Practical Tips for Strata and Community Association Disputes

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Introduction

1. Over 2017-18, some 1,279 strata and community titles disputes were commenced in the Consumer and Commercial Division of the Civil and Administrative Tribunal of NSW and over 1800 mediation applications were made to Fair Trading.

2. Around one-third of the applications for mediation do not resolve at mediation, and even some of those that do resolve come back as new applications for orders by the Tribunal.

3. There also were some 22 internal appeals to a Tribunal Appeal Panel.

4. Some disputes arise out of misunderstandings that are easily resolved, but some involve very substantial issues and on occasion are worth a great deal of money.

5. Not all strata disputes are between residential owners, but the statutory scheme was originally established with just residential disputes in mind. The process was aptly described by Bryson J in Regis Towers Real Estate Pty Ltd v Kin Fung [2001] NSW Conv R 55-960 as follows:

> *In my opinion the procedure under the Strata Schemes Management Act is not well accommodated to commercial disputes and the urgency imposed by economic interests, and is primarily directed and suited to disputes relating to home units.*

6. Today more and more strata disputes involve mixed use developments, with multiple stratums and interlocking rights and obligations of residential, commercial and industrial owners.

7. This paper addresses three areas which have become more significant in recent years. They are:

   a. Owners corporations acting beyond their statutory powers;
   b. Disputes about bylaws, including the now infamous case of Baxter the dog; and
   c. Owners approaching renovations the wrong way.

8. Preliminarily, it is important to recognise that there is no principle of *stare decisis* within the Tribunal, not is there a sense of comity among members for each other's decisional approaches. For example, as to two topics not the subject of this paper:

   a. some members will make detailed prescriptive orders to ensure that works are done according Hoyle, while others in similar situations will only make orders to do or approve works in general terms; this is particularly important in cases concerning long overdue repairs to buildings; and
   b. different members take different approaches to the exercise of their discretion to award costs.

9. The rules of evidence do not apply, but natural justice rules do apply: Civil and Administrative Tribunal Act 2013 (NSW) §38(2).

10. When appearing before the Tribunal however, sound and careful preparation is appreciated by most Tribunal members, and in strata matters leave to appear thus far has usually been granted.

11. One should not, however, expect the Tribunal or its somewhat disorganised registry to operate with the degree of attention to detail that the profession receives from, say, the Supreme Court registry. The registry is under resourced. It is not unheard of for Tribunal Members at directions hearings to require practitioners to give unavailable dates to the Registry, and for the Registry to set down a hearing on the unavailable dates. Sometimes this happens because it takes the Registry many weeks to schedule a hearing, and by then, unavailable dates have changed. Sometimes it happens simply because papers get lost in the Registry. Regrettably, there is no Tribunal Member with the power to allocate hearing dates, and although one division handles both consumer and commercial disputes, no commercial list has been established within the Tribunal.

Tip: Do not be afraid to engage the registry and if necessary the Deputy President to ensure that proceeding are managed in a cost-efficient and fair way.

Community Associations and owners corporations acting beyond their statutory powers

12. Community associations and owners corporations, it must be remembered are creatures of statute. Their powers depend on the relevant governing legislation.

13. So too for the Tribunal: Crawley v Cochrane (Supreme Court (NSW), 14 October 1998, Cohen J, unrep) at 14.

14. In The Owners – Strata Plan No 37762 v Pham [2006] NSWSC 1287, Rothman J held, at [70], that the equivalent of s 232(1)(a) and 232(1)(e) are "*words of limitation on the power of the Tribunal, confining the subject matter of the dispute or complaint about which the Tribunal may make orders*".

15. In Walsh v The Owners – Strata Plan No 10349 [2017] NSWCATAP 230 a Tribunal Appeal Panel followed Pham and observed that Rothman J held, at [65], that "for the jurisdiction under s 138(1)(a) of the Act [the equivalent of s 232(1)(e) of the 2015 Management Act] to be enlivened one must point to a function conferred by the Act or under the by-laws for a strata scheme". The words "function" and "exercise" which appear in SSMA §232(1)(e) are defined in SSM15 §4.

