

AUSTRALIA / JUDGMENT

Hadley v The Owners Strata Plan No 30558

[2026] NSWCATAP 302**COURT**

Civil and Administrative Tribunal

DECIDED

24 September 2026

BEFOREI R Coleman SC ADCJ, Principal Member
M Tibbey, Senior Member**CASE / FILE NUMBER**

2026/00093489

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Civil and Administrative Tribunal New South Wales

Medium Neutral Citation: Hadley v The Owners Strata Plan No 30558 [2026] NSWCATAP 302**Hearing dates:** 25 August 2026**Date of orders:** 24 September 2026**Decision date:** 24 September 2026**Jurisdiction:** Appeal Panel**Before:** I R Coleman SC ADCJ, Principal Member
M Tibbey, Senior Member**Decision:** (1) The appeal is allowed
(2) The orders of the Tribunal of 3 February 2026 are set aside
(3) The proceedings are remitted for re-hearing by a differently constituted Tribunal**Catchwords:** APPEAL – where appellant unrepresented at first instance and on appeal – legally represented respondent lodged no pleadings or evidence pursuant to Tribunal directions – Tribunal refused appellant leave to rely on recent affidavit without consideration of its contents – Tribunal granted leave to respondent to rely on recent affidavit – whether in all the circumstances appellant denied procedural fairness**Legislation Cited:** Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited:	Assistant Commissioner Michael James Condon v Pompano (2013) 252 CLR 34; [2013] HCA 7 Chalik v Chalik [2025] NSWCA 136 Collins v Urban [2014] NSWCATAP 17 Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55 Ferella v Chief Commissioner of State Revenue [2014] NSWCA 378 Frediani v Hall t/as Happy Camper Conversions [2024] NSWCATAP 134 Hamod v New South Wales [2011] NSWCA 375 Haritos v Commissioner of Taxation [2015] FCAFC 92 International Finance Trust Company Limited v New South Wales Crime Commission (2009) 240 CLR 319; [2009] HCA 49 Kudrynski v Orange City Council [2024] NSWCA 33 Lee v Huo [2026] NSWCA 15 Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Ros v Commissioner of Police [2020] NSWCATAP 70 Rowell v Westpac Banking Corporation [1993] NSWCA 240 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Schultz v Health Care Complaints Commission [2026] NSWCA 162 Selkirk v The Owners-Strata Plan No 2661, The Owners-Strata Plan No 2661 v Selkirk [2026] NSWCATAP 211 Shrestha v Migration Review Tribunal (2015) FCR 301; [2015] FCAFC 87 Spencer v Commonwealth of Australia [2018] FCA 1288 Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54 Thomas & Naaz Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCA 40 Unique Commercial Property Corporation Limited v Cusumano [2024] NSWCATAP 204
Category:	Principal judgment
Parties:	J Hadley (Appellant) The Owners–Strata Plan No 30558 (Respondent)
Representation:	
Solicitors:	Appellant (self-represented) Pobi Lawyers (Respondent)
File Number(s):	2026/00093489
Publication restriction:	Nil Decision under appeal
Court or tribunal:	Civil and Administrative Tribunal New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Nil
Date of Decision:	03 February 2026
Before:	K Mortensen, Senior Member
File Number(s):	2024/00352020

REASONS FOR DECISION

By Notice of Appeal lodged on 3 March 2026 Joanne Hadley (Appellant) appealed against a decision of the Consumer and Commercial Division on 3 February 2026 in proceedings brought by the Appellant against The Owners–Strata Plan No 30558 (Respondent). The Appellant also sought leave to appeal, and to adduce new evidence. The Appellant did not pursue the latter relief.

The Tribunal ordered, pursuant to s 106 of the Strata Schemes Management Act 2015 (NSW) (SSMA) that the Respondent complete remedial works to the roof of the Strata, bathroom and waterproofing repairs in Lot 3 and the removal of a tree located on common property in the rear of Lot 3. The Tribunal dismissed the Appellant's application for damages pursuant to s 106(5) of the SSMA. The Appellant is the proprietor of Lot 2 of the three Lots in the Strata.

By its Reply lodged on 25 March 2026, the Respondent sought dismissal of the appeal and rejection of the Appellant's application for leave to appeal and to adduce new evidence.

In her Notice of Appeal, the Appellant detailed 12 grounds on which she relied. On 27 May 2026 the Appellant lodged 3 volumes of material and supplementary submissions.

On 30 June 2026 the Respondent lodged submissions in response to the Appellant's Notice of Appeal and supplementary submissions.

Background

The proceedings became part-heard before the Tribunal at first instance on 25 September 2025. At the conclusion of the hearing that day, the Tribunal directed the parties to lodge submissions in writing in support of their cases. Both parties lodged written submissions in accordance with the Tribunal's directions.

The Tribunal published its decision on 6 February 2026. The Tribunal identified at [3] that the Appellant alleged that water ingress from the roof of the Strata and from the bathroom in the adjoining Lot 3 had caused damage to common property and to her Lot, including mould contamination. The Tribunal recorded that the Appellant also alleged that tree roots from a tree located on common property had caused damage to the common property and to her Lot, resulting in the Appellant having been unable to occupy her Lot since May 2024.

The Tribunal identified at [3], correctly there is no issue, that the Appellant was able to maintain her claim before the Tribunal in reliance on s 106 of the SSMA. The Tribunal identified at [4] accurately, the repair works which the Appellant sought to be ordered, which comprised repairs to the roof to remedy structural damage to the roof joist, repair of the Lot 3 bathroom including rectification of waterproofing defects and water damage and removal of a tree causing damage to common property structures and pathways. The Appellant also sought that the Respondent pay her compensatory damages pursuant to s 106(5) of the SSMA on a number of bases.

The Appellant substantially obtained the relief she sought from the Tribunal with respect to rectification work, but was wholly unsuccessful in relation to her compensatory damages claim.

The Tribunal identified at [10] the written submissions which the parties lodged pursuant to its directions of 25 September 2025. The Tribunal recorded at [11] that it was satisfied that it was appropriate to dispense with a further oral hearing of the proceedings pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (CAT Act).

Under the heading “Jurisdiction”, the Tribunal identified, accurately, the provisions of the SSMA which governed the proceedings. Under the heading “Evidence”, the Tribunal identified the material on which the parties relied at [17] and the oral evidence which was heard on 25 September 2025. The Tribunal identified at [20], accurately, the issues for determination. The Tribunal identified at [22] the principles governing the Respondent’s obligations to “properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation” pursuant to s 106(1) of the SSMA, and the obligation of the Respondent pursuant to s 106(2) to “renew or replace any fixtures or fittings comprised in the common property”.

The Tribunal referred at [23] to the expert evidence which was before it, of Mr Spratling, a Building and Civil Engineering Consultant, and Mr Poon, a Building Biologist. Under the heading “Roof damage”, largely by reference to Mr Spratling’s evidence, the Tribunal found at [29] that the Respondent had breached its duty under s 106(1) of the SSMA in relation to the roof, which has “fallen into disrepair and is no longer being properly maintained in a state of good and serviceable repair. The structural damage to the roof rafter requires rectification.” With respect to the “Lot 3 Bathroom Waterproofing” issue, the Tribunal found at [36], by reference to the evidence of Mr Spratling, that the Respondent had breached its duty under s 106(1) of the SSMA in relation to the waterproofing failure in the Lot 3 bathroom “that is causing damage to common property and to Lot 2”.

