Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd
Medium Neutral Citation:	[2018] NSWCATAP 256
Hearing Date(s):	12 July 2018
Date of Orders:	30 October 2018
Decision Date:	30 October 2018
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member J Currie, Senior Member
Decision:	The appeal is allowed, the order for costs made 23 April 2018 is set aside and the application for costs is dismissed.
Catchwords:	COSTS – Rule 38(2)(b) – meaning of the expression "the amount claimed or in dispute is more than $30,000" – scope of operation of the rule – special circumstances – challenge to finding that claimant had arguable case
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) Civil and Administrative Tribunal Rules, 2014 (NSW) District Court Act, 1973 (NSW) Fair Trading Act, 1987 (NSW) Home Building Act, 1989 (NSW) Judiciary Act 1903-1946 (Cth) Judiciary Act 1903-1955 (Cth) Residential Parks Act, 1998 (NSW) Residential Tenancies Act, 2010 (NSW) Retail Leases Act, 1994 (NSW) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act, 2015 (NSW)

	Supreme Court Act, 1970 (NSW)
Cases Cited:	Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Ballas v Theophilos (No 1) (1957) 97 CLR 186; [1957] HCA 49 Bonita v Shen [2016] NSWCATAP 159 C G Constructions Pty Ltd v Hanson Constructions Materials Pty Limited [2017] NSWCATAP 130 Collins v Urban [2014] NSWCATAP 17 Ebert v The Union Trustee Company of Australia Ltd (1957) 98 CLR 172; [1957] HCA 88 Gillard v Hunter Wire Products Pty Ltd t/as Hunter Screen Products (No.2) [2001] NSWCA 450 Jabulani Pty Ltd v Walkabout II Pty Ltd [2016] NSWCA 267 Jensen v Ray [2011] NSWCA 247 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 Nanschild v Pratt [2011] NSWCA 85 Oertel v Crocker (1947) 75 CLR 621; [1947] HCA 40 Project Blue Sky Inc & Ors v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
Texts Cited:	Ritchie's Uniform Civil Procedure (NSW)
Category:	Principal judgment
Parties:	Appellant: The Owners – Strata Plan 63341 Respondent: Malachite Holdings Pty Ltd
Representation:	Counsel: P Menadue (Respondent) Solicitors: JS Mueller & Co Lawyers (Appellant) Penmans Solicitors (Respondent)
File Number(s):	AP 18/23049
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable

Date of Decision:	23 April 2018
Before:	K Ross, Senior Member
File Number(s):	SC 17/12035

REASONS FOR DECISION

Summary of Decision

1 The appeal is allowed, the order for costs is set aside, and the application for costs in application SC 17/12035 is dismissed.

2 Rule 38(2)(b) of the *Civil and Administrative Tribunal Rules, 2014* (NSW) (Rules) does not apply to proceedings under s 236(1) of the *Strata Schemes Management Act, 2015* (NSW) (Management Act) for an order that the unit entitlements in a strata scheme be reallocated because the initial unit entitlement allocation was unreasonable.

3 Rule 38(2)(b) applies to the following proceedings:

(1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;

(2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that

(a) there is credible evidence relating to the amount the Tribunal could award; and

(b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.

4 Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.

5 Rule 38(2)(b) does not apply to proceedings:

(1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a

consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or

(2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:

(a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or

(b) the relief sought does not depend on there being a finding that a specific amount of money is owed.

Introduction

6 On 19 January 2018, the Tribunal dismissed application SC 17/12035 (Proceedings) made by the appellant, in which the appellant applied for an order under s 236(1) of the Management Act for the reallocation of unit entitlements of the Lot owners in Strata Scheme SP 63341 (Strata Scheme). The respondent owned a Lot in the Strata Scheme and was one of the respondents in those proceedings.

7 Following dismissal of the application, the respondent applied for costs.

8 On 23 April 2018, the Tribunal ordered the appellant to pay the respondent's costs in respect of the application, such costs to be as agreed or assessed on a party/party basis. In awarding costs, the Tribunal found that r 38 of the Rules applied in respect of the application for costs because there was a "dispute in respect of the respondent's Lots [which] exceeded $30,000". The Tribunal published reasons for its decision (Reasons).

9 The appellant appeals this decision.

Notice of Appeal and submissions

10 In its Notice of Appeal, the appellant raised 5 grounds. These were:

(1) The Tribunal erred in its interpretation of r 38(2)(b) of the Rules in finding that there was an amount in dispute greater than $30,000. Rather, the Tribunal should have concluded there was no amount in dispute because the appellant did not seek a money award and, had the appellant been successful, there would have been no change in its financial position.

(2) The Tribunal erred in not following *Jensen v Ray* [2011] NSWCA 247 (*Jensen*) and inappropriately distinguished that case.

(3) The Tribunal erred in not following *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 (Allen) and inappropriately distinguished that case.

(4) The Tribunal erred in not giving reasons or sufficient reasons for not following *Jensen* and *Allen*.

(5) The Tribunal should have found both *Jensen* and *Allen* applied "because there was no material difference between the legislation considered in those cases and r 38(2)(b)."

11 The parties provided written submissions and made oral submissions at the hearing. In addition, at the conclusion of the hearing, the Tribunal made directions to permit the parties to provide supplementary written submissions.

