Civil and Administrative Tribunal

New South Wales

Case Name:	Burbank Montague Pty Ltd v The Owners – Strata Plan No 85312
Medium Neutral Citation:	[2020] NSWCATAP 100
Hearing Date(s):	10 February 2020
Date of Orders:	2 June 2020
Decision Date:	2 June 2020
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member M Gracie, Senior Member
Decision:	(1) Leave to appeal is refused. (2) The appeal is dismissed. (3) The appellants are to pay the respondents costs of the appeal, on the ordinary basis, as agreed or assessed. (4) If a party seeks a different costs order, order 3 above ceases to have effect and the following orders apply: (a) Any application for a different costs is to filed and served within 14 days of the publication of these orders and is to be supported by evidence and submissions not exceeding five pages in length. (b) Any response to the costs application(s) is to be filed and served 14 days thereafter. (c) Submissions in reply are to be filed and served within 7 days of receipt of submissions in response.
Catchwords:	APPEAL – leave to appeal – exercise of discretion – leave refused - leave to adduce new evidence refused - strata scheme – common property defects – scope of works – rectification costs – whether strata levy excessive - costs of appeal

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 House v The King (1936) 55 CLR 499 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Burbank Montague Pty Ltd (First Appellant) Gornoa Pty Ltd (Second Appellant) The Owners – Strata Plan No. 85312 (First Respondent) Anne Lewinsky and Sidney Lewinsky (Second Respondents) Ronald Allen Zucker (Third Respondent)
Representation:	Counsel: R Cheney SC with D Neggo (Appellants) M Pesman SC (First Respondent) V Kerr SC (Second and Third Respondents) Solicitors: Le Page Lawyers (Appellants) Chambers Russell Lawyers (First Respondent) Strata Specialist Lawyers (Second and Third Respondents)
File Number(s):	AP 19/47955
Publication Restriction:	Nil
:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	26 September 2020
Before:	T Simon, Principal Member

File Number(s): SC 19/21348 and SC 19/29191

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (the NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 26 September 2019 and the costs decision made in the proceedings on 3 January 2020. The substantive proceedings were heard on 19 September 2019 and the costs application was determined on the basis of written submissions.

2 The Tribunal's substantive decision concerns two applications brought under the *Strata Schemes Management Act* 2015 (the SSM Act) by the appellants, which own three lots of the five lots in Strata Plan No. 85312. Mr Desmond Lee is the sole director of both appellants. The first respondent is the Owners Corporation of the strata scheme, which is currently under compulsory management by GK Strata Management Pty Ltd (GK Strata). The second and third respondents each own one of the remaining two lots in the strata scheme.

3 For the reasons set out below, we have decided to refuse leave to appeal, dismiss the appeal and order the appellants to pay the respondents' costs.

Background

4 Strata Plan No. 85312 has as history of conflict going back several years. It has been the subject of a number of applications in the Tribunal and before the Appeal Panel, as well as applications for adjudicator's orders under the *Strata Schemes Management Act* 1996.

5 Relevantly to this application, in 2018 the second and third respondents lodged an application (SC18/21685) which resulted in consent orders being made on 23 August 2018 (the 2018 consent orders). The 2018 consent orders are central to the proceedings giving rise to this appeal and are relevantly as follows:

> 1 Pursuant to section 237(1)(a) of the Strata Schemes Management Act 2015, GK Strata Management Pty Ltd is appointed as the strata managing agent of the respondent to exercise all of the functions of the respondent, its

strata committee and office bearers until certification is provided in accordance with order 7, or 12 months, whichever is earlier, such appointment commencing today. The remuneration of GK Strata Management Pty Ltd will be in accordance with their consent letter dated 23 August 2018.

2 The respondent will procure Foreshew Strata Agency to provide the books and records of the owners corporation and any other property of the owners corporation to GK Strata Management Pty Ltd within 7 days of these orders.

3 The respondent shall, within 14 days of this order, engage RHM Consultants Pty Ltd ("RHM") to conduct an inspection of the common property and prepare a report on the common property defects (i.e. common property requiring repair, maintenance, renewal, or replacement) and a detailed scope of work to rectify any identified common property defects ("Works").

4 Within 7 days of receiving the report and remedial scope of work from RHM, the respondent shall instruct RHM to call for at least 3 tenderers to perform the Works.