With respect to the “Tree on Common Property” issue, the Tribunal found at [40] that the Respondent had breached its duty under s 106(1) of the SSMA in relation to the maintenance of common property that has “been damaged by tree roots from the tree on common property”.

The Tribunal then addressed the issue of “Mould contamination and uninhabitability” which was the basis of the Appellant’s claim for compensation pursuant to s 106(5) of the SSMA. The Tribunal found at [46] that the Appellant’s Lot “became uninhabitable in or around May 2024 as a result of water ingress and mould contamination”. That finding was “supported by multiple sources of evidence”.

The Tribunal found at [50] that there was a “clear causal connection” between the Respondent’s breaches of s 106 of the SSMA and the “losses suffered” by the Appellant. The Tribunal further found at [51] that the mould contamination rendering Lot 2 uninhabitable was a direct consequence of the water ingress from the roof and the Lot 3 bathroom, both of which resulted from the Respondent’s breach of its duty under s 106 of the SSMA.

In view of its findings, under the heading “Work orders”, the Tribunal considered the parties’ contentions and the expert opinion evidence before it. The Tribunal concluded at [62] that “Having regard to the nature and extent of the works required, the Tribunal considers that a period of three months from the date of these orders is reasonable for the Respondent to complete the roof repairs, bathroom waterproofing repairs, and tree removal management. A further period of one month is reasonable for completion of the professional mould remediation and post-remediation verification testing”.

The Tribunal considered the Appellant’s claim for compensatory damages pursuant to s 106(5) of the SSMA and, under the heading “Alternative Accommodation Costs” identified at [65] the monetary compensation which the Appellant sought, and the basis of her claim. The Tribunal recorded, accurately, at [66] that the Respondent disputed those costs and submitted that there was a lack of evidence to support the Appellant’s claim. The Respondent relied on the absence of any tenancy agreement, or evidence showing that payment had been made for the asserted accommodation costs on which the Appellant based her claim. The Appellant was found to have acknowledged on 25 September 2025 that she had in fact not paid any of the sums referred to in the invoices upon which she relied.

The Tribunal found at [68] that the need for alternative accommodation was a reasonably foreseeable consequence of the Respondent’s breach of its duty pursuant s 106 of the SSMA. The Tribunal found that the Appellant’s Lot had become uninhabitable on 10 May 2024 as a result of water ingress and mould contamination directly caused by the Respondent’s breaches and that her “need to secure alternative accommodation was a natural and direct consequence of the uninhabitability of her property”, such accommodation costs being recoverable as “consequential losses”. The Respondent has not, by notice of contention or submission, challenged any of the findings referred to above.

The Tribunal held at [69] that proving that the Appellant’s loss was reasonably foreseeable was not sufficient, and that she also needed to prove that the loss had actually been suffered and its quantum. The Tribunal held that the Appellant had failed to discharge the onus of proof which she bore.

The Tribunal referred at [70] to the evidence which the Appellant gave in relation to her accommodation costs claim. The Tribunal recorded at [71] that the Appellant had not provided evidence that the invoiced amounts had actually been paid or tendered “bank statements, receipts, or other documentary evidence showing that money changed hands”, the invoices thus not being accepted as “proof of actual loss suffered”. The Tribunal recorded that the “apparent personal relationship” between the Appellant and Mr Lake further undermined the reliability of the invoices as evidence of genuine commercial loss, the amounts claimed not appearing to reflect “an arm’s length commercial transaction”.

The Tribunal further found at [72] that the Appellant had failed to adduce any evidence from which the Tribunal could assess reasonable accommodation costs. The Tribunal observed that the requirement to “achieve a just result and make estimates where necessary applies only where

there is some evidentiary foundation”, and that the Tribunal “cannot invent accommodation rates in an evidential vacuum”. The Tribunal held at [74] that the Appellant’s claim for alternate accommodation costs must be dismissed for failure to prove actual loss on the balance of probabilities, notwithstanding that the Appellant was “displaced from her uninhabitable property and may have incurred some accommodation costs” but had not provided “sufficient evidence to enable the Tribunal to quantify the costs”.

Under the heading “Loss of rent and loss of amenity”, the Tribunal identified at [75] the Appellant’s claim for damages for loss of rent from 2 October 2024 at the rate of \$630 per week. The Tribunal referred to the evidence of the Appellant that, if the Lot were habitable, she would not “be presently living in it” but would be “travelling around Australia in a caravan”, “funded by the incoming rent”. The Tribunal referred to the Appellant’s reliance on her oral evidence on 25 September 2025, in which “it was asserted that prior tenancy agreements were in place during prior periods that she did not personally occupy the property”.

The Tribunal referred at [77] to its review of the transcript of the hearing and to the Appellant having confirmed during cross-examination that she had no documentary evidence of having entered into prior tenancy agreements and was thus entirely reliant on uncorroborated oral evidence “regarding a hypothetical scenario that can be put this way; but for the Respondent’s breach she would have rented the property rather than occupied it, and that would have achieved a rental of \$630 per week”.

The Tribunal referred at [78] to a number of authorities in relation to the evaluation of evidence of the kind given by the Appellant and found at [79] that the “complete absence of any documentary evidence of prior tenancy agreements, tax returns evidencing historical rental income, bank statements showing deposits, or correspondence with real estate agents” or “current rental appraisal to support the claim value of \$630 per week” provided an insufficient basis for making the finding sought by the Appellant. The Tribunal was accordingly at [80] not satisfied that the claim for rent had been made out.

Principles governing the appeal and application for leave to appeal

Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) of the CAT Act.

An appeal under s 80(1) of the CAT Act from a final Tribunal decision is focused upon whether the appellant has established an error on a question of law; or otherwise (if leave to appeal is sought) leave to appeal is granted based upon the evidence and submissions before the Tribunal and the manner in which the Tribunal hearing was conducted. In certain circumstances, fresh or further evidence can be admitted (*Ros v Commissioner of Police* [2020] NSWCATAP 70).

An appeal, whether as of right or by leave, does not simply provide a disappointed party before the Tribunal at first instance with the opportunity to run a case again, nor is it sufficient for an applicant to disagree with the outcome and to contend that there should have been a different outcome (*Frediani v Hall t/as Happy Camper Conversions* [2024] NSWCATAP 134). Persuading the

Appeal Panel that, had either of its members heard the proceedings at first instance, a different decision may have been made does not, in the absence of recognised legal error, enliven appellate intervention. An evaluative determination of the kind involved at first instance in this case generally permits of reasonable disagreement.

An appeal is not simply an opportunity for a dissatisfied or aggrieved party to reargue the case advanced at first instance (*Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39).

What is an error on a question of law was considered in *Unique Commercial Property Group Limited v Cusumano* [2024] NSWCATAP 204 (Cusumano). An error on a question of law is an appeal made as of right, and does not require leave. A mixed error of fact and law requires leave to appeal.