12 The parties provided an agreed bundle of documents (Agreed Bundle) which was substantially irrelevant to the resolution of the issues ultimately raised on appeal.

13 Be that as it may, the parties' submissions were as follows

Ground 1 – The Tribunal erred in its interpretation of r 38(2)(b)

14 The appellant said it did not seek a money order in its application. As such, there was no amount claimed and no amount in dispute. Rather, the nature of the claim was an order for the reallocation of units between the Lot owners in the Strata Scheme, the issue to be resolved being whether the original unit entitlement allocation was unreasonable.

15 While it may be necessary to have regard to valuation evidence concerning each Lot, for the purpose of resolving the proceedings, the expression "amount claimed or in dispute" found in r 38(2)(b) is a reference to what is claimed in the application. Here, no amount was claimed or in dispute in the application and therefore the rule could not apply.

16 To support this submission, the appellant pointed to the fact that other respondents in the proceedings, the Andersons, did not serve any valuation evidence of a valuer at all. Consequently, the appellants submitted there was "no dispute about the respective values of all lots".

17 The appellant set out some of the legislative history in respect of costs payable in respect of Strata applications.

18 In this regard, the appellant referred to ss 176 and 192 of the *Strata Schemes Management Act, 1996* (NSW) (1996 Act), which related to orders for costs in respect of applications made under the 1996 Act.

19 We note these sections are of limited relevance to the present application, the costs regime for applications under the Management Act being dealt with by the *Civil and Administrative Tribunal Act, 2013* (NSW) (NCAT Act) and the Rules; the NCAT Act and Rules being in substantially different terms to that originally found in the 1996 Act, which provided:

> The Tribunal may not make any order for the payment of costs except as specifically authorised by this Act or in relation to an order dismissing an application or appeal because:
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> (a) the application or appeal is frivolous, vexatious, misconceived or lacking in substance, or
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> (b) a decision in favour of the applicant or appellant is not within the jurisdiction of the Tribunal.

20 In relation to the expression "amount claimed or in dispute" found in r 38(2)(b), the appellant noted that the Appeal Panel had considered the meaning of this expression in *Allen* but submitted that this case did not deal with the issue of whether r 38(2)(b) applied to proceedings under s 236 of the Management Act. However, the appellant submitted that the Appeal Panel in *Allen* did deal with the question of whether the rule required a consideration of the claims made by an applicant or the position of the respondent. The appellant submitted that *Allen* "focused upon the position of the party moving the Tribunal for orders"; in this case, the appellant was the applicant in the proceedings at first instance. The appellant submitted that its wealth would not have changed if it was successful, in that the total amount of levies which it was to receive would remain unaltered despite a reallocation between particular Lot owners.

21 Further, having referred to the Appeal Panel's reasons for decision in *Allen* at [43], [57] and [59], the appellant submitted there was never an amount claimed or referred to in the strata application.

22 The Appellant said that the effect of the Reasons was to construe r 38(2)(b) in a manner that made it uncertain whether the costs rule would operate. This was because r 38(2)(b) might not be engaged where no amount was claimed in the application lodged. However, if the respondent served evidence about an amount during the course of the proceedings, the rule would thereupon operate. The appellant submitted that such a construction was "capricious" in its operation and did not promote certainty. Rather, the appellant said that a

reference to the word “amount” in the rule must be the amount (if any) in the application and not in any subsequent evidence.

23 Further, the appellant submitted that an application under s 236 of the Management Act is not a dispute about the value of particular Lots. Rather, it is a dispute about whether the original unit entitlement is unreasonable. In this regard, a resolution of any contest concerning opposing valuations “will not determine the outcome of a dispute under section 236”.

24 In its further written submissions following the hearing of the appeal, the appellant also said that r 38(2)(b) “bears a resemblance to the first limb of s 101(2)(r) of the *Supreme Court Act, 1970* (NSW) (Supreme Court Act) and s 127(1)(c)(i) of the *District Court Act, 1973* (NSW) (District Court Act).

25 The appellant referred to *Ritchie’s Uniform Civil Procedure (NSW)* (at SCA s 101.45- Vol 2), which deals with the two limbs contained in ss 101(2)(r)(i) and (ii) and said that:

(1) The “first limb”, which uses the expression “matter at issue”, applies to proceedings involving claims for a debt, damages or possession of property; and

(2) The “second limb”, which uses the expression “involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value”, applies to proceedings concerning injunctions, administration of trusts or prerogative relief where the precise matter of issue may be small but can have a substantial effect on property whose value exceeds the statutory threshold.

26 Here, the appellant noted that the authors of *Ritchie’s* rely on a decision of Latham CJ in *Oertel v Crocker* (1947) 75 CLR 621; [1947] HCA 40.

27 Applying *Oertel* in the interpretation of r 38(2)(b), the appellant says that the rule “can only apply to those cases where the applicant seeks an order for money (i.e. debt or damages) and an order for possession of property”; and also, as previously submitted by the appellant, to those cases where the applicant seeks relief from payment of money, for example under s 48O(1)(b) of the *Home Building Act, 1989* (NSW) (HB Act) or under s 72((1)(b) of the *Retail Leases Act, 1994* (NSW) (RL Act). This is because r 38(2)(b) is of a type

found in the first limb of the provisions of the Supreme Court Act and the District Court Act and not the second limb.