5 Within 7 days of the completion of the tender process, the respondent will select a successful tenderer to perform the Works.

6 Within 7 days of the selection of a contractor, the respondent will:

a. execute any contract for the commencement of the Works; or

b. in the event the respondent does not have sufficient funds in its administrative or capital works funds to meet the costs of the Works, shall:

i. raise a contribution to meet those expenses, payable one month after it is raised, with the notice to be provided to owners one business day after the contribution is raised; and

ii. execute a contract for the Works as soon as sufficient funds are available.

…..

6 Although the appellants were not named parties In those proceedings, Mr Lee gave instructions on behalf of the Owners Corporation and was present when the consent orders were made. On 11 July 2019, order 1 was varied by consent, to make the period of compulsory appointment 24 rather than 12 months. This means that the current period of compulsory appointment will end on 22 August 2020.

7 This background and the subject matter of the Tribunal proceedings which gave rise to this appeal are set out in the Tribunal's reasons for decision as follows:

1. These reasons relate to two applications. Matter 19/21910 is an application filed on 7 May 2019 seeking orders [for the] appointment of a Strata Manager to exercise all the functions of the scheme. Matter 19/21348 is an application filed on 25 June 2019 seeking orders in relation to a special levy that was

> struck by the Owners Corporation (OC) on 8 May 2019. The special levy is in the amount of $901,286 and the applicants seek that the levy be set aside or in the alternative the amount and method of contribution be amended.
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> 2. … On 23 August 2018, orders were made by consent in proceedings SC 18/21685 (the 2018 proceedings). Those consent orders appointed GK Strata Management Pty Ltd as compulsory manager for a period of 12 months (later amended to 24 months) and the scheme presently remains under compulsory appointment. In the final orders in the 2018 proceedings the parties agreed that the OC would engage RHM Consultants Pty Ltd ("RHM") to inspect the common property and "prepare a report on the common property defects (i.e. common property requiring repair, maintenance, renewal, or replacement) and a detailed scope of work to rectify any identified common property defects ("works")." Within 7 days of receiving the report the OC was to instruct RHM to call for at least 3 tenderers to perform the works and then the OC was to select a successful tenderer to perform the works and proceed for the works to be done.
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> 3. On 8 May 2019 the OC struck a special levy pursuant to those consent orders. The applicants allege that the levy is excessive and that the works contained in the RHM report go beyond the scope of works in the consent orders. The applicants seek an order pursuant to s232 of the Strata Scheme Management Act 2015 (SSMA) that the levy be set aside and declared invalid or in the alternative they seek an order pursuant to s87 of the SSMA, that the amount of the levy should be altered as the applicants are not in a financial position to meet it. They also seek orders that the OC be restrained from implementing the recommendations of the report. The applicants seek orders for the replacement of the current compulsory manager on the basis that he has failed to properly manage the scheme, in particular in relation to the maintenance of the common property.

8 We note that the Tribunal's finding that the special levy (the Levy) was struck on 8 May 2020 appears to have been in error. Rather, according to material provided by the parties, the Levy was struck on 20 May 2019 by GK Strata in its capacity as compulsory strata managing agent. The Levy was in the sum of $901,286, based on advice from RHM Consultants (RHM), which had prepared a report as a consequence of the 2018 consent and a quote from a builder, Structial Building Pty Ltd (Structial). Structial's quote was for $781,286. RHM recommended an additional $80,000 to $120,000 be raised for a contingency in the event of variations. GK Strata accepted RHM's recommendation and struck the Levy for the quoted amount and a contingency allowance in the sum of $120,000.

9 Two months after the levy was struck, RHM revised the scope of works and Structial reduced its tender by $113,190 (about 15%), to $688,096. The appellants submitted that there was no longer any need for the total amount of the Levy and that GK Strata should have varied the Levy downwards.