In Cusumano, at [33], the Appeal Panel recorded that the categories of questions of law are “not closed”, and at [37] stated that (citations omitted) “What constitutes a question of law is vexed and context dependent in the sense that the distinction between matters of fact and of law may turn on the circumstances in which the question arises”. It is unnecessary for the purpose of this decision to set out all the examples of error on a question of law which were discussed in Cusumano. As summarised in *Selkirk v The Owners-Strata Plan No 2661, The Owners-Strata Plan No 2661 v Selkirk* [2026] NSWCATAP 211 (Selkirk) at [156], an error on a question of law may arise in circumstances including the following:

“(i) *failing to provide procedural fairness at the hearing;*

(ii) no jurisdictional power to make an order;

(iii) constructive failure to exercise jurisdiction, in the sense of a failure to consider a “substantial, clearly articulated argument relying upon established facts” that was within the jurisdiction of the Tribunal to determine;

(iv) applying the wrong legal principle (identified in isolation to the factual findings) which materially affected the outcome. ... the wrong application of the correct legal principles to the facts is an error of mixed fact and law for which leave to appeal is required under s 80(2)(b) of the CAT Act;

(v) making a factual finding where there was no evidence at all to substantiate the factual finding, ... a wrong finding does not amount to an error of law. An erroneous finding of fact, including the drawing of an inference or the erroneous failure to find a fact or failure to draw an inference, which is perverse in the sense that it is contrary to the overwhelming weight of the evidence, is not an error of law”

(citations omitted).

The Appellant is required to identify with sufficient precision the questions of law asserted to be raised by her Notice of Appeal (*Ferella & Anor v Chief Commissioner of State Revenue* [2014] NSWCA 378).

Although not unacquainted with litigation, at first instance and on appeal, the Appellant is not legally qualified and, as a litigant in person, the Appeal Panel adopts the “more generous” approach to the articulation of her grounds of appeal than would be the case if she were legally qualified or legally represented (*Kudrynski v Orange City Council* [2024] NSWCA 33). Consistent with that approach, and as it could cause the Respondent no procedural unfairness, the Appeal Panel proceeds on the basis that the Appellant seeks leave to appeal in reliance on grounds of appeal purportedly raising questions of law which in substance do not do so. That does not mean however that different principles govern the determination of her appeal or application for leave to appeal than those in cases where parties are legally represented. The Appeal Panel has focused on the substance of the Appellant’s challenges to the decision of the Tribunal at first instance.

As is apparent from their terms, most of the Appellant’s grounds of appeal assert errors on questions of law. Whether that is so remains to be seen. In *Schwartz v Health Care Complaints Commission* [2026] NSWCA 162, Leeming JA, with whom Adamson JA and Griffiths AJA agreed, said that at [3] that pleading grounds commencing with the words “The Tribunal erred in law” did not necessarily mean that the ground raised a question of law. His Honour recorded that that “familiar deficiency” in pleaded grounds of appeal was “not cured by the drafting technique of framing complaints, some of which were palpably complaints about fact finding unattended by any question of law, by the mantra of the six words “the Tribunal erred in law” or “the Tribunal erred in law by”.

In *Haritos v Commissioner of Taxation* [2015] FCAFC 92, at [192] it was accepted that, although it could not be held that an appeal on a question of law could “never extend to a mixed question of fact and law or as requiring that the question of law be a ‘pure’ question”, it may “more accurately be said that the right of appeal does not extend to mere questions of fact”, as the court, or Appeal Panel in this case should not “usurp the fact-finding function” of, in this case, the Tribunal. It was also accepted, at [195] that

“where the facts found are capable of falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact and not of law. Such a decision will generally involve weight being given to one or other element of the facts and so involve matters of degree”

(citations omitted).

In *Thomas & Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 at [32], Leeming JA said, with the agreement of Meagher JA and Griffiths AJA that it has “been said on a large number of occasions, it is not sufficient merely to assert that the Tribunal erred in law in order to satisfy the limited conferral of jurisdiction” and that an appellant cannot “‘convert’ a challenge which is wholly or partly factual to one which is on a point of law or question of law merely by including those words in the formulation of a ground”.

The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are not at large, and are limited to those set out in cl12(1) (a)-(c) of Sch 4 of the CAT 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:

the decision of the Tribunal under appeal was not fair and equitable; or

the decision of the Tribunal under appeal was against the weight of evidence or, which has no application in the present appeal,

that significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

In *Collins v Urban* [2014] NSWCATAP 17 (Collins) the Appeal Panel said at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 may have been suffered where “there was a ‘significant possibility’ or ‘a chance which was fairly open’ that a different and more favourable result would have been achieved for the appellant had the relevant circumstances in (a) or (b) not occurred”.

The Appeal Panel further recorded in *Collins* at [84] that the authorities to which the Appeal Panel had earlier referred revealed the “general principles” with respect to applications for leave to appeal which establish that, in order to be granted leave to appeal the appellant must demonstrate:

“(1) something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact;

- (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 what is merely 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.”

(citations omitted).

To the extent that the Appellant's purported grounds of appeal on questions of law in substance involve mixed questions of fact and law or raise only issues of fact, the Appeal Panel will consider them in the context of the Appellant's application for leave to appeal.

Grounds of appeal

Ground 4 of the Appellant's Notice of Appeal is formulated in a composite fashion and alleges that the Tribunal at first instance erred on a question of law by reason of "Denial of Procedural Fairness & Apprehended Bias". In *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 [2006] HCA 55, Kirby and Crennan JJ, with whom Gummow ACJ agreed at [3], observed at [117] that an appellate court:

"dealing with allegations of apprehended bias, coupled with other discrete grounds of appeal must deal with the issue of bias first. Must do this because, logically, it comes first. Actual or apprehended bias strike at the validity and acceptability of the trial and its outcome. It is for that reason that such questions should be dealt with before other, substantive, issues are decided".

Although exceptional in view of the Appellant's apprehended bias ground of appeal, it is appropriate to deal first with the Appellant's procedural fairness challenge. The Appellant's Ground 4 asserted that the Tribunal failed to afford her procedural fairness by:

4.2 Failing to accord the Appellant a "reasonable opportunity to settle in and organise her documents at the commencement of the hearing"

4.3 Criticising the volume of the Appellant's evidence within the first minutes of the hearing, thereby disrupting her ability to organise and access that evidence.

4.4 Prematurely intervening, without allowing reasonable time for a self-represented litigant to prepare, impeded the Appellant's effective presentation of her case and contributed to an uneven playing field compared to the represented Respondent, who arrived having filed no evidence, and openly admitting that she did not have physical copies of the Appellant's documents.

4.6 The appointment of a compulsory manager was a known point of concern to the Appellant, who was explicitly seeking findings regarding the failures of that manager to perform.

4.8 The Respondent had filed no evidence, no points of defence, and, through its solicitor, admitted to having physical copies of relevant documents and needing to "understand what was actually filed".

4.9 The Tribunal "accommodated, guided and excused the Respondent's solicitor for her admitted unpreparedness".

4.11 The Respondent's sheer failure to bring the hard copy documents to the hearing "hijacked" the proceedings, significant hearing time being consumed by the Tribunal having to verbally establish what the Respondent's solicitor did and did not have, identify exhibit numbers for her and accommodate the Respondent's lack of preparation.

4.12 When the Appellant sought leave to adduce a further affidavit in the matter, that affidavit was rejected as irrelevant, without the Tribunal looking at it to determine its relevance. Whereas the statement and affidavit presented by the Respondent's solicitor were both viewed before any decision on their relevance was made.

4.13 The Appellant was compelled to cross-examine the Respondent's new witness (Ms Gawne) to defend the new "ambush defence" brought by the Respondent on the day of the hearing regarding alleged unauthorised works.

4.14 Because the three hour hearing time limited was squandered accommodating the Respondent's non-compliance, the Appellant was aggressively rushed and deprived of her time and opportunity to methodically present her uncontested damages claim."