16. Courts will not infer a statutory power where none exists, and where a statute sets out in detail the subject matter to which the statute is addressed (as opposed to a broad delegation to make rules), the ambit of the power will be appropriately limited: Morton v The Union Steamship Company of New Zealand (1951) 83 CLR 402 at 410.

Tip: Always consider whether a particular decision or by-law of a strata corporation is valid.

17. The earlier case law about power limitations on owners corporations concerned the application of section 43 of the Strata Schemes Management Act 1996 ("SSMA96"), which provided as follows:

> *43 WHAT CAN BY-LAWS PROVIDE FOR?*
>
> *(1) By-laws may be made in relation to any of the following:*
>
> *safety and security measures*
>
> *details of any common property of which the use is restricted*
>
> *the keeping of pets*
>
> *parking*
>
> *floor coverings*
>
> *garbage disposal*
>
> *behaviour*
>
> *architectural and landscaping guidelines to be observed by lot owners*
>
> *matters appropriate to the type of strata scheme concerned.*
>
> *(2) Subsection (1) does not limit the matters for which by-laws may be made.*
>
> *(3) The regulations may prescribe model by-laws which may be adopted as the by-laws for a strata scheme.*
>
> *(4) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.*
>
> [emphasis added]

18. SSMA96 §43(4) had been introduced in 2005 to make it clear that the owners corporation could not, by means of a by-law, extend its powers beyond those given it under the Act.

19. In Owners Strata Plan 60919 v Consumer Trader and Tenancy Tribunal (2009) 16 BPR 31,673, Acting Justice Patten determined one of a series of cases concerning the Italian Forum complex in Sydney. A special by-law had sought to impose a plan for a promotion of the complex as a retail and commercial centre with a schedule of marketing levies on lot owners in the scheme. Not all lots were required to pay and the charging was not in accordance with unit entitlements. His Honour determined that the special by-law was beyond power, because the owners were not being charged levies proportionate to their unit entitlements as required by SSMA96 §78(2): Id. at [18], [20]-[21].

20. In a subsequent decision, also in relation to the Italian Forum development: Italian Forum Limited v Owners Strata Plan 60919 (2012) 16 BPR 31,685, Justice White (as his Honour then was) heard an application to set aside the orders made two and half years earlier by Acting Justice Patten. Despite misgivings about the delay in making the application, and a number of substantive difficulties with it, Justice White, *obiter*, expressed the view that because section 43 of the *Strata Schemes Management Act 1996* permits by-laws to be made in respect of "*matters appropriate to the type of strata scheme concerned*" by-laws could be made to give effect to the obligations in a strata management statement for lot owners to pay promotional levies: Id at [48]. It is important to note that there is no exact equivalent to section 43 in the Strata Schemes Management Act 2015 ("SSMA15").

21. SSMA96 §43 has been replaced by SSMA15 §136, which deceptively simply provides as follows:

> *136 Matters by-laws can provide for*
>
> *By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.*
>
> *(2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.*

22. Subsection (2) continues old subsection (4).

23. In Davis v Owners Corporation SP 63429 [2018] NSWCATCD 27, a number of by-laws were challenged as being beyond the owners corporation's power to make.

24. One was a bylaw which enabled the Owners Corporation to charge an:

> *"Annual Fee to an Owner granted Exclusive Use and/or Special Privilege to undertake Building Improvements to the lot where the Incremental Replacement Value of the Improvements exceeds $50,000 (Indexed, as defined)."*

25. The bylaw was successfully challenged on the basis that charging lot owners other than on the basis of unit entitlements was impermissible.

26. The decision in Davis followed Owners Corporation SP65564 v Community Association DP270215 [Jacksons Landing] [2018] NSWCATCD 29 to similar effect in the context of a community association levying contributions other than in proportion to unit entitlements as stated on the Community Plan.

27. Another bylaw purported to pass on to lot owners' the owners corporation's responsibility to repair and maintain some of the common property. The Tribunal invalidated the bylaw because it had not specially resolved to grant to the lot owners exclusive use of or special privileges over the common property in a by-law made in accordance with SSMA15 § of the SSMA. The bylaw which was invalidated transparently was nothing more than a cost-shifting exercise by an owners corporation which frankly did not appreciate the extent of its responsibilities.

