the tile joints of unit 1501 and would block all water ingress through this path into the tiling screed. This would negate the need and expense to rip-up all the tiling and repeal the crack injection, waterproofing process on the basis that concrete cancer may occur. In conjunction with this, regular inspections should be undertaken every (say) five to seven years to ensure there is no rust staining, new cracking, or leaking.
>
> I hope this review and opinion is useful and the Megaseal provides a viable and affordable option…

20 On 15 April 2021, there was a meeting of the strata committee of the Owners Corporation. The Minutes of the meeting relevantly stated:

> The recent heavy rain 19-23 Mar 21, while causing significant water ingress, was very unfortunate, particularly in U1501, but serendipitously discovered two significant issues: a previous hole in the concrete slab in the northern end that was not properly sealed and that the drainage fall in the slab is in a very satisfactory state. The latter has resulted in a significant reduction in required labour and materials.

21 The appellant commenced proceedings in the Tribunal on 28 April 2021 seeking an order that the Owners Corporation conduct works to the common property balcony of unit 1501 in the same manner as the waterproofing work being conducted on the common property roof.

22 In substance, the appellant was asserting the Owners Corporation was in breach of its duty under s 106 of the SSMA; and the work that needed to be performed to comply with its duty under s 106 of the SSMA was to waterproof the common property balcony of unit 1501 and the common property roof area above his Lot to the “same standard” as the waterproofing work being conducted on the common property roof.

Tribunal Decision

23 The Tribunal found that it was not satisfied that the appellant was entitled to the relief he sought. Detailed written reasons were given.

24 The Tribunal referred to s 106 of the SSMA which provides:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that—
>
> > (a) it is inappropriate to maintain, renew, replace or repair the property, and
> >
> > (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> (8) This section does not affect any duty or right of the owners corporation under any other law.

25 The Tribunal then referred to a decision of the Supreme Court of New South Wales in *Siewa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 which although relevant to the previous legislation, applied with equal force since the terms of current legislation are identical. .

26 The Tribunal referred to the history provided by the appellant, namely that there were units which had sustained water ingress; that waterproofing rectification had been carried out; that the appellant's unit was not the subject of any current water ingress; that an engineer's report confirmed that there was no leak into the appellant's unit; and that there was no visual evidence of water seeping into such unit.

27 The Tribunal considered the chronology of the investigations and rectification carried out by the respondent to the building since 2003, which included investigations and rectification. The Tribunal said at [36] of its decision:

> "36. Based on the evidence before the Tribunal, and having regard to the written and oral submissions made by the parties, the Tribunal makes the following findings:
>
> (1) The (Roof Top Remediation Project) includes a variety of matters other than waterproofing.
>
> (2) The waterproofing work includes replacing a waterproofing membrane.
>
> (3) There has been water leaking into the living room of unit 1402.
>
> (4) That water came from the balcony of unit 1501.
>
> (5) That resulted in work being undertaken that included a collection tray.
>
> (6) Unit 1402 has not sustained water ingress since that work.
>
> (7) As a result, that work (including that collection tray) has been effective.
>
> (8) That work addresses the effect but not the cause of a water leak.
>
> (9) A structural engineer has subsequently recommended the application of a product to externally seal the tile joints on the balcony of unit 1501.
>
> (10) That sealing work is preferable to removing tiles and sealing the cracks, being a solution previously used but which has failed over time.
>
> (11) That sealing work should be inspected every five years to ensure there is no rust staining, new cracking or leaking."

28 At [37] the Tribunal observed:

> "37. From the evidence it appears that there are three ways in which the cause of water ingress from the balcony of unit 1501 into unit 1402 could be addressed. First, remove the tiles on the balcony and inject material into any cracks. That method has been tried but failed over time. Secondly, seal the balcony tiles and inspect every five years. That method is recommended by a structural engineer. Thirdly, remove the tiles and install a bitumen-sealed, waterproofing membrane on level 15, as is being done on the roof top due to

> the previously installed membrane having failed, the new membrane being said to have a guarantee of 20 years."