10 In relation to whether the works recommended in the RHM report went beyond the scope of works required by the consent orders made in the Tribunal proceedings, the Tribunal heard evidence from the parties' respective expert witnesses: Mr Riad for the appellants and Mr Poriters from RHM for the owners corporation. The Tribunal relevantly found that:

> 12. Having considered the evidence of the experts, the Tribunal does not find that the difference in opinion about how works should be done and the scope warrants the Tribunal making an order to set aside the special levy. It is not ordinarily up to the experts to determine the regime for how works under s106 for an OC to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the OC, although in this case the parties agreed that RHM would do just that. Having considered both experts evidence the Tribunal is not persuaded that the RHM report or tenders go beyond the orders made in the 2018 proceedings or the obligations of the OC pursuant to the SSMA. An improvement to common property ordinarily requires a special resolution pursuant to section 108 of the SSMA, this scheme is under compulsory appointment and such resolution would unlikely be required. In any case, he Tribunal is not satisfied that any of the works contained in the RHM report are improvements, rather the Tribunal finds that the works fall into common property repair, maintenance, renewal, or replacement. Tenders were obtained in relation to those works and accepted. Section 106 of the SSMA does not set out a regime of how works
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> which fall under that section should be managed and prioritised. That is ordinarily left up to the OC to resolve and in this case all lot owners agreed to the regime by way of the 2018 proceedings. The compulsory manager has simply instigated that regime on behalf of the OC and in accordance with those orders. The fact that the applicants now disagree with the schedule and scope of those works does not warrant the Tribunal setting aside the special levy or refraining the OC from doing the works. Maintenance works can always be staggered or delayed depending on urgency that does not mean that they are not maintenance works. Mr Poriters gave evidence and the Tribunal accepts that destructive testing would have required more time and additional costs for the OC. The photos attached to the affidavits of Mr Zucker and Mr Lewinsky dated 19 September 2019 clearly show significant water ingress issues to the common property. The applicant themselves concede that there are issues requiring maintenance and repair. The Tribunal is not satisfied in circumstances where Mr Lee himself consented to the 2018 orders being made, that it should now prefer the methods of rectification or scope proposed by Mr Riad. In his supplementary affidavit dated 5 July 2019 at paragraphs 9-16, Mr Lee sets out the reasons why he agreed to the orders in the 2018 proceedings and states that he did not believe that the works required were extensive as in his view many of the works had already been done. Regardless of what Mr Lee's own observations may have been about what works were required at the time of making the consent orders, the Tribunal is satisfied that the works required in the RHM report are works required to rectify common property in disrepair.

11 The Tribunal went on to identify the test it had to apply in order to make an order under s 87:

> 13. Section 87 of the SSMA allows the Tribunal to make an order for payment of contributions of a different amount and/or for payment of contributions in a different manner. The Tribunal may make the order if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable.

12 At [14], the Tribunal stated:

> 14. Mr Lee sets out in his affidavits that the Corporations would not be able to financially meet the special levy. He has included at paragraphs 3-7 of his further supplementary affidavit dated 16 September 2019, the enquiries he has made and steps he has taken to secure finance for the Corporations. The Tribunal is not persuaded that the Corporations inability to pay the levy makes the special levy excessive or unreasonable. The works have been in dispute for some time and need to be done. It is clear that the OC has not been able to carry out the works to common property because it has lacked the funds to do so. The Tribunal is not satisfied that it should prevent the OC from carrying out the works recommended by RHM, and otherwise required by the Tribunal's orders. The fact that the applicants cannot meet the special levy does not make the levy itself excessive or manner of contribution unreasonable. The lots owned by the applicants are tenanted. The OC has already taken steps through its appointed consultant RHM, to find alternative solutions to some of the report items, including the balustrades, and the cost was reduced by $113,190. The Tribunal is not satisfied on the evidence that it should make any orders altering the amount or manner of payment of the contribution and the contribution is necessary to undertake the works.

13 In relation to the application to appoint a different compulsory strata manager, the Tribunal found at [15]:

> 15. The Tribunal is not satisfied that it should make orders replacing the current compulsorily appointed strata manager with Foreshaw [sic] Strata. Given the finding of the Tribunal in relation to the levy and works, the Tribunal is satisfied that the scheme is functioning satisfactorily. The compulsorily appointed strata manager has largely complied with the 23 August 2018 orders on the OC's behalf and any minor non-compliances with timelines are inconsequential and certainly do not establish that the OC is not functioning satisfactorily.