28. Section 142 defines a "common property rights by-law" as:

> *a by-law that confers on the owner or owners of a specified lot or lots in the strata scheme:*
>
> *(a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or*
>
> *(b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes)*

29. Where a particular owner or owners corporation do not get common property rights, an owners corporation is not entitled to shift costs onto them.

30. Earlier, in Owners Corporation SP 32033; Patrick and Valerie Mullins [2015] NSWCATD 23, the Tribunal had before it a by-law which made lot owners responsible for the maintenance, renewal, repair and replacement of windows. The special resolution which adopted the by-law did not attempt to transfer ownership of the common property windows to the lot owners. It also did not purport to make an exclusive use by-law which provided for the future maintenance by the lot owner enjoying the benefit of exclusive use. Senior Member K Rosser relevantly said:

> *[30] Under the SSMA, the obligation to maintain and repair common property can be transferred to lot owners. Specifically, it may happen when an Owners Corporation makes a by-law which gives to a lot owner either a right of exclusive use and enjoyment of all or part of the common property, or special privileges in respect of the whole or part of the common property. If such a by-law is made, then it may impose on the relevant lot owner or owners the responsibility for the maintenance and upkeep of the common property concerned. Such a by-law may be made by special resolution under s 52 of the SSMA, but only with but only with the written consent of the owner or owners of the lot or lots concerned.*

31. As in Davis, the by-law was a naked cost shifting exercise.

32. These decisions ought not to have been surprising. In New South Wales v Law (1992) 45 IR 62, the NSW Court of Appeal had before it regulations which sought to restrict employees' access to a state government superannuation scheme. The Government had determined that it could not afford the scheme. There was no provision in the statute for the scheme to be closed to employees who wished to contribute: Id. at 69. The Act permitted amendments to the scheme by delegated legislation. Kirby P held that the power could only be exercised in accordance with the object and purpose of the legislation. Id at 73. Kirby P and Priestley JA decide that he power could not be used to extinguish rights (nor to impose obligations).

33. In Gurram v Owners Corporation SP 36589 [2018] NSWCATCD 39 the Owners Corporation had, prior to the commencement of the 2015 Act, passed a by-law which prohibited the installation of hard flooring such as timber or ceramic floor tiles in any of the lots in the scheme except for ground floor units. (The floor spaces of rooms such as kitchens, laundries and the like were excluded.) The applicants sought to replace the current carpet flooring in their lot with wood flooring, or in the alternative, ceramic flooring. They had made several abortive attempts to have the owners corporation to agree. The prohibition was held to be inconsistent with SSMA15 §110 which specifically anticipated wood or other flooring as minor renovations and set out a regime for obtaining approval to install or replace wood or other hardwoods flooring: Id. at [11]. A by-law which prevented an owner seeking approval under section 110 for such flooring was invalid.

34. Further, a by-law which authorises the strata committee of an owners corporation to make exclusive use by-laws with respect to the common property, without reference back to the corporation, is inconsistent with a statutory provision such as SSMA15 §142 and any exclusive use by-law made pursuant to such a by-law will be invalid: Victorian Professional Group Management Pty Ltd v Proprietors "Surfers Aquarius" Building Units Plan No 3881 [1991] 1 Qd R 487.

Harsh, unconscionable or oppressive bylaws – The story of Baxter the dog

35. By-laws can be declared invalid by the Tribunal either because they are beyond power, as addressed above, or because they are harsh, unconscionable or oppressive, under SSMA15 §150, which in relevant part provides as follows:

> *150 ORDER INVALIDATING BY-LAW*
>
> *(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.*
>
> *…*

36. SSMA15 §139 creates the basic prohibition.

> *139 RESTRICTIONS ON BY-LAWS*
>
> *(1) By-law cannot be unjust A by-law must not be harsh, unconscionable or oppressive.*
>
> ***Note :*** *Any such by-law may be invalidated by the Tribunal (see section 150).*

Tip: When challenging a bylaw, do not assume that the narrow approach of courts to the concept of unconscionable conduct will be followed by the Tribunal.