Ground 4 thus asserted that "A fair minded lay observer would conclude that the Member applied an impermissibly hostile and restrictive standard to the self-represented applicant (who had followed the rules and brought her evidence), while simultaneously applying a highly sympathetic, accommodating, and flexible standard to the legally represented Respondent (who had broke the rules and brought nothing). This unequal treatment constitutes apprehended bias and a denial of procedural fairness".

In its Reply, the Respondent disputed that the Appellant had been denied procedural fairness by the Tribunal and submitted that the Appellant had "disclosed no valid grounds of appeal nor any question of law which would allow for an appeal as of right" and that the Appellant's stated grounds in support of her application for leave to appeal "appear to be frivolous, vexatious and without substance". With respect to the Respondent, each limb of this ground involves a question of law.

In her supplementary submissions, the Appellant identified by reference to the time during the hearing, transcript references in support of a number of her grounds, and particularly with respect to ground 4.

In her submissions of 27 May 2026, albeit headed "Additional submission regarding ground 10: the oral ambush and the "red herring" defence", the Appellant reiterated the substance of ground 4 with respect to the asserted denial of procedural fairness. In those submissions, the Appellant reiterated her complaint with respect to the Respondent's ability to rely on an "unpleaded defence", to the Tribunal permitting the Respondent to "articulate an oral defence for the first time at the final hearing" having failed to comply with the directions of 29 May 2025 to lodge points of defence, the Respondent being permitted to allege at the hearing, for the first time, that 2015 renovations and unauthorised works carried out to the Appellant's Lot caused the water damage, notwithstanding the Respondent's concession that it did not have evidence to substantiate that defence, the Tribunal allowing the Respondent to rely on a late affidavit containing those allegations which the Appellant was then obliged to deal with through cross-examination.

The Appellant ultimately submitted [2.7] that it was a denial of procedural fairness “to require a self-represented litigant to expend limited cross-examination time addressing an unpleaded defence that the Tribunal ultimately dismisses for lacking the very expert evidence the Respondent conceded it did not have at the outset this procedurally prejudiced the Appellant’s ability to present her uncontested damages claim within the constrained hearing time”.

In submissions in reply, the Respondent reiterated its contention that no ground of appeal advanced by the Appellant had been made out. With respect to the Appellant’s procedural fairness and apprehended bias ground, the Respondent submitted at [27] that “despite claiming vulnerability”, the Appellant had not requested an adjournment of the proceedings, any “special measures” or made any “request for procedural accommodation”. The Respondent submitted that the transcript of the hearing reveals “extensive communication, detailed evidence preparation, and active participation”. The Respondent further submitted that the transcript revealed “firm but appropriate case management and nothing more” and that the Tribunal had been “entirely appropriate in the handling of the hearing”, the Tribunal’s directions being “procedural, not coercive”. It was ultimately submitted that the Tribunal had been “consistent and fair” in its treatment of all parties and that the Appellant’s challenge failed.

Neither the Appellant nor the Respondent materially added to her or its written submissions during oral submissions. The Respondent did not submit that if, contrary to its primary contention, the Appellant made out her procedural fairness challenge, the ground should not be upheld on the basis that the proceedings could have had no other outcome had the Appellant been afforded procedural fairness.

In view of the Appellant’s substantial success at first instance with respect to her claims for relief not involving monetary compensation, the ultimate issue for determination in the appeal is whether the Tribunal’s rejection of that claim was vitiated by her being denied procedural fairness, or the Tribunal not having brought an impartial mind to bear on the issue. However, that does not mean that the course which the proceedings at first instance took with respect to issues on which the Appellant was successful can assume no significance in that determination. The course which the proceedings took, on a holistic or overall basis require analysis.

Principles governing the Appellant’s procedural fairness challenge

Courts, and tribunals, have an overriding duty to ensure that a trial is fair, that duty requiring that a litigant not suffer a disadvantage from exercising his or her right to be self-represented (*Hamod v New South Wales* [2011] NSWCA 375), but that duty is not owed solely to the unrepresented litigant. The obligation is to ensure a fair trial for all parties. There is an obvious “tension” in reconciling the court or tribunal’s duties.

The authorities recognise two relevant aspects to giving parties a reasonable opportunity to present their case. The first is that parties must be afforded a reasonable opportunity to be heard. The second aspect is that a primary decision maker has an obligation to take appropriate steps to ensure that an unrepresented litigant has sufficient information about the practice and

procedure of the court or tribunal, so far as is reasonably practicable for the purpose of ensuring a fair trial. That obligation does not extend to advising a party as to how his or her rights should be exercised.

The workload of a court is taken into account when assessing the content of procedural fairness, although the authorities suggest that such considerations are subservient to other relevant considerations (*Shrestha v Migration Review Tribunal* (2015) 229 FCR 301; [2015] FCAFC 87). In *International Finance Trust Company Ltd v New South Wales Crimes Commission* (2009) 240 CLR 319; [2009] HCA 49, French CJ said, at [54] that “Procedural fairness or natural justice lies at the heart of the judicial function ... it is an incident of the judicial power” and “requires that a court be and appear to be impartial, and provide each party to the proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it”.

In *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7, Gageler J as he then was said at [186] that:

“Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions and to generate unjustified feelings of resentment in those to whom fairness is denied. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice.”

In *Spencer v Commonwealth of Australia* [2014] FCA 1288, Mortimer J, as Mortimer CJ then was said, at [20] that:

“Where a party, in particular an applicant, is self-represented, the Court has a more active role in ensuring the fairness of the trial – not only to the self-represented party, but also to the represented parties. The manner in which a trial must be conducted is quite different.”

In *Lee v Huo* [2026] NSWCA 15 (Lee), the Court of Appeal recorded at [70] that the appellant asserted that the primary judge “failed to take appropriate steps to ensure that the appellant, as an unrepresented litigant, had sufficient information about the practice and procedure of the District Court of New South Wales as is reasonably practicable for the purpose of ensuring a fair trial”. The Court of Appeal referred to the statements in *Chalik v Chalik* [2025] NSWCA 136 at [68]-[71] that:

*“The question of the extent, if any, of assistance which a trial judge or appellate court should afford to an unrepresented litigant in civil proceedings is nuanced and has been the subject of many intermediate appellate judgments of this court since *Rajski* was decided almost 40 years ago. Those decisions have emphasised that an unrepresented litigant should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place. Even then, care must be taken not to disturb the balance which the rules of practice and procedure are designed to afford both parties.” The duty of a trial judge to assist an unrepresented litigant does not “extend to advising the litigant as to how his or her rights should be exercised. That is, it is not the function of the court to give judicial advice to or conduct the case on behalf of, the unrepresented litigant”*

(citations omitted).

Identifying what is not the duty to an unrepresented litigant of a decision maker in a civil case is not problematic. In *Rowett v Westpac Banking Corp* [1993] NSWCA 240 Handley JA said at 3 that the role was

“not to actively assist one party against the other; to advise one party against the other; or in any way to act as the legal adviser or the legal representative for that party even if that party is unrepresented. The role of the judge in a civil case in our system is to act as the umpire and he or she has no active role such as may occur under our system in criminal proceedings where a citizen is fighting the state as prosecutor and the judge has a proper role in protecting the accused, especially an unrepresented accused. Civil cases involve citizen (corporate or otherwise) against citizen, and the judge’s role, as I have said, is that of an umpire”.

The Court of appeal said in *Lee* at [72] that “One of the reasons why the question of the extent, if any, of assistance which a trial judge should afford to an unrepresented litigant in civil proceedings is nuanced is that not all unrepresented litigants are alike; some may lack language skills or be plainly “at sea” in an unfamiliar court environment; others may fixated on a particular issue or issues; still others may be intelligent and articulate”.