29 The Tribunal found that the issue between the parties could be stated as follows:

> "38. Simply stated, the applicant is seeking the third method while the respondent supports the second method. The applicant contends that the owners of the penthouses are getting a better quality, more durable result (20 years compared to 5 years was his suggestion) and, implicitly if not explicitly, that the amount being spent on the [Roof Top Remediation Project] dwarfs the amount spent on waterproofing his unit.

30 The Tribunal relevantly concluded:

> "43. Fifthly, the evidence does not show that there has been any breach by the respondent of its obligation to repair and maintain the common property, even allowing for the applicant's contention that water penetration could occur and the required element of prevention to which reference was made in Siewa.
>
> 44. Sixthly, it is noted that the (Roof Top Remediation Project) is the result of a resolution passed at a meeting of the owners corporation and that the owners of the penthouses do not carry a majority of the votes at a meeting of the SC. While the democratic principle that 'majority rules' is not an answer to a breach of section 106 of the SSMA, on matters of discretion the voting of lot owners is to be respected provided the outcome cannot be said to be unreasonable,
>
> 45. In view of the findings and reasons set out above, the Tribunal is not satisfied that the applicant, who bears the onus of proof, has established either a breach of the duty to repair and maintain common property imposed on the respondent by section 106 of the SSMA or any valid basis for an order to be made under section 232 of the SSMA in relation to the waterproofing of his unit. Accordingly, the Tribunal determines that the application should be dismissed."

Grounds of appeal

31 The appellant's appeal does not identify any error of law. Rather, the appellant seeks leave to appeal under Cl. 14 Sch. 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act') on the following grounds:

32 The appellant claims that the Tribunal's decision was not fair and equitable. The grounds of appeal are stated as follows:

> "Sections 39 to 44 of the Notice of Order on 24 Aug, 21 seem to summarise the reasons for the dismissal of my application. Consequently each of these sections is addressed in the attachment. Two other claims made in the order also disputed the details in the attachment."

33 The attachment contains a narrative which does not address any specific error in the findings.

34 The narrative expresses disagreement with the Tribunal's findings but does not identify any specific matter, other than express the fact that the appellant takes a different view to the findings of the Tribunal and reiterates the appellant's claims that the work carried out to the common property of the building as it affects his Lot is inadequate and, at best, is temporary. The appellant states that the Tribunal's findings was:

> "..largely based on false assumptions and statements made by the respondent that are either false or hugely exaggerated. The evidence indicates that as at April this year all four units affected by overhead water damage had received similar temporary prevention measures which are proving effective at present. A water test provided evidence that U1401 was being protected and the torrential rain in the CBD did not affect any of the penthouses as indicated in the April 2021 building management report.. The only significant benefits achieved by applying bitumen waterproofing to the roof is providing the penthouses with the security of a 20 year warranty. Having applied that standard overhead waterproofing to the three of the four relevant units, it is completely and totally unfair to say that U1402 will get no guarantee whatsoever and will have to be satisfied with just the temporary measures taken this year".

35 The Notice of Appeal contains the heading: *What evidence should the Tribunal has given more weight to? Why?*

36 The appellant has responded:

> "The water test report only asserts that there is no evidence of current leaking – it makes no comment on likely future leaking. However, despite the totally false information given to the engineer about my suppose concern about concrete cancer, he clearly sees the probability of leaking in the near future and suggest that Megaseal be applied to the 1501 balcony as a minimum measure.
>
> I fail to understand how the tribunal can conclude that this does not oblige the OC to take action under their obligation to provide preventive maintenance. Am I supposed to wait until more leaking damage occurs to my living room ceiling and then have more manholes cut into it et cetera et cetera with all the disruption and stress that this caused to my wife and I last year?."

Claimed order

37 The appellant claims the following order should be made:

> "The NCAT Appeal Panel should order the respondent to provide waterproofing to the balcony of unit 1501 with a 20 year warranty or the very least, provide a Mega Seal application with a 5 year warranty."