37. In Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19, the Tribunal invalidated a bylaw because it imposed a blanket prohibition upon pet ownership. The strata complex in Yardy was a five-storey building with 27 apartments. Unlike Gurram, this was not a case where the by-law was said to be incompatible solely with a provision in the Act itself, although the bylaw did not comply with SSMA15 §139(5). That subsection does not allow bylaws to prohibit the keeping of assistance animals as referred to in section 9 of the *Disability Discrimination Act 1992 (Commonwealth)*.

38. Prior to 2009, the owners corporation had in place a by-law which permitted lot owners to keep animals with the consent of the owners' corporation (not to be unreasonably withheld).

39. One owner of a lot had a dog which was neglected and became something of a nuisance. As a result, the owners corporation in December 2009 made extensive changes to By-law 16 which effectively prohibited keeping of animals, other than assistance animals.

40. In 2015, the Yardys bought a dog, Baxter, which they kept in their apartment without seeking permission. The couple were reassured by the words of the strata manager, who apparently told them that pets were no problem.

41. In early 2017, the couple, were considering purchasing another unit, and at that time, Mr Yardy observed that the strata by-laws were on display in a strata notices panel. The by-laws displayed were those which preceded the 2009 amendment. Having bought the new unit, in April 2017, an application was made to the owners corporation for permission to keep Baxter in the new unit. Shortly after the initial application, they were informed that there was a pet prohibition in the by-laws resulting from the December 2009 amendment.

42. Somewhat incensed, the Yardys moved a motion to amend the prohibitory bylaw. The motion was supported by the majority of voters, but not by the 75% needed to amend the by-law by way of special resolution: Yardy at [24].

43. They challenged the anti-pet bylaw as harsh, unconscionable or oppressive in the Tribunal. They received a remarkably sympathetic hearing.

44. In effecting that great sympathy for the Yardys, the Tribunal did not confine itself to finding an inconsistency between the prohibitory bylaw and SSMA15 §139(5) which precludes owners corporations from making bylaws which would prevent assistance animals residing in a strata building.

45. In Yardy the Tribunal held at [63] that the no-pet by-law was "*contrary to a lot owner's basic habitation rights*" and against "*contemporary community standards*." Taking first the issue of *"basic habitation rights",* there is no judicial interpretation of this concept. But things that spring to mind might include:

    - The right to choose the colour and type of curtain in one's home;
    - The right to choose the colour and type of tiles to put on one's balcony;
    - The right to hang one's washing where one wishes including on the balcony;
    - The right to use one's swimming pool 24/7; and
    - The right to own animals, including but not limited to dogs, cats, rabbits, birds, snakes, fish and birds.

46. These are rights that residents in detached houses take for granted, but in a strata title complex, these rights are generally regulated by by-laws and residents in such complexes generally accept them as reasonable. Although hanging washing on balconies is often a contentious issue and often done in breach of a relevant by-law.

47. A strata complex comprises a society of residents living in very close proximity to each other, much closer than in a suburb of detached dwellings. Do the *basic habitation rights* of residents wishing to live in a pet free environment not bear the same weight as those that want to live with pets? If a clear majority of owners vote to ban pets except for assistance animals, should they not be entitled to do so?

48. The Tribunal provided a good summary of its considerations at paragraphs 76 – 78 below:

> *76. The reasons that By-law 16 is "harsh" are first that it is a blunt instrument which imposes a complete prohibition upon the keeping of animals as pets, with no exceptions, and secondly it provides no means by which the special circumstances of particular lot owners might be considered. It is based on the interests of only one side of the issues associated with the keeping of animals as pets. It is clearly ungentle and unpleasant in its effect for owners who wish to have a pet.*