Relevantly for present purposes, the Court of Appeal referred at [73] to the appellant in that case being in the “intelligent and articulate” category of litigant, for reasons which it outlined. With no disrespect intended to her, although unfamiliar with the Tribunal environment, the present Appellant showed herself to be in that category in the course of the conduct of her appeal.

As the Court of Appeal’s determination of the appellant’s challenge confirms, close regard must be had to the transcript of the proceedings when evaluating her procedural fairness challenge. Both parties provided a transcript of the hearing on 25 September 2025. Although each asserted that her or its transcript was preferable, when invited to do so, neither the Appellant nor the solicitor for the Respondent identified any significant differences between the two. Other than in formatting and typescript, the Appeal Panel has not identified any significant differences between the transcripts. For reasons which will become apparent, our evaluation of the Appellant’s procedural fairness challenge will be by reference to the copy of the transcript provided by the Respondent.

The transcript of the hearing

In these reasons, reference will be made to the transcript exhibited to the Affidavit of Freya Gordon of 19 November 2025, adopting the pagination appearing in the bottom right hand corner of each page of the transcript.

When the matter was called on for hearing the Tribunal informed the Appellant that it would “attend to some general housekeeping. There are a great number of documents that have been filed in evidence ... some of those are relevant to issues that have to be decided today, but most of them, in my view, are not. There are two folders filed on the 17th of July in accordance with the orders previously made by Senior Member Rose. Those documents contain points of claim.

Chronology schedule of claim together with some expert reports”. The Tribunal asked the Appellant whether she relied upon those documents. The Appellant confirmed that she did. The Tribunal did not identify the documents of the Appellant which it did not consider relevant to the issues requiring determination.

Immediately after those matters were marked as exhibits, the solicitor then appearing for the Respondent said to the Tribunal “I actually don’t have physical copies of anything, so I need to understand what was actually filed on, what dates I’ve been provided with some documents, but I haven’t been given hard copies of any of these labelled folders and I have raised this as well. With the applicant”. The Tribunal responded “If we are. Not at all. Careful this afternoon. It’s gonna get out of hand in a very big way”. The Tribunal observed [2] that “I have to keep a lid on this and I have to run it very tightly. So it’s the case. Is that how did you not come to or what documents do you have?”

In the course of discussion with the Respondent’s solicitor, the Tribunal said “There is something in the order of 10 documents filed by the parties that have various submissions and so forth” but that “I don’t intend to admit those documents into evidence immediately. However, if the Applicant wishes to rely on something in there during submissions, I’ll admit them on a case by case basis. And I’ll hear objections to it at that time. If you want to make objections to it, okay. Alright. So they’re the two documents filed that I think are most relevant to the proceedings”. The Tribunal did not identify which of the Appellant’s documents were not being admitted. The great bulk, if not all of the 10 documents had been lodged by the Appellant.

The Tribunal then addressed the Appellant and said “I’m aware that there’s a great number of documents here, and I appreciate that you’ve tranced in here with boxes of them. I’ve actually reviewed pretty well all of those documents ... I’ve been through this case quite thoroughly, it’s my view, as I’ve already expressed, that much of that content perhaps isn’t relevant to what I have to decide today. If you think it is relevant in submissions, I’ll you can simply take me to it and we will deal with it in just the way that I said. I don’t intend at this stage to mark 12 exhibits”. The Tribunal did not indicate, even in general terms, the documents lodged by the Appellant which were considered to be irrelevant.

Superficially, the opportunity to seek to rely on excluded documents in written submissions, at least to some extent, allowed the Appellant the opportunity to seek to rely on them. Having not been informed as to which documents were excluded, that opportunity was more apparent than real.

The Tribunal reiterated, correctly, that it is “not my job to fossil [sic] through 1000 pages of evidence”, and that “unless you take me to the particular document that you wish to rely upon, it’s very possible I won’t see it”.

The solicitor for the Respondent enquired at [3] about which of the Appellant’s witnesses were “actually here and available for cross-examination”. The transcript does not suggest that the Respondent had given prior notice of the intention to cross-examination but, as the transcript confirms, each of Mr Spratling and Mr Poon was available for cross-examination. The

Respondent's solicitor confirmed that she wished for the statement of Mr Adrian Lake to be tendered and also to cross-examine him. The statements of those witnesses of the Appellant were the only statements which had been lodged in accordance with the Tribunal's directions.

After those exchanges, the Appellant said [4] "Thank you, Member. Can I ask a question? Yes. So I don't really understand what's happening with the proceedings today. I'm not represented, obviously, and I have an idea. I've a little idea of how evidence goes back and forth. I was in a matter with my daughter recently, but I think we've explained really well at the outset. So I understood what was going to happen and right now I don't understand what's going on with this housekeeping bill".

In response, the Tribunal said:

"There are several records kept of proceedings by the tribunal. 1 is my written record, another is the recording. In many circumstances the recording is needed to be listened to by other people ... there's a formality where we in all courts identify formally identify the documents on the record that we're relying upon. We give them exhibit numbers. That means that anyone who reads the transcript or recording of those (knows) very easily what document we're referring to. So I've put two of your documents, most recently served documents into formal evidence. And I've given them exhibit numbers. Given the volume of other documentation, it probably isn't practical for me to put the remainder into exhibits unless they're particularly relied on to. OK. And so what I did is explain to the solicitor for the other side that I would deal with that on a case by case basis if the situation came up. And she might want to object to some of that evidence. Maybe she does. Maybe she. I have no idea. But if she does, I said the objections would be taken at that time. Do you have any more questions about that process?"

The Tribunal continued to answer the Appellant's "second question", saying that:

"The next part of the housekeeping I was attending to was. On planning. I'm actually planning how I intend to run the hearing and deciding how I intend to run it, and one of the most time consuming things in a hearing like this is cross-examination. So I was asking which witnesses the parties intend to call given that the Respondent hasn't filed any evidence and perhaps they're going to make an application to put some on, I don't know. But given that they haven't there's no reason for me to ask you who you wish to cross-examination because there's no evidence. And therefore the reason for cross-examination doesn't arise."

The Appellant then informed the Tribunal that there was "the Affidavit of Debbie Gawne that was served to me by email last Friday". The Tribunal stated [5] that it did not have that Affidavit. The Respondent's solicitor said, presumably on her instructions at the time, that the Affidavit related to an adjournment application which had been refused "so we wouldn't rely on that affidavit, but I will be making an application to seek leave to actually rely on two short statements which were served on", what emerged as having been the night prior to the hearing.

The Tribunal asked “What do they go to”, the Respondent’s solicitor responded “It goes to the orders that are being sought, in particular one of the statements is from a contractor, so it’s not in the form of an expert report. It’s a simple statement just. With respect to. The work orders that are being sought and the other statement goes to our defence of the work order. In the. There are allegedly some unauthorised works that have been carried out. To the Applicant’s Lot”.

The Tribunal responded that if it was “minded to make a work order, then I’m probably going to do it by reference to the expert reports and the recommendations therein, unless there’s some incredible concession that you’ve managed to achieve in cross-examination” and asked “Is it still relevant with that in?”. The Respondent’s solicitor replied, “It is”, informed the Tribunal that the Appellant had seen the evidence “last night” and confirmed that the tender of the evidence was pressed. The Appellant confirmed that she had “read through” the reports the night before.