14 The Tribunal ordered the appellants to pay the respondents' costs of both proceedings.

Scope and nature of internal appeals

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

16 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

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

(3) Whether a wrong principle of law had been applied;

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

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

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

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

17 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

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

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

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

18 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

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

19 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

20 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Submissions and evidence

21 In deciding the appeal, we have had regard to the following:

- The Notice of Appeal lodged on 24 October 2019;
- The Amended Notice of Appeal lodged on 31 January 2020;
- The Second and Third Respondents' Reply to Appeal lodged on 7 November 2019;
- The appellant's written submissions received on 11 December 2019;
- The appellant's supplementary submissions received on 23 December 2019;
- The first respondent's written submissions received on 28 January 2020;
- The appeal bundles filed by the parties;
- The procedural directions made at callover;
- The Tribunal's reasons for decision in the substantive and costs decisions;
- The applications to the Tribunal; and
- The oral submissions made on behalf of the parties.

Notice of Appeal

22 The Notice of Appeal was lodged on 24 October 2019, which is within the 28 day time period specified in cl 25(4) of the *Civil and Administrative Tribunal Rules* 2014 (the Rules). An Amended Notice of Appeal was lodged on 31 January 2020. It was confirmed at the hearing that the appellants rely on the Amended Notice of Appeal.

Grounds of Appeal

23 The grounds of appeal specified in the Amended Notice of Appeal are:

(1) The Tribunal erred in failing to exercise its discretion under s 87 of the SSM Act to vary the Levy the subject of the proceedings, being $901,286 to $Nil.

(2) In the alternative to Ground 1, the Tribunal erred in failing to exercise its discretion to make an order for the payment of contributions of a lower amount.

(3) The Tribunal erred in failing to vary the Levy on the mistaken bases that:

    (a) The amount was “necessary to undertake the works”;

    (b) An order varying the Levy to a lesser amount would “prevent the Owners Corporation from carrying out the works”.

(4) The Tribunal erred in exercising its discretion in a manner that was unreasonable or plainly unjust.

(5) The Tribunal erred in:

    (a) Failing to revoke the order made on 10 July 2019 in proceedings SC 18/21685 appointing GK Strata as strata managing agent; and

    (b) Failing to order that Foreshew Strata Agency be appointed as strata managing agent pursuant to s 237 of the SSM Act 2015.

(6) The Tribunal erred in ordering the appellants to pay the costs of each of the respondents.

24 The appellants argue that leave to appeal is not required. In the alternative, they seek leave to appeal on the basis that the decision is not fair and equitable because:

    (a) The Levy requires payment of $233,190 more than the amended quotation provided by Structial dated 16 July 2019, of which the appellant would be required to pay $139,914 (60%) and the second and third respondents, the balance ($93,276); and

    (b) The amount of the levy was derived by reference to a redundant, higher quote from Structial and out at least to have been reduced to reflect the lesser amount referred to in (a) above.

25 Alternatively, the appellants argue that leave should be granted because the proper exercise of the discretion as to the amount that should be levied ought to be informed by significant new evidence which will demonstrate that the amount reasonably necessary to repair, maintain, renew, or replace common property defects is significantly less than the amount of the amended quotation provided by Structial dated 16 July 2019 and a reduction in the levy in in the interests of all owners.

Consideration

Ground 1: Did the Tribunal err in failing to exercise its discretion under s 87 of the SSM Act to vary the levy from $901,286 to $Nil?

26 Section 87(1) of the SSM Act provides:

> **87 Orders varying contributions or payment methods**
>
> (1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—
>
> (a) an order for payment of contributions of a different amount,
>
> (b) an order for payment of contributions in a different manner.

27 The appellants argue that the Tribunal erred in not varying the Levy to $Nil. The respondents submit that the only order the Tribunal can relevantly make under s 87(1)(a) of the SSM Act is an order for payment of contribution "of a different amount", which must be in excess of $Nil.

28 We agree with the respondent's submission in this regard. Even accepting that "zero" is a number, the power of the Tribunal under s 87(2) to order the payment of "a different amount" in our view necessarily implies that the amount payable will be more than $Nil. If the levy was reduced to $Nil, then no amount would be payable. We conclude that the Tribunal had no power under s 87(1) to vary the levy to $Nil. The appellant has not argued that the Tribunal otherwise has specific power under the SSM Act to reduce a levy to $Nil.

29 In any event, even if the Tribunal does have the power under s 87(1) to vary a levy to $Nil, we are not satisfied that a failure to do so constituted an error for the same reason that we do not consider that Grounds 2, 3 and 4 are established. Additionally, there would be no basis to vary the Levy to $Nil in circumstances where the new evidence the appellant seeks to rely on indicates that there is $364,459 worth of rectification work to be done.