28 In addition, the decision in *Oertel* confirms that the test is to be applied by considering the position of the claimant, not the respondent. This view, the appellant submits, is supported by the decision of Kitto J in *Ballas v Theophilos (No 1)* (1957) 97 CLR 186 at 199; [1957] HCA 49 at [5].

29 Finally, the appellant relies on the decision of the Court of Appeal of the Supreme Court of New South Wales in *Gillard v Hunter Wire Products Pty Ltd t/as Hunter Screen Products (No.2)* [2001] NSWCA 450 (*Gillard*). Having referred to the reasons at [11], the appellant says that the expression "at issue" involves "the concept of what is 'truly at issue or inversely, not unrealistically at issue'" and is a test that "looks at the true position of the moving party only and not the respondent".

30 In this context, the appellant says its true position was that it claimed the unit entitlements were unreasonable and an order should have been made reallocating units.

31 The appellant also submitted that the statutory scheme under the Management Act "does not indicate an intention that the jurisdiction of the Tribunal in Strata applications is one where costs orders should be made". In this regard, the appellant noted that the Management Act contains no general power to award costs and that there are limited, specific powers to award costs, for example under s 86(2A) (costs of levy recovery action) and s 236(6)(a) (being "costs incurred by the applicant, including fees and expenses reasonably incurred in obtaining the valuation and the giving of evidence by a qualified valuer") against an original owner where the units were not allocated in accordance with a valuation of a qualified valuer and, in the opinion of the Tribunal, were allocated unreasonably by the original owner.

32 In reply, the respondent refers to *Allen* at [48] and says that, in the present case, there was a dispute concerning the respective value of the Lots in the strata scheme. The difference between the values for the various Lots asserted through each party's expert evidence exceeded $30,000. Although no evidence

had been served by the respondent, it was clear from the submissions made by Mrs Anderson that the valuation evidence was in dispute.

33 The respondent also submitted that its wealth would change by more than $30,000 because an alteration in unit entitlements would increase the strata levies payable by the respondent by an amount exceeding $30,000. While the respondent says “the levies were not a relevant consideration in the proceedings”, it is nonetheless a relevant consideration in an application for costs.

34 Consequently, the respondent says, on any view, r 38(2)(b) was engaged.

35 As to the decision in *Allen*, where a successful party was denied the costs because r 38(2)(b) did not apply, the respondent submitted that these proceedings related to a right to possession of residential sites, and not the dwellings or any rights in relation to those dwellings and therefore there was no amount in dispute.

36 As to the proposition that the operation of the rule is to be considered in the context of the position of the moving party, the respondent said this would be an inappropriate interpretation of the rule because it would be unjust “if only one party in proceedings had access to a costs order and the other party did not”. *Allen*, which was a case dealing with an application for costs by an applicant, was not determinative of this issue and there was no restriction found in r 38(2)(b) that would limit the operation of this rule to a consideration of the position being advanced by an applicant, as opposed to a position being advanced by a respondent.

37 The respondent submits that what is in dispute cannot be ascertained until a respondent provides a response to the claims made. While regard may be had to the application lodged to determine what was in dispute (see *Allen* at [59]), in *Allen* the Tribunal looked at the evidence about the value of the right for possession which had been tendered and the Tribunal was not limited to a consideration of the application lodged (*Allen* at [64]).

38 Where the application itself does not claim any amount, the fact that evidence might be served indicating that the amount in dispute is greater than $30,000

does not make the operation of the rule capricious. To the contrary, it would be a capricious result if a party could avoid the possibility of a costs order because their application omitted to identify the amount which they claimed. This interpretation, the respondent submitted, was consistent with the use of the words "in proceedings" found in the rule.

39 In relation to the power of the Tribunal to make an award for costs, the source of this power is generally the NCAT Act, not the Management Act.

40 As to the appellant's examples of particular powers under the Management Act to make orders, these are cases in which there is no amount in dispute. For example, invalidating a resolution of a meeting of the owners Corporation under s 24(1) involves a finding the Management Act or regulations have not been complied with in relation to the meeting. Similarly, in proceedings to enforce compliance with a covenant under s 234 of the Management Act, the cost of doing work would be irrelevant.

41 In any event, the Management Act contains no restriction on costs that would mean that r 38 would not apply, the rule operating in respect of "proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal".

Ground 2 – The Tribunal erred in not following Jensen

42 In relation to the decision in *Jensen*, the appellant noted that this case considered the meaning of the phrase "matter at issue" appearing in s 127(2)(c)(i) of the District Court Act. The appellant said that while the Tribunal declined to follow *Jensen*, the Reasons at [11] did not explain why. The appellant said that *Jensen* focuses upon the "wealth of the moving party" and that there was no realistic prospect, in the present proceedings, of the wealth of the appellant changing by more than $30,000 if the application was successful. While the expression "matter at issue" was being considered by the Court of Appeal in *Jensen*, and the expression in r 38(2)(b) is different, by analogy one looks to the claim made by the moving party. In the present case, no amount was claimed and no amount could be in dispute.

43 In reply, the respondent says that the Tribunal was not obliged to follow the decision in *Jensen*, a case which involved construing the provisions of the

District Court Act. Further, the respondent says that the appellant does not explain why there was an error in this regard.

44 In any event, in *Jensen*, the Court made clear that it was necessary to look at the change of wealth of the parties as a consequence of any determination, whether or not that could be ascertained from the pleadings.