The Tribunal asked the Respondent’s solicitor [6] what the relevance of the Affidavit of Ms Gawne was. The solicitor replied that it was “relevant to the issue of unauthorised works that have been carried out”. The Tribunal suggested “That’s not an issue in these proceedings, are they?”. The Respondent’s solicitor responded that although it was “not an issue in these proceedings” it “may cause some doubt on the actual works that need to be carried out and the extent of those works as well”, and reiterated the Respondent’s contention that there were “actually unauthorised works that have been carried out which, in my preliminary view and reading the Affidavit of sorry the statement of the contractor, it could very well be that the work order that’s been proposed is not actually the most suitable work order”. The solicitor conceded that “We’re in a situation where I don’t have a competing scope of work, so I don’t have a competing expert report” but reiterated that it was “relevant”. Importantly for present purposes, the Respondent’s solicitor submitted that the report was also relevant to the issue of damages, because “there’s alternate accommodation that’s being sought”.

The Respondent’s solicitor submitted “I don’t see the prejudice of this coming in”. The Tribunal did not invite the Appellant to indicate whether she opposed or consented to the evidence being admitted, or, if it was, whether the Appellant could deal with it in the hearing. The Tribunal replied, “Yes, much of this isn’t new news at all, alright. Well, there’s one. Perhaps the most straightforward way to deal with this is by asking Ms Hadley whether she thinks anything in this Affidavit is untrue”. The Appellant was not invited to respond to that suggestion, but rather asked whether she would take an oath or affirmation with respect to her evidence.

When asked (page 7) whether there was anything in the Affidavit which she thought was not true, the Appellant replied “I didn’t read it closely enough to determine whether. I scanned it, I was kind of appalled by it and I didn’t go into detail”. The Tribunal asked whether the Appellant would like a short adjournment to read the material, to which the Appellant replied she would like to read it. The Tribunal replied “Alright, why don’t you do that now while we sit here”. There was an intervention from a Mr Carmack whilst the Appellant was reading the Affidavit. The Tribunal then asked the Appellant whether, having read the document there was anything in paragraphs 6 and 7 of it which she thought was untrue. The Applicant replied that she had and gave evidence about those matters. The Tribunal then ruled (8) that the statement would be admitted as an

exhibit.

The Appellant was then directed to read the witness statement of Theo Dirkson. For the reasons it briefly stated, the Tribunal rejected the Respondent's application to rely on the evidence of Mr Dirkson. This challenge cannot be advanced in reliance on Mr Dirkson's rejected statement.

After further exchanges between the Tribunal and the solicitor for the Respondent, the Appellant said (9) that, "When I received the Affidavit of Debbie Gawne on Friday evening for the application, and I noted that in my rejection to the application in my opposition that I was preparing an affidavit I emailed the parties and let them know that I would be serving that. And I would like leave to serve this Affidavit because it goes to the conduct of the compulsory manager". Ms Gawne was the compulsory manager.

The Tribunal did not have the Affidavit, or invite the Appellant to provide a copy of it for the purpose of ruling on the Appellant's application for leave to rely on it. Notwithstanding that it had not seen the Affidavit, the Tribunal replied "So that's not relevant to anything I have to decide today. Well, I suppose that's not entirely true, but...". The Appellant submitted "It's very relevant", to which the Tribunal replied "Well, if it's not really it's not it's not really because all I really have to decide is whether the work's been done or not. I don't have to decide why that is." The Appellant responded "There've been a number of complaints with Fair Trading and they're on the record and I deal and there's been quite some antagonistic comments towards me because I made these complaints to Fair Trading. One of them was around the initial insurance for the scheme, which was changed. By the former strata manager, and when he changed that insurance, he changed it. Two weeks after the initial water damage claim, and that's that".

The Tribunal responded (10) "Ms Hadley. Ms Hadley. All I have to. All I have to make a decision on in these proceedings is what? The existing condition of the common property is. What damage has been caused to the various Lots? What has caused that damage? The reason the Owners Corporation perhaps hasn't acted although that might just be an ancillary issue. And whether it is appropriate to make an order that they be rectified and what those orders should be the previous interactions with the statutory body are of no interest to me at all". With all due respect, having not considered the affidavit, suggesting that its contents could have "no interest" to the Tribunal "at all" would cause a reasonable person in the Appellant's position disquiet.

The Appellant submitted that "The ongoing failure of the Owners Corporation to deal with these matters and new issues that have arisen at the property". The Tribunal said "There will be self-evident that if it's still in disrepair. Won't it? There's been a failure as simple as that". The Appellant reiterated that "the failure is at the hands of the compulsory manager and it's having a serious impact on the Owners Corporation". The Tribunal suggested that the orders it would make would "remedy that outcome". The Appellant disputed that proposition. The Tribunal suggested "Better get on with this because it's five minutes to two". The Appellant asked "What? What would be?" to which the Tribunal replied "I'm not sure that material is relevant to anything I have to decide well, what issue do I have to?". The Appellant asked "Can I at least let you?". The Tribunal responded "No, just answer my question, please. What is the issue that you

say is before me that that's relevant to?" The Appellant suggested that it was "relevant to breaches of the Strata Schemes Management Act".

After further exchanges the Appellant said "What I would be seeking is that you look at the material so that you can make a determination of fact finding of fact as to. The ongoing. And exacerbated loss that's been caused by the failure of the compulsory manager to act in the way that she should have acted from the outset the delays that we've had". The exchanges concluded (11) with the Tribunal saying "I've noted your comments, I'm going to move on, but that's not admitted". As is not in doubt, the Tribunal made that ruling without seeing and thus knowing the contents of the Appellant's Affidavit.

Having refused the Appellant leave to rely upon her Affidavit, the Tribunal asked her whether she wished to cross-examine Ms Gawne. By that stage, the Respondent had decided that it wished to rely on Ms Gawne's Affidavit. The Appellant said that she had "never cross-examined before" and asked "What am I allowed to ask her?" to which the Tribunal replied "Anything that's relevant to something that I have to decide today or in due course. And those are the issues that I have already told you that I have to decide. Unless there's a submission from the Respondent that there was something that prevented the maintenance, will there be submissions to that effect?" to which the Respondent's solicitor replied "Yes". In the Appeal Panel's opinion, it would have been appropriate in view of the Appellant's inquiry, for the Tribunal to have informed her in general terms of the likely implications of failing to suggest to Ms Gawne anything contrary to her evidence which the Appellant intended to allege.

The Tribunal then advised the proposed course of cross-examination (11). The Appellant then said "You'll have to give me a minute, please. Senior Member can I just say", to which the Tribunal replied "No, just I'm. I'm. I'm sick of being taken all over the room everywhere by people. I'm going to restore this to how it should be. We're going to deal with one thing at a time". The course of the proceedings to that point, as revealed by the transcript implies that the Tribunal's comment was directed to the Appellant, or primarily to the Appellant.

The Appellant asked whether the Tribunal only had her documents from 10 July 2025, to which the Tribunal replied "No no what I've asked you is there's a document that you filed in the Tribunal on 17th of July." The Appellant replied "Yes. Largely, but it missed some points because on the 29th of May at the hearing, I was represented by a solicitor from BBL and I had engaged her the day before because they told me, you know, early in the year that they would do some stuff to help me. But it never happened."