Fresh Evidence

38 The appellant relies upon evidence which he asserts is fresh evidence. Included is a report by Towers, Building Property Management. Such report is

entitled “Building Management Report & Summary, Strata Committee Meeting, Thursday, 15 April 2021” (“the report”). It was commissioned by the respondent. The appellant also refers to emails which predated the Tribunal hearing and financial records of the Owners Corporation in respect of the repair works to common property.

Reply by Respondent

39 The respondent filed a reply dated 7 October 2021.

40 The reply, subject to amendment to the orders, supports the orders of the Tribunal. The respondent also submits that leave should not be granted to bring the appeal since it was fair and equitable and based on the material before the Tribunal; the decision was supported by the evidence; and the appellant’s claim that significant new evidence has arisen is misleading.

Application for leave to appeal

41 The applicant asks for leave to bring this appeal under Cl. 12 Sch. 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘the NCAT Act’). Leave to appeal may be granted under this provision if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

(1) The decision was not fair and equitable

(2) The decision was against the weight of evidence

(3) Significant new evidence is now available that was not reasonably available at the time of the hearing.

Appellant’s submissions

42 The appellant provided a bound folder of documents which had been before the Tribunal and the report. At the hearing of the appeal, the appellant made extensive oral submissions.

43 The submissions reiterated the same factual matters as he had already relied upon before the Tribunal. The appellant maintained that the decision of the Tribunal was wrongly decided; that he should have the same standard of treatment to the surface above his unit as that which the penthouses will have; that the proposed waterproofing above his unit will be inadequate; that he has already suffered considerable inconvenience because of the failure of the

waterproofing in the past; that he does not wish to subject himself to further expense and inconvenience because of water ingress into his unit.

44 The appellant also made assertions suggesting that the owners of the penthouses, who also served on the Owners Corporation had corrupted the minutes and were acting in their own interests rather than in the interests of all Lot owners.

Respondent's submissions

45 The respondent submitted that the irregularities both in relation to the proposed waterproofing and to the assertions of favouritism were baseless. The essential facts that arise from the Summary of the respondent's submissions may be stated as follows:

(1) Documented evidence of structural engineers indicated there are no water leaks into unit 1402; nor are there leaks from the unit 1501 balcony into unit 1402;

(2) The respondent's Building Manager operates a Building Management System (BMS) that actively addresses all maintenance issues on their merits. The Strata Committee and building manager have assiduously followed up the appellant's complaints and the owners corporation expended more resources and funds to further investigate them in the order $22,000;

(3) The issue raised by the appellant is a routine maintenance issue that has been thoroughly addressed in the normal course of building maintenance;

(4) Repairs to the common property roof water membrane are distinct and different to that required for the common property balcony of unit 1501, and the roof top repair project is necessary for the owners corporation to comply with its duty under s 106 (1) of the SSMA. The rooftop works are not to "benefit" only the owners of Lots on the top floor;

(5) The owners corporation has properly and completely fulfilled its statutory duty and responsibilities under SSMA s106 (1); it has properly maintained and kept in a state of good and serviceable repair the common property namely the ceiling to unit 1402 and the balcony of unit 1501.

(6) Strata committee members strongly denied the appellant's assertions that minutes to meetings were inaccurate or had been modified.

Appellant's reply submissions

46 The appellant has filed submissions in reply. These submissions reiterate that the report of Towers Building and Property Management titled *'Building*

Management Report & Summary-Strata Committee Meeting 15 April 2021' which was not previously before the Tribunal supports the appellant's contentions.

Nature of Appeal

47 This appeal has been instituted under s 80 of the NCAT Act. It is an internal appeal as provided by s 80(2)(b). Pursuant to Cl. 12(1) of Sch 4 of the NCAT Act, an Appeal Panel may grant leave under s 80(2)(b) of the NCAT Act only if it is satisfied that the appellant may have suffered a substantial miscarriage of justice because:

> (a) the decision of the Tribunal under appeal was not fair and equitable; or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence; or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

48 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel referred to the requirements for a grant of leave and at [84] said:

> "… (1) in order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision-maker was arguably wrong in the conclusion arrived at or that there was a bona fides the challenge to an issue of fact: BHP Billiton Ltd v Dunning (2013) NSWCA 421 at [19] and the authorities cited their; Nakad v Commissioner of Police, NSW Police Force (2014] NSWCATAP 10 at [45);
>
> (2) ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> > (a) Issues of principle;
> >
> > (b) Questions of public importance or matters of administration or policy which might have general application; orc
> >
> > (c) an injustice which is reasonably clear, in the sense of going merely beyond 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."