45 Lastly, the respondent says that the appellant implicitly accepts that the wealth of the respondent would have changed by more than $30,000 if the appellant had been successful.

Ground 3 – The Tribunal erred in not following Allen

46 In relation to the Tribunal's reasons concerning *Allen*, the appellant says that the Tribunal appeared to distinguish this case because it related to termination proceedings under the *Residential Parks Act, 1998* (NSW). Further, the appellant says that it is not clear from the reasons at first instance that the Tribunal dealt with *Allen* at all.

47 The appellant noted that, in *Allen*, the Tribunal dealt with evidence concerning the valuation of some of the sites, which was more than $30,000. However, the appellant submitted that the Tribunal concluded at [63] in *Allen* that even if the residents won their appeal, their wealth would not be changed by more than $30,000.

48 This, the appellants submitted, demonstrated that there could be a dispute on valuation evidence where there were differences of more than $30,000 and yet r 38(2)(b) would not apply.

49 The respondent says that the decision in *Allen* supports its position. This is because it would have suffered an increase in strata levies if the appellant had been successful. Consequently there was "a realistic possibility that its wealth would change by more than $30,000".

Ground 4 – The Tribunal erred in not giving reasons or sufficient reasons for not following Jensen and Allen

50 On this aspect, the appellant's contention is that the Tribunal failed to deal with its submissions to the effect that it was the position of the moving party that needed to be considered in determining whether their financial position would

be improved by more than $30,000. The appellant said the reasons for rejection of those submissions were not provided by the Tribunal.

51 It seems to us unnecessary to consider this ground any further as the substantive issue of the proper construction of r 38(2)(b) and a consideration of the effect of the decision in *Allen* will otherwise resolve this appeal.

Ground 5 – The Tribunal erred in finding r 38(2)(b) applied

52 As with ground 4, this ground of appeal raises an issue of the failure to give reasons, or adequate reasons. In this regard, the appellant says the Tribunal failed to deal with clearly articulated arguments, relying upon established facts. Reliance was placed on the decision of the Appeal Panel in *C G Constructions Pty Ltd v Hanson Constructions Materials Pty Limited* [2017] NSWCATAP 130, which in turn referred to various High Court authorities to support this ground of challenge.

53 Again, having regard to grounds 1-3, it is unnecessary to consider this matter as a resolution of the other grounds will be determinative of this appeal.

Respondent's contention that special circumstances otherwise warrant the order for costs

54 The final matter to note is that the respondent contends that special circumstances applied to the present case. Consequently, even if the Appeal Panel were to determine that r 38(2)(b) did not operate, there were special circumstances otherwise permitting an order for costs under s 60 of the NCAT Act.

55 The respondent referred to the Tribunal's reasons in its primary decision made 19 January 2018. There, the Tribunal reached the conclusion that there was a three stage test to be considered in deciding whether an order should be made to reallocate unit entitlements. Having considered the evidence, the Tribunal concluded at [27] that:

> The first task of the Tribunal is to value the lots. The report of Mr Dick is not a valuation of all of the lots in the scheme and cannot form the basis for a finding in respect of all of the lots. Tribunal is left without a report on which it could base a finding of the values of the lots and the application must be dismissed.

56 The respondent contends that the proceedings were complex. In addition, the appellant had failed to deal with the inadequacy of the expert report of Mr

Hyam. At [24] and [26], the Tribunal rejected the evidence of the expert Mr Hyam.

57 In light of these deficiencies, the appellant's claim was untenable, or misconceived and lacking in substance. Consequently, the Tribunal should have concluded that there were special circumstances warranting an order for costs.

Consideration

58 The decision to award costs is an ancillary decision within the meaning of the NCAT Act: see Definition of "ancillary" in s 4(1). Consequently, s 80(2)(b) applies and there is a right of appeal on a question of law and otherwise leave to appeal is required. Sch 4 cl 12 of the NCAT Act provides that leave can only be granted if the appellant can demonstrate that he may have suffered a substantial miscarriage of justice. *Collins v Urban* [2014] NSWCATAP 17 sets out the principles applicable when determining whether or not leave should be granted.

59 The substantive issue raised in this appeal concerns the proper construction of r 38(2)(b) and the meaning of the expression "the amount claimed or in dispute in the proceedings". This raises a question of law.

60 Rule 38 provides:

> **38 Costs in Consumer and Commercial Division of the Tribunal**
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> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
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> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:
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> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10 (2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.

61 There is no dispute that no amount was claimed in the proceedings for more than $30,000. The order sought by the Owners Corporation was that the unit entitlements of the various Lots should be reallocated.

62 The question is what is meant by "the amount … in dispute in the proceedings is more than $30,000" and whether the rule applies to the Proceedings.