After referring (13) to her updated points of claim, the Appellant asked "Can you? Sorry, can you explain that it can't be used as evidence? Is that because they're not? What". In a number of subsequent exchanges with respect to the relevance of Ms Gawne's evidence, the Tribunal said (13) "If you're not careful, we're going to. You're you're not going even to get to make submissions this afternoon. Because what do you have to do to some extent, is accept on face what I tell you. Because based on normal procedures and the law. Otherwise, otherwise you're not going to get heard today". In what way the Appellant needed to be "careful" was not identified. Up to that

point, the transcript does not reveal the Appellant to have been unresponsive to the Tribunal's questions, argumentative, disrespectful, or to have otherwise conducted herself in a manner which disentitled her to procedural fairness.

After further exchanges with the Tribunal, and the Appellant said (14) that her "entire week has been destroyed" by the asserted "game playing" by the Respondent. The Tribunal replied "I don't accept that, you've had since January to prepare your case". It is not in doubt that the Affidavit of Ms Gawne was only provided to the Appellant days prior to the hearing, and that, although the Appellant had fully complied with procedural orders, the Respondent had not complied with them at all.

The Appellant confirmed (15) that she did not wish the case to be adjourned, but rather that there were "a couple of other issues", in the light of which, if the Tribunal made orders in those terms "We'll probably end up back, which is a bit of shame". The Tribunal responded that "You won't because you'll have exhausted your opportunity to get the orders". The Appellant then sought leave to amend her orders and hand up a document "so you can at least see the difference". The Tribunal did not receive the document, but asked "In your own words, what the amendment that you need just in five sentences or less? Just tell me about it". It is regrettable that the Tribunal did not look at the document.

After discussion, mainly between the Tribunal and the Respondent's solicitor, to the extent that the Appellant sought to amend the relief which she sought, the Tribunal concluded (20) that the Appellant would be permitted to seek that relief as "I can simply deal with that by taking written submissions" on the contentious amendment. The Tribunal added that any "prejudice that arises out of the new order" to the Respondent, was cured by the intention to make orders for "written submissions following" the hearing.

The Appellant then addressed the Tribunal in relation to the conflict of interest issue which she raised with respect to the solicitors for the Respondent, during the course of which (21), the Tribunal asked the Appellant what "prejudice" she asserted arose from her previous, apparently unsuccessful, attempts to retain the Respondent's solicitors to act for her in relation to disputes with the Owners Corporation. The Tribunal clearly became, not unreasonably, somewhat frustrated by the Appellant's apparent difficulty in explaining the asserted conflict which was that the solicitors "know detail about the Owners Corporation's, initial failure to maintain and repair and to do the repairs". The Tribunal ruled at (22) there was no conflict. How the Tribunal dealt with the Appellant's conflict submissions cannot advance her procedural fairness challenge.

In response to the Appellant saying "You're now not admitting my evidence, okay?" the Tribunal replied "Now, something I'm not admitting it. I've read it and I've read your Affidavits I've read. Your statements they'll be considered". It has not been suggested that the Tribunal was there referring to the Affidavit of the Appellant which had earlier been rejected by the Tribunal without being read. The Appellant then said "This noise in the background is really, really difficult for me to function with. I'm autistic. I don't do well with verbal processing and you are requiring me to be on the spot and answer your questions really clearly. And abruptly, with this noise in the

background, and it's just not working for me, I'm going to try. I really am doing my best, but this is very difficult. The reason that I put documentation on is because that allows me to actually get what I need to say out. Yep, and and do it. Clearly." The Tribunal reiterated that it had read the Appellant's Affidavit of 10 July 2025. The Appellant replied, "That Affidavit. No, that Affidavit really just goes to".

During the course of exchanges between with the Tribunal (28), (29), (30), the Respondent's solicitor made a number of submissions as to the relevance of the evidence of Ms Gawne. The Tribunal did not then, or at any time, ask why leave to rely on the Affidavit should be granted. During the course of her submissions, at (29), although the Respondent had lodged no expert reports, the Respondent's solicitor took issue with some of the reports on which the Appellant relied.

The Appellant was then cross-examined (35). The Tribunal explained that, after cross-examination "at the end" you "get afforded a more latitude than a normal witness would ... but there's a limit to that. If I can't see the relevance of it, I'll stop you", by way of explanation of the Appellant's right to give evidence in the nature of re-examination at the conclusion of her cross-examination.

In the course of cross-examination (38) the Appellant was asked whether she had "an idea of the split between when you might live (in her Lot) versus when you might (not)?". The Appellant said that she had a document that "shows the exact times and dates" from "the last 20 years". The solicitor for the Respondent declined the Appellant's invitation to see the document, the Appellant said "I have let it out well, it's in the document. If you'd let me refer to it, I'd tell you, I let it out in. Around 2007, and I was away from it until the end of 2009. I was travelling and living somewhere else ... I then let it out". The Respondent's solicitor reiterated that she did not wish to know the details of the letting of the property and that it was "a generic question". The Appellant replied "It's in the evidence. So Airbnb did it in 2023." The Appellant was asked about tenancy agreements to which she replied "I also have documents that I can show you for that". The Respondent's solicitor did not ask to see those documents. It is to be remembered that the Respondent had not lodged points of defence as directed by the Tribunal. The Appeal Panel has not been referred to anything which establishes that, prior to her cross-examination, the Appellant should have anticipated that she needed to substantiate the loss she claimed.

At the conclusion of the cross-examination of the Appellant the Tribunal said to the Appellant "I have no further questions for you ... you're free to resume your seat at the bar table please" (41). In the Appeal Panel's opinion, in the circumstances, it would have been appropriate to ask the Appellant whether she wished to tender the documents which she had offered to show the Respondent's solicitor, and, if she did, to ask the Respondent's solicitor why they should not be received in evidence.

Mr Lake was then due to be called for cross-examination, but the Respondent's solicitor said that he was not required. Mr Poon was then cross-examined (41-46) after which Mr Spratling was cross-examined (46-50). The Tribunal noted (51) that at 3.46 the Strata Manager, Ms Gawne, could be cross-examined, and then the parties would be heard on whether final submissions could be made in writing because of time constraints.

The Appellant asked (51) what "That's going to mean if we do the submissions in writing because as the applicant, like I understand, there's a certain right to reply". The Tribunal confirmed that the Appellant would have the right to reply to the Respondent's submissions. The Appellant asked whether "the Respondent gets 'the final say', so whatever they've said today is all they know about their case ... they have given me no points of defence to know what their intention was so procedurally, I just want to be sure that it's fair that I have an opportunity to respond to whatever they might raise and perhaps even get legal advice in it which I haven't been able to have an opportunity to do because it's blowing me today". The Tribunal asked "When you say sprung it on you?". The Appellant replied "Well, the case they have against me, all of these points that they're making that we could have looked at much earlier than this and that I could have received legal advice on to you know, to, you know, how to address those, which I haven't had a chance to do". In response the Tribunal said that it would afford the Appellant the opportunity to lodge submissions in reply to the Respondent's submissions, albeit the submissions in reply (52) would be "very much limited to only things that surprise you in their response". The Appellant confirmed that was "what I would be seeking".

The Appellant asked (53) whether she could re-examine Mr Poon or Mr Spratling. The Tribunal permitted the Appellant to re-examine Mr Poon. The Appellant said that she had (55) "questions" for Mr Spratling but "didn't highlight them then". Mr Spratling was then briefly re-examined (57). Ms Gawne gave evidence and was cross-examined by the Appellant without interruption by the Tribunal.