49 In summary it must be clearly demonstrated that an appellant may have suffered a substantial miscarriage of justice because the decision of the Tribunal was not fair and equitable; or the decision under appeal is against the weight of evidence; or new evidence has arisen that was not reasonably available at the time of the hearing; and further that the Appeal Panel should exercise its discretion to grant leave to appeal by reason of the matters set out in para [84] of *Collins v Urban*.

50 The notice of appeal has not been prepared by a legally qualified person and accordingly the Tribunal must discern the nature of the appeal as was considered in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) at [12].

51 The Appeal Panel identifies the issues as follows:

(1) The decision was not fair and equitable; thereby resulting in a substantial miscarriage of justice;

(2) The Tribunal did not decide the proceedings according to law (although no legal error was clearly identified).

Applicable legal principles governing appeals

52 Section 80(2)(b) of the NCAT Act states:

> Any internal appeal may be made:
>
> > (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
> >
> > (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds."

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

> An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> > (a) the decision of the Tribunal under appeal was not fair and equitable, or
> >
> > (b) the decision of the Tribunal under appeal was against the weight of evidence, or
> >
> > (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

54 The decision under appeal is a primary decision of the Consumer and Commercial Division.

55 A question of law may include, not only an error in ascertaining or characterising the legal principle or statutory provision or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Ct); [2000] FCA 1343 at [45], applying the statement of principle in *Craig v State of South Australia* (1995) 184 CLR 163 at 179; [1995] HCA 58.

56 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In *Prendergast* at [13], the Appeal Panel enunciated the following as specifically included:

(1) Whether the Tribunal provided adequate reasons;

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

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

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

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

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

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

(8) Whether the decision was legally unreasonable.

57 A failure to deal with evidence may also, in the appropriate circumstances, be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence.

58 It is generally not mandatory to consider particular evidence: *Rodger v De Gelder*; [2015] NSWCA 211; (2015) 71 MVR 514 at [86]; *Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244; (2012) 61 MVR 443 at [15] per Basten JA (McColl and Macfarlan JJA agreeing).

59 However, by s 38(6) (a) of the NCAT Act, the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all

of the relevant facts in issue in any proceedings." This obligation includes an obligation to have regard to material which has been disclosed to the Tribunal and which is relevant to the facts in issue, at least where that material is of some significance.

60 Further, at common law, where a decision-maker ignores evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the decision-maker, this is an error of law: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62]-[63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61]-[62].

61 Legal unreasonableness can be concluded if the Appeal Panel comes to the view that no reasonable tribunal could have reached the primary decision on the material before it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364; [2013] HCA 18 (*Li*) at [68].

62 A failure properly to exercise a statutory discretion may be legally unreasonable if, upon the facts, the result is unreasonable or plainly unjust: *Li* at 367, [76]. There is an analogy with the principle in *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40 that an appellate court may infer that there has been a failure properly to exercise a discretion "if upon the facts [the result] is unreasonable or plainly unjust" and legal unreasonableness as a ground of judicial review: *Li* at 367; [76].

63 Further, there is some authority to the effect that unreasonableness as a ground of review may apply to factual findings, although this has not been finally resolved: see *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 at [153]; *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176 at [29]; *Legal Profession Complaints Committee v Rayney* [2017] WASCA 78 at [193].

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

> "76 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred

to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

77 As to the particular grounds in cl 12(1) (a) and (b), without seeking to be exhaustive in any way, the authorities establish that:

> (1) If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
>
> (2) The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].

78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.

79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1) (a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].