63 On this issue, in distinguishing *Jensen* and considering the effect of *Allen*, the Tribunal said at [10]-[12]:

> 10. The Tribunal accepts the respondent's submission and finds that Rule 38 applies to these proceedings. The dispute was a dispute as to whether the unit entitlements in the scheme should be reallocated. In considering the application the Tribunal was required to "have regard to the respective values of the lots and to such other matters as the Tribunal considers relevant." [s236(2)]. There was a dispute as to those values, and the amount of that dispute, in respect of the respondent's lots, exceeded $30,000. In addition, the other lots owners who actively took part in the proceedings disputed the valuation of their lot.
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> 11. In coming to this decision the Tribunal has considered the decision of the Court of Appeal in *Jensen v Ray [2011] NSWCA 247*. That matter concerned the threshold for appeal under the District Court Act 1973. The Tribunal is not satisfied that the requirement expressed in that case, that the test is whether the appeal "would change the wealth of the appealing party by more than $100,000" is relevant to a determination as to whether the amount in dispute for the purpose of Rule 38 exceeds $30000. In Rule 38 there is a distinction between "the amount claimed or in dispute". The Tribunal is satisfied that this distinguishes the test from that under consideration in *Jensen v Ray [2011] NSWCA 247.*
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> 12. Furthermore the decision in *Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25* concerned applications for termination under the Residential Parks Act. It was also an appeal, and the Appeal Panel found that as the appeal related to the orders for possession, the value of the land was not relevant in determining the amount in dispute.

64 In *Allen*, the Appeal Panel said that some assistance may be gained in the interpretation of the expression "amount in dispute in the proceedings" from cases dealing with the restrictions of a right of appeal found in s 101(2)(r)(i) of the Supreme Court Act. However, the Appeal Panel said that such assistance was limited, having regard to the fact that the wording of the provisions was different and the provisions serve a different purpose: *Allen* at [52]. Those decisions to which the Appeal Panel referred included *Jensen*.

65 Having set out the cases dealing with 101(2)(r)(i) of the Supreme Court Act, the Appeal Panel said at [57]:

> 57. Adapting these principles to the circumstances of the present appeals and having regard to the specific wording of r 38, it appears to us that in applying r 38(2)(b):
>
> > (1) The determinative factor is the amount in dispute in each appeal, not the amount in dispute in the proceedings at first instance;

> (2) The phrase "in dispute" is to be construed as meaning truly in dispute or at issue or, inversely, not unrealistically in dispute;
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> (3) Whether "the amount … in dispute" in each appeal is more than $30,000 depends on whether there is a realistic prospect that in each appeal the wealth of the appealing party would be changed by more than $30,000 or, put another way, whether the right claimed by the appealing party, but denied by the decision at first instance, prejudices that party to an amount in excess of $30,000;
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> (4) The fact that the value of the property the subject of any appeal exceeds $30,000 does not, of itself, mean that "the amount … in dispute" in that appeal is greater than $30,000.
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> 58. At the outset, it is important to observe that the fact that each of the dwellings (apart from the Byngs') situated on the residential sites was valued at more than $30,000 does not mean that the amount in dispute in each appeal was greater than $30,000. The appeals were against termination and possession orders in respect of the residential sites, which belong to the owner, and not the dwellings, which belong to the residents. Thus, the property the subject of the appeal was the right to possession of the residential sites and not the dwellings or any rights in relation to the dwellings. As a result, the value of the dwellings should not determine what the amount in dispute was in any of the appeals.
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> 59. What was actually in dispute in each of the present appeals can generally be ascertained from the grounds of appeal set out in each appellant's notice of appeal, *Jensen v Ray* [2011] NSWCA 247 at [11].

66 The Appeal Panel in *Allen* decided that r 38 did not apply because the issue in the proceedings was whether a resident should be ordered to deliver up possession: *Allen* at [63]. There was no amount claimed in the original proceedings or by the appellant on appeal and therefore the first limb of the test in r 38(2)(b) was not satisfied.

67 Further, the fact that a person might have a dwelling located on the site of which possession was sought, being a dwelling of more than $30,000 in value, did not mean the amount in dispute in the proceedings was more than $30,000: *Allen* at [58].

68 Finally, the Appeal Panel found there was no evidence of any right with a value greater than $30,000 that might lead to a conclusion that the amount in dispute was more than $30,000. Consequently, the Appeal Panel said "even if an argument was accepted" that it was appropriate to value the right for possession for the purpose of determining if r 38 applies, the facts would not support a finding that the amount in dispute is more than $30,000": *Allen* at [64].

69 As a result, the Appeal Panel in *Allen* rejected the submission that r 38 applied to the proceedings where the appellant sought to set aside an order for possession made by the Tribunal at first instance.

70 As stated above, neither party contended in this appeal that there was any amount claimed in the proceedings at first instance.

71 Rather, the respondent's contention was that the Tribunal was correct to determine that there was an amount in dispute greater than $30,000, that the Tribunal was correct to decide that the amount in dispute was the value of the various Lot properties and, in any event, the wealth of the respondent would have changed by more than $30,000 if the unit entitlements were altered because of the effect on the levies which the respondent would be required to pay. Consequently, the Tribunal was correct to conclude that r 38 applied to the proceedings at first instance.

72 A resolution of this appeal requires us to determine what is meant by the expression "the … amount in dispute" used in r 38(2)(b).

73 As a preliminary comment, we should indicate our view that *Allen* is not determinative of this issue. As we set out above, the Appeal Panel in *Allen* decided there was no amount claimed or in dispute that was greater than $30,000. Consequently, it was unnecessary for the Appeal Panel to resolve the issue of whether the expression "the amount claimed or in dispute in the proceedings" used in r 38(2)(b) included a reference to a right of possession valued at an amount in excess of $30,000, which might be lost by a tenant or occupant if an order for possession was made against them in favour of an applicant.

74 Otherwise, at [63], the Appeal Panel in *Allen* determined that an application seeking an order for possession did not, of itself, involve proceedings to which r 38(2)(b) applies.