> *77. The reasons that By-law 16 is unconscionable are first, that it quite unreasonably and unnecessarily precludes the exercise of a right of habitation which the Tribunal considers is part of contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes. Secondly, it provides no opportunity for consideration to be given to the rights and needs of individual lot owners. A possibly irrelevant consideration in this matter, which involves a degree of unconscionability, is the fact that the Respondent displayed only the superseded by-laws and that the Strata Report also identified the former provision as to the keeping of animals as being in place. The by-law is unreasonably excessive in that it is unbalanced and operates only in the interests of those who are opposed to the keeping of animals as pets.*
>
> *78. The reasons that By-law 16 is oppressive are that it does not involve or permit a balanced consideration of the interests and needs of all lot owners or occupiers and operates only in the interests of lot owners who are opposed to pet ownership. The by-law provides no process by which a lot owner could be able to keep an animal as a pet and thus operates only in the interests of those opposed to the keeping of animals as pets.*

49. The Tribunal referred to the Second Reading Speech and Fair Trading's Position Paper 4.7 which reflected a position that the Government would not require strata buildings to accept pets, but rather expressed an aspiration that more strata buildings would do so over time: Yardy at [30]-[31]. Ironically, the decision in Yardy fell into error because it has the very effect of rendering invalid by-laws which the legislative intent was to leave in place.

50. In the Second Reading Speech, Minister Victor Dominello said:

> *New model by-laws will be introduced when the regulations are made to deal with a number of issues that are of importance to strata residents. These include amending the existing by-laws relating to pets to make it easier for schemes to become more pet friendly. While a scheme can make its own by-laws,* ***it cannot unreasonably refuse the keeping of the animal,*** *nor can it prevent a resident from keeping an assistance animal. The tribunal still retains the power to make an order for the removal of an animal from a strata scheme if the animal is a nuisance or a hazard. (Emphasis added).*

51. These comments are plainly premised on strata schemes continuing to have the power to exclude pets.

52. The Yardys also secured an order under SSMA15 §157 that they were entitled to keep the small Maltese Cross Terrier, called Baxter, on their lot, or on the common property.

53. Section 157 relevantly provides as follows:

> *157 ORDER PERMITTING KEEPING OF ANIMAL*
>
> *(1) The Tribunal may, on application by the owner or occupier (with the consent of the owner) of a lot in a strata scheme, make an order declaring that the applicant may keep an animal on the lot or common property.*
>
> *(2) The Tribunal must not make the order unless it is satisfied that:*
>
> *(a) the by-laws permit the keeping of an animal with the approval of the owners corporation and provide that the owners corporation cannot unreasonably withhold consent to the keeping of an animal, and*
>
> *(b) the owners corporation has unreasonably withheld its approval to the keeping of the animal on the lot or common property.*

54. The section 157 order was made by the Tribunal despite it being a prerequisite to such an order that "*the by-laws permit the keeping of an animal with the approval of the owners corporation*", which the relevant by-laws in that case did not.

55. However, given that it is a condition of the Tribunal's power to make an order under SSMA15 §157 that "*the by-laws permit the keeping of an animal with the approval of the owners corporation* …", the legislation is premised upon the proposition that after the passage of the 2015 Act there will continue to be schemes in existence which have valid by-laws prohibiting the keeping of animals.

56. One can hope that astute Tribunal members will confine or distinguish Yardy in subsequent cases.

Renovations: Unauthorised or unreasonable?

57. Different types of renovations can be approved by an owners corporation under a variety of provisions in the SSMA.

58. SSMA15 §108 requires a special resolution to approve additions or alterations to common property.

59. Since 2016, certain minor renovations to the common property require only a resolution at a general meeting: SSMA15 §110, and certain cosmetic work can now be done without approval: SSMA15 §109.

60. Often for renovations which affect common property, a lot owner will need to have in place a common property rights bylaw under SSMA15 §142 - 145. Such a bylaw enables the renovation to extend to common property.

61. It should never be forgotten that the SSMA15 reserves to the owners corporation the power to manage and control of the use of the common property: SSMA15 §9(2)(a) with a corresponding duty to maintain and repair common property: SSMA15 §9(3)(c) and 106. The duty to repair, while the subject of considerable and varied judicial and tribunal jurisprudence is not the subject of this paper. In passing though, solicitors are reminded to always check whether a common property memorandum exists, as it may modify the scope of the owners corporations' duties: SSMA15 §107.