30 Ground 1 is not established.

Grounds 2 and 3: Did the Tribunal err in failing to exercise its discretion to make an order for the payment of contributions of a lower amount?

Ground 4: Did the Tribunal err in exercising its discretion in a manner that was unreasonable and plainly unjust?

31 In the alternative to Ground 1, the appellant submits that the Tribunal erred in failing to vary the Levy on the mistaken bases that:

(1) The amount was "necessary to undertake the works";

(2) An order varying the Levy to a lesser amount would "prevent the Owners Corporation from carrying out the works".

32 In relation to these grounds of appeal, the appellant relevantly submits that:

(1) The revision of the Structial quote meant that the amount of the Levy was no longer required for its intended purpose, but GK Strata took no steps to vary the levy downwards.

(2) There was no evidence to support the Tribunal's findings that the amount of the Levy was necessary to undertake the work and that varying the Levy to a lesser amount would prevent the Owners Corporation from carrying out the works.

(3) It was clear that the works could be carried out for less than the Levy.

(4) There was a clear error in the exercise of the discretion under s 87. The Tribunal mistook the facts.

(5) The exercise of the discretion was unreasonable and plainly unjust and disproportional to the facts of the case.

33 Where, as in this case, a lot owner claims that a levy is excessive and seeks an order under s 87, the Tribunal is required to undertake a two-step process. The Tribunal must first decide whether the amount levied or proposed to be levied by way of contributions is excessive. This is a finding of fact based on the evidence before the Tribunal and does not involve the exercise of a discretion. Only if it is satisfied that the amount is excessive, does the Tribunal have a discretion to make an order for payment of contributions of a different amount.

34 In this case, it is clear from [13] to [14] of the Tribunal's reasons for decision that the Tribunal understood the test it had to apply and that it was not satisfied that the Levy was excessive. As the Tribunal was not satisfied that the Levy was excessive, there was no discretion for the Tribunal to exercise under s 87.

35 We therefore understand the appellant's argument to be that:

(1) The Tribunal erred by not finding that the Levy was excessive;

(2) The Tribunal should have found that the Levy was excessive; and

(3) The Tribunal should have exercised the discretion to make an order for payment of contributions of a different amount.

36 As noted above, whether or not the Levy was excessive is a question of fact. Error in a finding of fact only constitutes an error of law if there is no evidence to support the finding: *Prendergast* at [20]. We are not persuaded that there was no evidence to support the Tribunal's finding that the Levy was not excessive.

37 First, the orders made by consent on 23 August 2018 required the Owners Corporation to engage RHM to inspect, report on scope and tender works to rectify common property in disrepair. The orders also required the Owners Corporation to raise a Levy to meet those expenses. The amount levied is consistent with the works RHM assessed were to be undertaken in accordance with those orders, plus a contingency allowance. In its report, RHM recommended the contingency allowance to deal with "variations encountered during the works", which brings the contingency allowance squarely within the scope of the consent orders.

38 There was ample evidence before the Tribunal to justify the conclusion at [10] of its reasons for decision that "The OC has raised a contribution to meet the expenses of the works in accordance with the orders in the 2018 proceedings". There was also ample evidence for the Tribunal's finding at [12] of the reasons for decision that "The compulsory manager has simply instigated [the regime set by the 2018 consent orders] on behalf of the OC and in accordance with those orders".

39 Second, the Tribunal rejected the opinion of Mr Riad, the building consultant engaged by the appellant, that RHM had overstated the defects. This occurred following cross-examination of the expert witnesses. The Tribunal's reasons for doing so are set out at [12] of the Tribunal's reasons for decision. We consider that the Tribunal's findings concerning the expert evidence were open to the Tribunal on the available evidence. No error of law arises from the Tribunal's rejection of Mr Riad's evidence that RHM overstated the defects.

40 Third, the relevant time at which to assess whether a levy is excessive is the time at which the Levy is struck. While there may be circumstances in which events that occur after the striking of a levy will support a conclusion that the levy is excessive, in our view the fact that Structial issued a revised quote after the Levy was struck does not make the Levy excessive. The Levy was struck in accordance with the RHM report and therefore in accordance with the consent orders. The fact that a revision of the scope of works led to a revision of the quoted price of the works does not, in such circumstances, mean that the Levy was excessive. Nor does the fact that the appellants or another expert engaged by the appellants take the view that RHM's scope of work is unnecessary mean that a Levy based on the original scope is excessive.