What is meant by the expression "the amount in dispute" used in r 38(2)(b)

75 The statement of the High Court in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, concerning statutory

construction, is relevant in resolving the present dispute. At [69]-[71], the Court said (citations omitted):

> 69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> 70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> 71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

76 As pointed out in *Allen*, in construing r 38(2)(b), care needs to be taken in using decisions of the courts in interpreting differently worded legislation, the provisions of which serve a different purpose. It is therefore necessary to examine the particular legislation which the courts were construing in order to consider the relevance of those decisions in the construction of r 38(2)(b) of the Rules.

77 In this regard, *Allen*, as in the present appeal, was concerned with the expression used in r 38(2)(b) of the Rules which provides:

> Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:
>
> …
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.

78 The decision *Oertel* was concerned with the expression found in s 35(1)(a) of the *Judiciary Act 1903-1946* (Cth) which provided:

> Every judgement, whether final or interlocutory, which –
>
> (1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of Three hundred pounds; or
>
> (2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds.

79 So too was the decision of *Ballas v Theophilos (No 1)*. The High Court also dealt with s 35(1)(a) of the *Judiciary Act 1903-1955* (Cth) in *Ebert v The Union Trustee Company of Australia Ltd* (1957) 98 CLR 172; [1957] HCA 88, although by this time the specified value had been increased to £1500.

80 In *Gillard* and *Jensen*, the Court of Appeal was concerned with s 127 of the District Court Act, which provides:

> (c) an appeal from a final judgement or order, other than an appeal:
>
> (i) that involves a matter at issue amounting to or of the value of $100,000 or more, or
>
> (ii) that involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $100,000 or more,

81 In *Jabulani Pty Ltd v Walkabout II Pty Ltd* [2016] NSWCA 267 and *Nanschild v Pratt* [2011] NSWCA 85, the Court of Appeal was concerned with s 101(2)(r) of the Supreme Court Act, which provides that an appeal lies only with leave of the Court of Appeal from:

> a final judgement or order in proceedings of the Court, other than an appeal:
>
> (i) that involves a matter at issue amounting to or of a value of $100,000 or more, or
>
> (ii) that involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $100,000 or more.

82 As can be seen from the legislation dealing with right of appeal considered by the various courts, the expression found in r 38(2)(b) is substantially different.

83 The language of the Judiciary Act, District Court Act and Supreme Court Act, which the courts were required to consider in the decisions to which we have referred above, concerned proceedings "that involves a matter in issue" or

"involves (directly or indirectly) any claim, demand or question" (emphasis added) to or of a specified value or more than the prescribed amount.

84 The expressions are of wide import. The expressions do not speak of "the amount claimed" or "the amount in dispute".

85 The words "involves a matter at issue" and "involves (directly or indirectly) any claim, demand or question" are not limited to proceedings in which an order for an amount of money is claimed or to proceedings where an order might be made relieving a party from an obligation to pay. Nor are those words limited to proceedings where a specific amount must be found due and payable in order to establish an entitlement to the relief sought. However, the words are wide enough to include such claims. As the authorities make clear, the provisions are seeking to confine the circumstances in which a decision may be challenged as of right by applying a monetary filter. In the case where no specific amount is claimed or in dispute, the value of the property or other rights must be greater than the prescribed amount.

86 On the other hand, the expression "the amount claimed or in dispute in the proceedings" used in r 38(2)(b) suggests that the rule is concerned with the relief being directly sought in the proceedings in respect of a specific amount. It does not speak of any property or other civil right that might be at issue or any question of valuation in relation to such rights.

87 In this regard, the meaning of the rule needs to be considered in the context of the NCAT Act and the fact that r 38 operates as an exception to s 60 of the NCAT Act. Section 60 states that a party is to pay their own costs, however the Tribunal may make an order for costs if special circumstances are established: see *Bonita v Shen* [2016] NSWCATAP 159 at [41] and following. That is, but for r 38 (or provisions in other enabling legislation conferring power to award costs in particular circumstances), the general position under s 60 is that each party is to pay their own costs: see s 60(1) of the NCAT Act.

88 Also, the expression in r 38(2)(b) needs to be considered in light of the enabling legislation by which the Tribunal is given jurisdiction to hear and determine particular disputes. It is an expression reflective of some of the types

of orders which the Tribunal might make in connection with claims brought before it.

89 For example, in dealing with a consumer claim, an applicant for relief might seek an order for the payment of money or to be relieved from an obligation to pay money in a consumer claim: see s 79N(a) and (d) of the *Fair Trading Act, 1987* (NSW) (FT Act). Similarly, in a building claim, an applicant for relief might seek an order for the payment of money or to be relieved from an obligation to do so; see s 48O(1)(a) and (b) of the HB Act. Other examples include the order making power of the Tribunal under ss 72(1)(a) and (b) of the RL Act.

90 In cases where an amount is claimed by an applicant, an award of money may be made. In cases where an applicant seeks relief from payment, no amount is claimed as an order for payment is not sought. Rather, an order is made for relief from payment. However, "the amount in dispute" is the specific amount from which relief from payment is sought, there being a dispute about whether the applicant for relief is liable to pay the particular sum or should otherwise be relieved from the obligation to pay. In each case, "the amount" is identified and, where it is greater than $30,000, r 38(2)(b) is engaged.