Tip: Check whether a common property memorandum exists and get approvals all lined up before you start renovating; - Get the sequence right!

62. When an owner proposes a common property rights bylaw to a general meeting and it is rejected, proceedings can be commenced before the Civil and Administrative Tribunal to have the Tribunal make the bylaw on the basis that the rejection was unreasonable. SSMA15 §149(1) relevantly provides as follows:

149 Order with respect to common property rights by-laws

(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.

63. If, however, the owner undertakes works before the owners corporation has met and made a decision, the works will be unauthorised works, and the owners corporation can move to have them removed. The decision of the owners corporation to require the removal of the renovations is not one that can be challenged on the basis of reasonableness.

64. If works are unauthorised, an owners corporation is entitled, under its strict duty to repair and maintain the common property, to order the common property be restored to its original state: Owners–Strata Plan 21702 v Krimbogiannis [2014] NSWCA 411.

65. Similarly, even if all that is needed is a resolution to approve the renovations, it is most unwise to commence works before the resolution is passed. In Pollak v OC SP 54298 (Strata and Community Schemes) [2013] NSWCTTT 334, an owner was required by the Tribunal to remove extensive renovations of a very expensive apartment in Elizabeth Bay, Sydney. Dr Pollak unsuccessfully applied to the Tribunal for retrospective approval of his renovations, an application which today would proceed under SSMA15 §126. An owners corporation is entitled, among other things, to assure itself that a lot owners has provided proper plans and specifications, detailed drawings and adequate engineering certificates demonstrating the absence of adverse structural impact: Id. at [17]

66. Another, more recent, example of a lot owner which approached renovations in the wrong sequence was the Charitable Islamic Association of Beirut City Incorporated, which purchased a lot in an industrial strata scheme at Merrylands. It wished to use the lot as a prayer hall. Renovations were undertaken to achieve that outcome.

67. The strata scheme was located in an area zone "IN2 Light Industrial", and neither owners corporation nor the necessary council approvals were obtained before the renovations were undertaken.

68. The owners corporation applied to the Tribunal for an order under SSMA15 §232 that the Association remove its renovations and reinstate the common property. Meanwhile the Association put forward a bylaw to the owners corporation which would retrospectively authorise the works.

69. When the owners corporation's application came on for hearing, the Association sought an adjournment on the basis that the owners corporation should first consider the proposed bylaw. The Association argued that if the bylaw was passed, then the works would be retrospectively authorised and there would be no need to remove them. If, as was more likely, the bylaw was rejected, then the Association would apply to the Tribunal for the rejection to be overruled as unreasonable.

70. If, on the other hand, the application to adjourn was rejected, the Tribunal was likely to, and did, make an order that the works be removed and the common property be reinstated. No owners corporation could be expected to then authorise works in respect of which the owners corporation had obtained a Tribunal order for the removal of those very works.

71. Once the Tribunal decided to refuse the application for an adjournment, it was inevitable that the owners corporation's application would succeed because the works were, indeed, unauthorised.

72. The refusal of the adjournment application thus had very significant consequences. Understandably, the Association appealed, but a two-member Appeal Panel rejected the appeal: Charitable Islamic Association of Beirut City Incorporated v The Owners Strata Plan No 75506 [2018] NSWCATAP 207.

73. The Association argued on appeal that the original Tribunal decision did not disclose a balancing of the respective consequence to each party if the adjournment was not granted: Id. At [45].

74. Both the Tribunal and the Appeal Panel focussed on the lack of timely action by the Association, and the Association's failure to do things in the legally correct sequence. But more importantly, the Tribunal, at first instance, focussed upon the proposition that any adjournment would cause delay in resolution of the dispute which it considered was solely about the removal of unauthorised works: Id. at [54].