41 Fourth, we are of the view that, read in the context of the reasons for decision as a whole, the findings that the Levy was "necessary to undertake the works" recommended by RHM and that a reduction in the Levy "would prevent the OC from undertaking those works" are components in reaching the conclusion that the Levy was not excessive and the manner of its payment was not unreasonable, rather than findings that stand alone. In relation to this, the Tribunal found that all of the work recommended by RHM was necessary to repair common property defects. As we have concluded above, there was evidence before the Tribunal to support that finding and the finding discloses no error of law. Further, the Tribunal did not fail to consider that after the Levy was struck, RHM found an alternative solution which led to a reduction of about 15% in Structial's quoted cost to undertake the repairs. However, for the reason set out above, we are not satisfied that the reduction in the quote caused the Levy to become excessive.

42 Overall, we are not satisfied that the Tribunal erred in failing to find that the Levy was excessive. If the Levy was not excessive, then it follows that there was no basis on which to exercise the discretion to reduce it and the failure of the Tribunal to do so does not disclose any error.

43 In such circumstances, it is not strictly necessary to deal with Ground 4; that is, the claim that the Tribunal erred in exercising its discretion in a manner that

was unreasonable and plainly unjust. However, we do so for the sake of completeness.

44 In submissions on the appeal, the appellant cites *House v The King* (1936) 55 CLR 499 at 505 in support of the claim that the Tribunal erred in the exercise of its discretion:

> It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to God or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may be infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In some such a case although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the ground that a substantial wrong has in fact occurred.

45 In our view, no error in the *House v King* sense arises from the Tribunal's decision. The Tribunal made findings that were open to it on the available evidence and reached a conclusion based on that evidence that the Levy was not excessive.

46 Grounds 2, 3 and 4 fail.

47 Even if the Tribunal had erred in deciding that the Levy was excessive, we would not conclude that the discretion in s 87 should be exercised to reduce the Levy.

48 First, the reduction in the Structial quote was approximately 15%. This is a relatively small reduction, which in our view does not warrant the intervention of the Tribunal and the making of an order under s 87. This is particularly the case in circumstances where any funds not expended on completing the works recommended by RHM will be available to the Owners Corporation for future works and must be taken into account when determining contributions in the future financial years in accordance with s 79(3) of the SSM Act.

49 Second, we note the first respondent's submission that events have overtaken the utility of relief as the owners corporation had (at the time of the preparation of the submissions) $29.63 cash at bank and immediate liabilities of approximately $145,000 and had to raise contributions to pay the ordinary

expenses arising from day-to-day management of the scheme, which amounted to approximately $140,000 in the period from December 2018 to November 2019. At the appeal hearing the appellants objected to us considering this submission on the basis that it was unsupported by evidence. However, the appellants had an opportunity to deal with the issue in submissions in reply and did not do so. In such circumstances, if we had concluded that the Tribunal had erred in concluding that the Levy was not excessive or had erred in the exercise of its discretion, the first respondent's financial situation would be a compelling reason not to reduce the Levy.

50 Third, the Tribunal was correct in concluding that the appellants' sole director Mr Lee's observations about the amount required at the time of the consent orders was not a basis for preferring his expert witness, Mr Riad. The Tribunal was also correct in concluding that the financial position of the appellant companies is not a basis for concluding that the Levy is excessive. We would add that neither the basis on which Mr Lee agreed to the consent orders on behalf of the Owners Corporation, nor the financial position of the appellants is a basis on which the Levy should be reduced. The striking of the Levy was based on the scope of work prepared by RHM as a result of the 2018 consent orders. The appellants' sole director, Mr Lee, agreed to those orders on behalf of the Owners Corporation.

Ground 5 – Did the Tribunal err in failing to revoke the order made on 10 July 2019 in proceedings SC 18/21685 appointing GK Strata Management Pty Ltd as strata managing agent; and in failing to order that Foreshew Strata Agency be appointed as strata managing agent?