91 Rule 38(2)(b) may also operate in circumstances where the Tribunal has power to make an order for the payment of a specific amount of money, despite the particular relief sought by the applicant. For example, in a building claim under the HB Act, the Tribunal may make an order for the payment of money despite the preferred outcome for a claim in respect of defective work being a rectification order (see s 48MA of the HB Act) or despite an applicant for relief claiming a different order (see s 48O(2) of the HB Act).

92 In these cases, the specific cost of the work to be undertaken can be determined by reference to the relief claimed, in order to ascertain whether the monetary threshold for engagement of the rule has been reached. However, in these cases, one or all parties to the proceedings would provide evidence of the cost of the rectification or completion so as to enable the Tribunal to make specific findings as to "the amount in dispute in the proceedings".

93 If there is no such evidence, then it could not be said there is a dispute about the amount of the cost of rectification or completion of the works.

94 Lastly, where it is necessary that the specific amount of any debt owed or payable must be determined as part of the fact finding process, in order to found any relief and establish that the specific amount in dispute is more than $30,000, it may also be said that this sum is "the amount in dispute in the proceedings" for the purpose of r 38(2)(b) and that the rule may also operate in these circumstances. An example might be where it is necessary to determine the specific amount of rent that remains unpaid for the purpose of making a termination order for non-payment of rent under the *Residential Tenancies Act, 2010* (NSW). However, for the purpose of this appeal, it is unnecessary to resolve whether the rule would operate in cases where only an order for possession was being sought and not an order for the payment of rent.

95 On the other hand, it seems to us that where there is a claim for relief that may, as a consequence of that relief being granted, result in the loss of a property or other civil right to a value greater than $30,000, it could not be said that there are proceedings in which the amount claimed or the amount in dispute is greater than $30,000 within the meaning of the rule. Similarly, the fact that it is necessary to evaluate evidence about the value of particular property or determine other rights as part of determining whether there is an entitlement to relief does not mean "the amount claimed" or "the amount in dispute" in the proceedings is more than $30,000. Where the relief sought is not dependent on a finding that a particular amount is payable or not payable, it could not be said that "the amount claimed or in dispute in the proceedings is more than $30,000".

96 Rather, in such proceedings, the evaluation of the evidence of value or amount is for the purpose of determining whether to grant relief, not to ascertain the amount which is to be the subject of a specific order.

97 That is, in claims where the relief does not give rise to a money award or relief from an obligation to pay a specific amount the rule does not operate.

98 This construction is consistent with the different language used in those Acts dealing with rights of appeal and the more limited expression found in r 38(2)(b).

99 Rule 38(2)(b) operates because there can be identified in the proceedings "the amount claimed or in dispute". It is not in language requiring an exercise in the valuation of the right being affected by the order sought in order to determine whether the costs rule applies or to engage in some collateral evaluative process. It does not, by its language, operate because a party raises an issue in proceedings that might be capable of being assigned a monetary value or which might involve the assessment of value as part of determining the relief which is claimed.

100 It should not be construed in a manner that enables a party to raise any issue in the proceedings so as to trigger a liability for costs, absent the establishment of special circumstances. Such a construction would permit the displacement of s 60 of the NCAT Act by a party advancing any issue which might give rise to consideration of value or amount.

101 Further, it seems to us unlikely that the legislature intended the rule to operate so as to complicate proceedings and to require the Tribunal to embark upon an enquiry of the value of rights being affected in consequence of the relief sought in order to determine whether the costs rule is engaged. Such an interpretation is not consistent with the other provisions of the NCAT Act, including:

(1) The objects "to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible": s 3(d) of the NCAT Act;

(2) That, generally, each party is to pay their own costs: s 60(1) of the NCAT Act.

102 Such a construction would be contrary to the intention of the Legislature to simplify the process for dispute resolution by the Tribunal and would make the application of the rule subject to complicated disputes on costs, thereby making the proceedings more complex and extending the time taken to resolve proceedings.

103 The respondent did not suggest that the rule applied to all proceedings where some valuable right my affected. To the contrary, the respondent said, for example, that seeking an order to invalidate a resolution of an owners corporation under s 24(1) of the Management Act would not engage the rule.

104 However, this submission highlights the difficulty of a broad construction, for which the respondent contends, in determining the limits of the expression “the amount claimed or in dispute”.

105 For example, a special bylaw granting an owner particular exclusive use rights may be of significant value if lost. It may also involve a question relating to the value of the right (a matter that might be relevant to the exercise of a discretion under s 24(1)), the question otherwise being whether the bylaw was validly passed at a properly convened meeting.

106 On the other hand, if an order was made in circumstances where the valuable right is lost, but the issue of value was not raised for the purpose of determining the primary relief sought in the proceedings, the construction of r 38(2)(b) proposed by the respondent would permit a party to raise a secondary dispute about the value of the affected right in order to determine whether or not the rule operated.

107 As we said above, we do not accept that the Legislature intended, by the language of r 38(2)(b), to create a complicated costs regime so as to require a collateral or subsequent enquiry as to the value of rights being affected. If it intended to do so, it could have used language of the type found in the Judiciary Act, District Court Act and Supreme Court Act, to which we have referred.