The hearing concluded with the Tribunal saying "Alright, so that concludes evidence. Submissions including submissions on the controversial order 4. Orders for those will be made tomorrow. I propose to make the following orders and I'll hear from the parties on any of the orders that either party thinks is inappropriate. The first order will be that the Applicant's submissions are to be made within three weeks. The next order will be the Respondent's submissions that will be made three weeks thereafter. Any submissions in reply being restricted strictly to any new issues, whereas by the reply will be made two weeks thereafter. There'll be a fourth order that no further evidence will be considered." The Tribunal asked whether any party had any issue to raise with those orders. The transcript does not suggest that anyone had anything further to say. The Tribunal recorded that a party opposing an order pursuant to s 50(2) of the CAT Act dispensing with an oral hearing, and having the proceedings determined on the basis of the evidence before the Tribunal and written submissions should include their submissions the basis of such objection.

Pursuant to the directions of the Tribunal of 25 September 2025 on 16 October 2025 the Appellant lodged extensive written submissions. Nowhere in her submissions did the Appellant oppose the proposed order pursuant to s 50(2) of the CAT Act dispensing with an oral hearing of final submissions.

On 20 November 2025 the Respondent lodged submissions in response to the submissions of the Appellant. On 4 December 2025 the Appellant lodged submissions in reply to the submissions of the Respondent.

No party having submitted that the Tribunal ought not make an order under s 50(2) of the CAT Act that order could not, and is not asserted by the Appellant in any event have caused or contributed to any lack of procedural fairness.

Consideration

In some cases an absence of procedural fairness can be established by reference to a particular occurrence during the course of proceedings. That is not so in this case.

To evaluate the Appellant's procedural fairness challenge, the Appeal Panel has closely considered the course which the hearing took, as evidenced by the transcript. The Appeal Panel has not "scrutinized" the transcript by taking an "over zealous review" of it (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6, at [31] or considered the transcript "minutely and finely with an eye attuned to the perception of error" (*Wu Shan Liang*, at [30]). The transcript has been reviewed in a balanced, fair and realistic way (*New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231).

As the Tribunal at first instance reminded the parties on a number of occasions, the time allocated for the hearing of their case was quite limited. It is readily apparent from the transcript that the combination of the Appellant being self-represented, and the Respondent's solicitor, and the Respondent's case, being unprepared, resulted in significant hearing time being taken up with administrative or procedural matters. The Tribunal at first instance was obliged to afford the parties procedural fairness, and observe the "guiding principles" articulated in s 36, and particularly ss 36(1) and s 36(4) of the CAT Act. In the circumstances, doing so in the time available to the Tribunal at first instance was not simple or straightforward.

The most significant individual matter upon which the Appellant appears to rely is the Tribunal's refusal to admit her Affidavit of 24 September 2025 into evidence, without first looking at the Affidavit and, in the light of reviewing it, and assessing the affidavit's potential relevance and probative value, ascertaining whether the Respondent opposed the Appellant having leave to rely on the Affidavit and, if so, on what grounds the Respondent did so. Refusing the Appellant leave to rely on the Affidavit, without first looking at it, and establishing what prejudice might flow to the Respondent if the Appellant were granted leave to rely on it, must be seen against the background, which is not in contest, that the Respondent had lodged no points of defence, or evidence in accordance with the Tribunal's directions, or otherwise provided, other than by clearly indicating that it opposed the granting of the relief sought by the Appellant, any clues with

respect to the basis on which the Appellant's claim was being resisted.

As is not in doubt, and the Tribunal identified, the Appellant had lodged extensive evidence, including expert reports in accordance with the Tribunal's directions. The Appellant was thus in a position where until, at most, days before the commencement of the hearing, other than knowing that her claims were being resisted, she had no notice or knowledge of the grounds on which the Respondent was defending the case. That was particularly significant with respect to the Appellant's damages claim. As is not in doubt, the Respondent was permitted to rely on the Affidavit of Ms Gawne which, properly, the Respondent acknowledged had only been served on the Appellant a short time prior to the hearing. The Appellant's contention that she had been "ambushed" was not without foundation.

With respect to the Tribunal at first instance, and appreciating how it happened, the contrast between the procedural and evidentiary indulgences granted to the Respondent on the one hand, and the refusal of leave to rely on an Affidavit of the Appellant which the Tribunal did not first look at, is supportive of the Appellant's claims with respect to an absence of procedural fairness.

In the Respondent's documents lodged on 27 May 2026 in a volume titled "Index to Respondent's documents" there appears a draft Affidavit of the Appellant attaching [18] copies of Annexures to the Affidavit sworn on 24 September 2025, which the Tribunal rejected. Nothing to which the Appeal Panel has been referred establishes that the Affidavit of 24 September 2025 was not capable of being probative of the Appellant's damages claim, which was a major issue in the proceedings, or that allowing the Appellant to rely upon it would have been procedurally unfair to the Respondent in all the circumstances. Properly, having regard to the Respondent's reliance on an Affidavit which was provided to the Appellant only a day or days earlier, the Respondent did not identify prejudice if the Appellant had been allowed to rely on it.

The Appellant's complaint with respect to being obliged to cross-examine Ms Gawne is, in the circumstances, not without substance. Until shortly before the hearing commenced, the Appellant had no reason to think that she would need to cross-examine Ms Gawne, or to prepare herself to do so. The Appellant should not have assumed that Ms Gawne's Affidavit would be received into evidence in view of the Respondent's failure to comply with procedural directions for the hearing. With respect to the Tribunal, and accepting that there were pressing time constraints, the circumstances surrounding the Appellant's cross-examination of Ms Gawne disadvantaged the Appellant. Until the hearing commenced, the Appellant was not to know the extent to which she would be put to proof of her alleged damages.

The Appeal Panel is not persuaded that the Tribunal knew, or ought to have known of the Appellant's asserted vulnerability. Nor do we accept that the Tribunal consciously did, or failed to do, anything which it could or should have done to afford the Appellant procedural fairness. Although the Appeal Panel has some sympathy for the Tribunal at first instance, our duty is to apply the legal principles which have been identified earlier in these reasons. The Appeal Panel finds that, largely because of time constraints, cumulatively, the matters which emerge from a consideration of the transcript of the hearing, establish that the Appellant was denied procedural

fairness in relation to her damages claim.

Although the most significant matter which informs our decision was the Tribunal's rejection of the Appellant's Affidavit of 24 September 2025, without reading or considering its contents, the other matters which have been identified in our analysis of the transcript constituted unintended failures to provide the Appellant with procedural fairness. Although it is unnecessary to decide the Appellant's apprehended bias complaint, the Appeal Panel is disinclined to find that claim made out.

It is unnecessary to consider other grounds of appeal. As it has not been established that remitting the matter for re-hearing could not result in a different outcome (*Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54) the inevitable consequence of the Appeal Panel's finding with respect to denial of procedural fairness is that the proceedings must be remitted for re-hearing by a differently constituted Tribunal. Although the only matter which requires re-hearing is the Appellant's compensation claim, the Appeal Panel will defer making directions with respect to the re-hearing to the Tribunal charged with conducting the re-hearing.

Costs

Without pre-empting a final decision on the issue, but being conscious of the assertions of both parties that funds are limited, and particularly as the Appeal Panel finds error on the part of the Tribunal, which was not caused by the Respondent, the Appeal Panel would be disinclined to make a costs order other than an order that each party pay her or its own costs, provided that no part of the Respondent's costs of the proceedings be visited upon the Appellant.

Order

The appeal is allowed.

The orders of the Tribunal of 3 February 2026 are set aside.

The proceedings are remitted for re-hearing by a differently constituted Tribunal.

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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