51 The appellants argue that GK Strata's "ongoing and unexplained failure to vary the Levy downwards," even where it was "clear" that the Levy went beyond what is required for its intended purpose is grounds for its removal under s 237(7) of the SSM Act and indicates that the management structure of the strata scheme is not functioning satisfactorily, such as to warrant the appointment of an alternative strata manager. They submit that the Tribunal erred in failing to revoke the appointment of GK Strata as the compulsory strata manager and failing to appoint Foreshew Strata Agency as the compulsory strata manager.

52 Given our findings in relation to Grounds 2, 3 and 4, we conclude that there is no merit in the appellants' submissions concerning Ground 5. Furthermore, the appellants have not pointed to a provision in the SSM Act that would have permitted GK Strata to reduce the Levy once it had been struck. We agree with the Tribunal's conclusion at [15] of the reasons for decision that the scheme is functioning satisfactorily and that GK Strata had "largely complied with the 23 August 2018 orders on the [owners corporation's] behalf".

53 No error is established in respect of the Tribunal's failure to revoke the appointment of GK Strata and to appoint Foreshew Strata Agency. Ground 5 fails.

Should the appellants be granted leave to appeal?

54 The appellants seek leave to appeal on the basis that the Tribunal's decision is not fair and equitable because:

(a) The Levy requires payment of $233,190 more than the amended quotation provided by Structial of which the appellants will be required to pay $139,914 (60%) and the second and third respondents, collectively, the balance of $93,276.

(b) The amount of the Levy was derived by reference to a redundant, higher quotation provided by Structial and ought at least to have been reduced to reflect the lesser amount of the amended quotation.

55 The appellants also submit that leave should be granted because "the proper exercise of the discretion as to the amount that should be levied ought to be informed by significant new evidence". The "significant new evidence" is a report from John Riad dated 16 December 2019 which according to the appellants "accurately identifies the common property defects … and provides a detailed scope of works to rectify those defects". The appellants also seek to rely on a report from a quantity surveyor, Andrew Cooper, dated 13 December 2019, who estimated the cost of Mr Riad's scope of work at $364,459.

56 The bases on which leave to appeal from decisions made in the Consumer and Commercial Division are set out at [15] to [20] above.

57 We are not satisfied that the Tribunal's decision was not fair and equitable because of the amount the appellants are required to pay. The appellants have to pay 60% of the Levy because the unit entitlement of the lots they own is

60% of the total unit entitlements of the lots in the scheme. Contributions must be levied in respect of each lot and are - with exceptions which do not apply in this case - payable by lot owners in shares proportional to the unit entitlements of their lots: s 83(2) SSM Act. There is nothing unfair or inequitable about the appellants being obliged to pay the proportion of the Levy that that they are required to pay by operation of the SSM Act. There is also nothing unfair or inequitable about the appellants paying their share of the Levy, when the Levy is not excessive.

58 In relation to the new evidence on which the appellants seek to rely, we note the affidavit dated 16 December 2019 of Mr Peter Fagan, the appellants' solicitor. The affidavit is in the bundle of documents provided by the appellants in the appeal proceedings. Mr Fagan's affidavit is offered as an explanation for the appellants' failure to provide the new evidence in the proceedings before the Tribunal. In summary, Mr Fagan states:

- His firm resumed representation of the appellants on 14 August 2019 and it was necessary to retrieve the files from the appellants' former solicitors, JS Mueller & Co.
- Between 14 August 2019 and the hearing on 19 September 2019, there was "considerable lack of time available to satisfactorily consider, seek instructions, liaise with appropriate candidates, procure satisfactory expert evidence and other lay evidence on the Applicants' behalf." During that period "there were considerable constraints and difficulties procuring and consolidating satisfactory expert and lay evidence on behalf of the Applicants".
- He was still receiving some of the file from the appellants' former solicitors on or about 29 August 2019 and it was unclear what material had been filed on behalf of the appellants.
- The material from the appellants' former solicitors did not contain an index and there was "delay and difficulty in understanding the status of the proceedings at that time, relative to existing NCAT timetables".
- The majority of the file was received approximately 14 days prior to the hearing. Time was expended briefing Counsel and seeking instructions from the client about the status of the evidence.
- There was "inadequate time to forensically consider the evidentiary matrix and assess what if any further evidence would be necessary to assist the Applicants".
- One of the elements of expert evidence deemed appropriate was quantity surveying expertise. However, "there was no means available under the

legislation for an expert to access the second - third respondent's lots in advance of the hearing on 19 September 2019".