…

84 The general principles derived from these cases can be summarised as follows:

…

(2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) Issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily

> apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) The Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,
>
> …"

65 The submissions of the appellant relate to issues of fact. The Appeal Panel is required to consider whether the Tribunal constructively failed to exercise jurisdiction as considered by the High Court of Australia in *House v the King* (1936) 55 CLR 499, 504-505; [1936] HCA 40 where the Court explained:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges comprising the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

66 The decision of the Tribunal member does not indicate any failure to comprehend the evidence before him. The decision reveals a careful analysis of the appellant's claim...

Should Fresh Evidence be Admitted in the Appeal?

67 Pursuant to s. 80(3) of the NCAT Act, the Appeal Panel may permit fresh evidence.

68 However, fresh evidence is evidence which is not available for the first hearing: or evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not buy reasonable means have come to his knowledge before that time: see *Colchester v Peck* (1926] 2 KB 366 per Avery J at 375 See *Lawless v R* (1979) 142 CLR 659 at 676 – 677. See also *Johnson v Johnson* [1900] P. 19.

69 Further, the court must be satisfied that the evidence is both relevant and credible before it would admit it as "fresh evidence": see *R v Kelly* 1965 1 WLR 730.

70 The report relied upon by the appellant dated of Tower Building Management does not satisfy the criteria of “fresh evidence”. The Appeal Panel has read the report but considers that it would not have assisted the appellant. The appellant relied upon the report because he claimed that it did not refer to any water leaks into unit 1501, when Mr Hurrell, the owner, stated that he had many water leaks. Irrespective, reliance upon the report would raise a factual issue which could have been raised at the Tribunal hearing.

71 We have reached the same conclusion in respect of the emails and financial records of the Owners Corporation that the appellant asserts is fresh evidence.

Consideration

72 The Appeal Panel is unable to discern any basis for the assertion that the decision is not fair and equitable; or that the Tribunal failed to understand the evidence adduced by the appellant; or that proceedings were not determined according to law.

73 In essence, the appellant’s case was that the repairs performed by the Owners Corporation in April 2020 by way of installation of a collection tray in the living room ceiling of unit 1402 to pick up any water penetrating through the concrete slab and have it discharge into stormwater pipes located in the ceiling with a non-return valve was inadequate, and there was a risk of future water ingress due to deterioration of the waterproofing membrane in the common property balcony of unit 1501.

74 The argument advanced by the appellant was that because there had been water ingress through the roof of the strata building and the owners corporation was conducting extensive repairs to the roof of the strata building, similar repairs should be conducted to the common property balcony of unit 1501 as a preventative measure to obviate the risk of future water ingress into unit 1402.

75 There has been no issue raised that the Tribunal did not apply the correct legal test for determination of whether the appellant had established breach of the duty of the Owners Corporation under s 106 of the SSMA.

76 In *The Owners Strata Plan SP 20211 v Rosenthal; Rosenthal v The Owners Strata Plan SP 20211* [2018] NSWCATAP 243, the Appeal Panel summarised

the relevant principles arising from the decision of Brereton J in *Seiwa Australian Pty Ltd v Owners Strata Plan 25042* [2006] NSWSC 1157 as follows at [35]:

> Section 106(1), (2) and (3) are in the same terms as 62(1), (2) and (3) of the 1996 Act. The decision of Brereton J in Seiwa summarises the relevant principles:
>
> 3. ……Section 62(1) imposes on an owners corporation a duty to maintain and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.
>
> 4. The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists [*Hamilton v National Coal Board* [1960] AC 633, 647 (Lord Keith of Avonholm); *Haydon v Kent County Council* [1978] QB 433, 464 (Shaw LJ); *Ridis v Strata Plan 10308* [2005] NSWCA 246, [161]]. Thus the body corporate is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction [*Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Limited* (1989) 18 NSWLR 33 (Young J); *Ridis*, [162]-[163]]. The duty extends to require remediation of defects in the original construction of the common property [*Proprietors Strata Plan No. 6522 v Furney* [1976] 1 NSWLR 412, 416 (Needham J); *Ridis* [164]-[165]]. And it extends to oblige the owners corporation to do things which could not be for the benefit of the proprietors as a whole or even a majority of them [*Proprietors Strata Plan 159 v Blake* (1986) CCH Strata Titles Cases ¶30-068 (Yeldham J); Ridis, [166]].
>
> 5. It follows that as soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 62 duty [cf *Ridis* [177]]. Insofar as *Ridis* held that s 62 did not oblige an owners corporation to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property, personal property vested in it, and fixtures and fittings comprised in the common property, that was in the context of a submission that by imposing the statutory duty to maintain and repair, s 62 had the ancillary effect of extending the common law duty of care of an owners corporation as an occupier of the common property to include rigorous duties of inspection. The Court of Appeal rejected the submission that s 62 expressly or implicitly resulted in the imposition of such a common law duty. But that is beside the point; in this case, unlike in *Ridis*, the plaintiff relies on a statutory cause of action said to arise on s 62, rather than a duty of care said to arise consequentially from s 62 [cf *Ridis*, [87]-[88]].
>
> 6. The duty of an owners corporation under s 62 is owed to each lot owner, and its breach gives rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty. This conclusion was reached by Young J, as his Honour the Chief Judge then was, in respect of the predecessor of s 62, namely *Strata Titles Act* 1973, s 68, in *Lubrano v Proprietors Strata Plan No 4038* (1993) 6 BPR 97,457, at 13,310-13,311, upon a thorough consideration of earlier authorities to like effect [*Jaklyn v Proprietors Strata Plan No 2795* [1975] 1 NSWLR 15, 24 (Holland J);

> *Proprietors Strata 464 v Oborn* (1975) 1 BPR 9623, 9624 (Holland J); *Proprietors Strata Plan 159 v Blake*, 50,654 (Yeldham J); *Proprietors Strata Plan 30234 v Margiz Pty Ltd* (NSWSC, Brownie J, 30 June 1993). Gzell J has since followed it in the context of the 1996 Act [*Lyn v Owners Strata Plan No 50276* [2004] NSWSC 88, [90]].

77 In *The Owners Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 ('*Vickery*') the Appeal Panel stated at [36]:\

> It is uncontroversial that the statutory duty in s 106(1) (and in s 62(1) of the 1996 Act) is a continuing one. An owners corporation has a continuing obligation to properly maintain and keep in a state of good and serviceable repair the common property. The statutory duty may be breached continuously or intermittently over a period of time.

78 Ultimately the Tribunal preferred the evidence of the respondent and was not satisfied the appellant had established any breach of its duty under s 106 (1) of the SSMA to keep and maintain common property in a state of good repair.

79 The appellant did not provide any expert evidence to the Tribunal to support his submission that the waterproofing membrane in the common property balcony to unit 1501 was likely to fall out of condition in the near future such as to cause water ingress into his unit; nor that the works that the Owners Corporation intended to adopt as set out in the report of Leigh Backmann Structural Engineer Pty Ltd dated 28 February 2021 were insufficient for the Owners Corporation to comply with its statutory duty under s 106 of the SSMA.

80 Whilst he appellant vehemently disagrees with the Tribunal findings based on his subjective belief that the standard of waterproofing to the roof of the building should be the same standard as the waterproofing of the balcony of unit 1501, the findings were available to Tribunal on the evidence before it. There is nothing illogical or unorthodox in the reasoning process of the Tribunal.

81 The appellant has failed to establish that a substantial miscarriage of justice may have occurred because the decision was not fair and equitable or that the decision was against the weight of evidence. We are also not satisfied that the fresh evidence that the appellant sought to rely upon (if it was regarded as fresh evidence within the meaning of Cl. 12 of Sch. 4 of the NCAT Act), if admitted, would have made any material difference to the outcome of the proceedings.

82 It follows that in the absence of any demonstrable error in the Tribunal's decision, there is no basis for asserting that there has been a substantial miscarriage of justice. Accordingly the Appeal Panel does not grant leave to bring the appeal insofar as leave is required; and the appeal is otherwise dismissed.

Orders

83 For the above reasons the Appeal Panel orders that:

(1) Leave to appeal the decision of the Tribunal 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