75. The Appeal Panel upheld the prioritisation of case management considerations over the practical impact on an adversely affected party. It focussed on a series of Tribunal decisions reflecting that prioritisation. The Appeal Panel considered that merely mentioning the consequences which had been averted to by the Association to the Tribunal at first instance was a sufficient demonstration that the Tribunal had taken the relevant consequences into account. Yet, it is well settled that a failure to address material provide by a person who is to be affected by an important decision which articulates factors relevant to the decision can amount to procedural unfairness: Dranichnikov v Minister for Immigration & Multicultural Affairs (2003) 77 ALJR 1088 (2003) 77 ALJR 1088 at 1092 [24], 1102 [95]; 197 ALR 389 at 394, 408; Plaintiff M61/2010 v Commonwealth (2010) 243 CLR 319 at 356[90]. Merely giving such lip service fails to respond to a substantial, clearly articulated argument and may give rise to legal error in various respects – whether through a failure to accord natural justice or, alternatively, through a constructive failure to exercise jurisdiction (through failure by the Tribunal to have regard to all relevant considerations in the determination of the matter before it): Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248; (2010) 274 ALR 438 (Stone, Foster and Nicholas JJ) at [57]-[59]; DZADQ v Minister For Immigration and Border Protection (2014) 143 ALD 659 at [44], [53].

76. Curiously, the Appeal Panel referred to prior Appeal Panel decisions but made no mention of important superior court authority upon which the Association had relied.

77. For example: Hans Pet Constructions Pty Ltd v Cassar [2009] NSWCA 230 was a case which Allsop ACJ, described as: "almost an archetypical example of the tension between the need for compliance with timetables and the common experience of their not being complied with for reasons that are debatable." Id. at [21]. That case, like the one before the Tribunal, was a small building case. It also involved an attempt to vacate a hearing date without a Notice of Motion: Id. at [22]. The approach of the Magistrate was to strike out a defence because of delays by the Defendant and to order that there be a hearing only as to damages: Id at [29]. This had the effect of the Defendant's case not being heard on its merits. The Court of Appeal emphasised that section 57 of the Civil Procedure Act 2005 requires the just determination of the proceedings to be one of the factors that a court must take into account. The Court's powers must not be used to punish a litigant, and must be used in a proportional way: Id. at [46].

78. Unique International College Pty Limited v Australian Council for Private Education and Training [2016] NSWSC 1027 more recently relevantly addressed the question of vacating a hearing date, again in circumstances where the parties did not follow appropriate procedures to seek the vacation of the hearing date. Following admonition of the parties, Justice Bellew vacated the hearing date in those proceedings.

79. The Tribunal was also taken to High Court authority on point. In Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, the High Court dismissed an appeal by the Minister of Immigration and Citizenship against the decision of the Full Court of the Federal Court of Australia, which held that the decision of the Migration Review Tribunal ("MRT") not to adjourn certain review proceedings was unreasonable. Gageler J held that the refusal to defer making the decision was unreasonable on the same basis as the majority in the Full Federal Court (Greenwood and Logan JJ). The adjournment was sought for a specific purpose, likely to be demonstrable within 3 months.

80. The MRT had refused to adjourn proceedings on the basis that the visa applicant had been given sufficient opportunities to present her case and the MRT was not prepared to delay the proceedings any further. The High Court formed the view that the MRT did not consider the impact on Ms Li of refusing the adjournment, and Hayne, Kiefel and Bell JJ held that "*error must be inferred*" and the MRT decision was set aside: 249 CLR at 369[85]

81. Although in the Association's case, the prospect of litigating the reasonableness of the Respondent's rejection of the by-law was to be triggered after a general meeting which had been called to occur a mere fortnight after the refusal of the adjournment, the Tribunal Appeal Panel upheld the refusal to grant the adjournment and in doing so made no reference to the High Court decision, nor the above-mentioned Supreme Court decisions, to which its attention has been drawn in submissions.

82. There are a number of important lessons to be learned.

83. Firstly, clients who wish to renovate strata premises must obtain their approvals before they commence any works.

84. Secondly, it is important to have any necessary council approvals, or at least applications for them, ready to show the lot owners who make up a general meeting of an owners corporation.

85. Thirdly, the Tribunal cannot be relied upon, even as before Appeal Panels, to retrospectively approve unauthorised works.

86. Fourthly, it is not at all unusual for a Tribunal Member or, indeed, an Appeal Panel to rely upon selected Tribunal decisions in preference to applicable appellate authority from the courts.

26 March 2019