- It was not until after filing the appeal that by consent, at the first directions hearing, agreement was reached to facilitate access in late November 2019.

59 We are not satisfied that reports obtained after the Tribunal's decision was made on 26 September 2019 constitute significant evidence for the purposes of cl 12(1)(c) of Schedule 4.

60 First, there is nothing in Mr Fagan's affidavit which suggests that he made an application to the Tribunal seeking an extension of time in which to provide expert or lay evidence or that he made an application for an order that the second and third respondents provide access to their lots.

61 Second, the transcript of the hearing on 19 September 2019 (the Transcript), is contained in the appellants' bundle of documents provided in the appeal proceedings. At Transcript page 4, line 45, the appellants' counsel Mr Neggo advised the Tribunal that the appellants had provided two folders of documents. He went on to state (at Transcript page 5, line 6) that there was also some "supplementary material". The supplementary material was later identified as a supplementary report by the appellants' expert Mr Riad, in the form of a letter dated 18 September 2019 (Transcript page 6 line 20-23) and the third and fourth affidavits of Mr Lee, dated 16 and 18 September 2019 respectively (Transcript page 6 line 22-25).

62 The appellants' supplementary material was clearly provided outside the timetable set for the filing and service of evidence. The Tribunal admitted it into evidence over the objection of the respondents' solicitor: Transcript page 17 lines 23-27. There was nothing in the submissions made by Mr Neggo in relation to this material to suggest that the appellants had intended to obtain even more evidence but had been prevented from doing so, by either a lack of time or the failure of the second and third respondents to allow access to their lots. There was no suggestion in the submissions made by Mr Neggo that the appellants were not ready to proceed with their case.

63 In these circumstances, we are not satisfied that the reports the appellants now seek to rely on are evidence "that was not reasonably available at the time the proceedings under appeal were being dealt with". The appellants could have

obtained the reports and provided them to the Tribunal below in accordance with procedural directions made in the Tribunal proceedings. If the change in solicitors caused a timetable problem, the appellants could have sought an extension of time, with or without an adjournment of the hearing. The appeal is not an opportunity to re-argue the case that was before the Tribunal with additional evidence that could have been provided at that time, any more than the Tribunal proceedings were an opportunity to re-argue the case that had been resolved by the 2018 consent orders.

64 We are not satisfied that the appellants have established any of the cl 12 Schedule 4 grounds for leave to appeal. Even if they had done so and could demonstrate that they may have suffered a substantial miscarriage of justice, we would not grant leave to appeal because we are not satisfied that the criteria for such leave to be granted as set out in *Collins v Urban* (see [20] above) have been met.

65 We refuse leave to appeal.

Ground 6 - Did the Tribunal err in ordering the Appellants to pay the costs of each of the respondents.

66 The appellants also appealed the Tribunal's costs decision made on 3 January 2020. However, the parties agreed at the appeal hearing that if the appeal was dismissed, the costs appeal would also be dismissed.

67 As the appeal is unsuccessful and we have refused leave to appeal, the appeal against the costs decision is also dismissed. Ground 6 therefore fails.

Costs of the appeal

68 We conclude that by operation of r 38A, r 38 applies to the cost of the appeal, as more than $30,000 is in dispute. The respondents are the successful parties in the appeal. We are satisfied that they should be ordered to pay the respondents' costs and make that order accordingly. Directions have been made in the event that a party seeks a different costs order.

Orders

(1) Leave to appeal is refused.

(2) The appeal is dismissed.

(3) The appellants are to pay the respondents costs of the appeal, on the ordinary basis, as agreed or assessed.

(4) If a party seeks a different costs order, order 3 above ceases to have effect and the following orders apply:

(a) Any application for a different costs is to filed and served within 14 days of the publication of these orders and is to be supported by evidence and submissions not exceeding five pages in length.

(b) Any response to the costs application(s) is to be filed and served 14 days thereafter.

(c) Submissions in reply are to be filed and served within 7 days of receipt of submissions in response.

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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

Amendments

10 June 2020 - Paragraph 24(a) "$133,190" corrected to "$233,190".

10 June 2020 - Paragraph 2 - Strata Plan Number corrected.