108 It follows from the above that, in our view, the rule does not operate in respect of proceedings in which an order is sought for the reallocation of unit entitlements pursuant to s 236(1) of the Management Act. In our view, the following are the circumstances in which r 38(2)(b) does and does not operate:

109 Rule 38(2)(b) applies to the following proceedings:

(1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or for an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;

(2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work) and the Tribunal has power make an order to pay a specific amount of money even if not asked for by the claimant, provided that

(a) there is credible evidence relating to the amount the Tribunal could award; and

(b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.

110 Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.

111 Rule 38(2)(b) does not apply to proceedings:

(1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or

(2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:

(a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or

(b) the relief sought does not depend on there being a finding that a specific amount of money is owed.

Respondent's contention that special circumstances warranting an award for costs under s 60 of the NCAT Act

112 As stated above, the respondent contends that, even if r 38(2)(b) does not apply, there were special circumstances that justified the award for costs made by the Tribunal in their favour.

113 The respondent contends that the Tribunal was in error in failing to find that special circumstances existed, that it should be permitted to challenge the finding in this appeal and, in the circumstances, the costs order should be allowed to stand and the appeal dismissed.

114 At [15] of the Reasons the Tribunal said:

> The Tribunal is satisfied that a costs order is appropriate. Whilst the Tribunal would not have been satisfied that special circumstances exist, in the absence of a requirement for special circumstances, the usual considerations (that costs are compensatory and should generally be paid by an unsuccessful party to compensate the successful party) support the making of a costs order. Even though the applicant's case was reasonably arguable, the evidence supplied was found to be deficient. The case failed. The respondent was successful and is entitled to its costs on the usual basis.

115 As can be seen, the Tribunal was not satisfied that special circumstances existed to warrant an award for costs under s 60 of the NCAT Act. In making this statement, the Tribunal was satisfied the appellant had a reasonably arguable case even though its evidence was ultimately found to be deficient. That is, the Tribunal concluded the appellant's case was not untenable.

116 In relation to the evidence of valuation, the Tribunal said, at [26]-[27] of its reasons for decision, in connection with the orders made on 19 January 2018 (Primary Reasons) (Agreed Bundle Tab 20):

> 26 As in *Makita (Australia) Pty Ltd v Sproules*, there is no doubt about Mr Hyam's authority, experience, qualification and skill. The reports are lengthy and detailed. However, the reports do not enable the Tribunal to test the accuracy of the conclusions. The Tribunal is left with doubts about the values assigned, when lots are compared to each other. The Tribunal cannot be satisfied that Mr Hyam's reports meet the test set out in *Makita (Australia) Pty Ltd v Sproules*.
>
> 27 the first task of the Tribunal is to value the lots. The report of Mr Dick is not a valuation of all lots in the scheme, and cannot form the basis for a finding in respect of all the lots. The Tribunal is left without a report on which it could base a finding of the values of the lots and the application must be dismissed.

117 "Special circumstances" means circumstances which are out of the ordinary but not necessarily extraordinary or exceptional: see eg *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].

118 Factors relevant to a consideration of whether special circumstances exist are set out in s 60(3) of the NCAT Act. Whether these factors are established is a question of fact.

119 The respondent says that the proceedings were complex, that the evidence of the appellant was inadequate, that the Tribunal erred in rejecting the evidence of the appellant's expert, Mr Hyam, and that, in light of these deficiencies, the appellant's claim was untenable, misconceived or lacking in substance.

120 In our opinion, the respondent has not identified any particular features of this case which make it out of the ordinary.

121 The Management Act requires that the Tribunal "is to have regard to the respective value of the lots and to such other matters as the Tribunal considers relevant" in determining whether an order for reallocation of unit entitlements should be made: see s 236(2) of the Management Act. The mere fact that there

is a need for valuation evidence or that issues of valuation need to be considered does not make the present application out of the ordinary.

122 The Tribunal expressly found that the appellant had a reasonably arguable case. This is hardly surprising where there is competing evidence and where a hearing may involve witnesses, including expert witnesses, being asked questions in cross-examination, which may add or detract from the reports which they have provided or which may be supplemented or complimented by evidence provided by other witnesses. The Tribunal reached its conclusion having had the benefit of dealing with witnesses at the original hearing, and we have not been pointed to any material that would sustain a finding that the claim by the appellant was untenable. Rather, the final form of the written and oral evidence fell short of proving a value for each of the lots. This conclusion involved an evaluation of the methodology adopted by Mr Hyam in preparing his report (Primary Reasons at [24]) and its rejection by the Tribunal because of an insufficient explanation. Otherwise, as recorded at [27] of the Primary Reasons, the Tribunal did not accept the report from Mr Dick as being a valuation of all lots in the scheme. In this regard, we note that Mr Dick was a witness for one of the respondents, who provided a report and was himself subject to cross-examination.

123 These sorts of findings are usual in instances where the Tribunal is required to resolve disputes where there are competing positions between experts and other witnesses. There is nothing out of the ordinary about the resolution of such a dispute.

124 Accordingly, we do not accept there were special circumstances that otherwise permitted the Tribunal to make an order for costs pursuant to s 60(2) of the NCAT Act.

Orders

125 It follows from what we have said above that the appeal should be allowed, the order for costs made 23 April 2018 should be set aside and the application for costs dismissed.

126 Accordingly, we make the following order:

(1) The appeal is allowed, the order for costs made 23 April 2018 is set aside and the application for costs is dismissed.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar