Civil and Administrative Tribunal

New South Wales

Case Name:	Loneragan v The Owners - Strata Plan No 16519
Medium Neutral Citation:	[2020] NSWCATAP 177
Hearing Date(s):	21 April 2020
Date of Orders:	25 August 2020
Decision Date:	25 August 2020
Jurisdiction:	Appeal Panel
Before:	A Britton, Principal Member M Gracie, Senior Member
Decision:	(1) Leave to appeal refused. (2) Appeal dismissed. (3) Any party seeking an order for costs must file and serve an application for costs together with supporting submissions within 28 days of the date of this decision. (4) Any party opposing that application must file and serve any submissions in reply within 14 days of receipt of the other party's submissions.
Catchwords:	APPEAL — NCAT — questions of law — leave to appeal from decision of Consumer and Commercial Division of NCAT LAND LAW — strata title — common property — maintenance and repair of common property — relationship between ss 106 and 108 of the Strata Schemes Management Act 2015 EVIDENCE — expert evidence — whether Tribunal permitted to consider whether witness was an expert in proceedings in which NCAT Procedural Direction 3, Expert Evidence did not apply

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Evidence Act 1995 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes (Freehold Development) Act 1973 (NSW)
Cases Cited:	Australian Broadcasting Tribunal v Bond [1990] HCA 33; 170 CLR 321 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390 Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705 Nationwide Builders Pty Ltd v Le Roy [2019] NSWCATAP 220 Ridis v Strata Plan 10308 [2005] NSWCA 246 Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157 Sittingbourne Urban District Council v Lipton [1931] 1 KB 539 Stolfa v Owners Strata Plan 4366 & Ors [2009] NSWSC 589 Stolfa v Hempton [2010] NSWCA 218 The Owners Strata Plan No 50276 v Thoo [2013] NSWCA 270
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Hugo Loneragan (Appellant) The Owners Strata Plan No 16519 (Respondent)
Representation:	Counsel: T Bors (Appellant) J Young (Respondent) Solicitors: Strata Specialist Lawyers (Appellant) Strata Title Lawyers (Respondent)

File Number(s):	AP 20/05435
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	21 January 2020
Before:	G Blake SC, Senior Member
File Number(s):	SC 19/48890

REASONS FOR DECISION

1 This appeal concerns a dispute among the owners of lots in a strata scheme in Kirribilli Sydney, namely The Owners - Strata Plan No 16519 (the **Owners Corporation**). At an annual general meeting held in October 2019, the Owners Corporation resolved to raise a special levy to fund the replacement of the roof of Ormiston, one of two properties which form part of the strata plan. One of the lot owners, Mr Hugo Loneragan, opposed that resolution.

2 Mr Loneragan unsuccessfully applied to the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (**NCAT**), for various orders under the *Strata Schemes Management Act 2015* (NSW) (***SSM Act***), including that the Owners Corporation refrain from replacing and instead undertake repairs to, the roof. Mr Loneragan now appeals against the decision of the Tribunal to dismiss that application.

3 For the reasons set out below, we have decided to dismiss the appeal and not to grant leave to appeal.

Background

4 There are 11 lots in the Owners Corporation's strata plan. That plan comprises of two separate buildings. The first building ("Ormiston") was built in about

1912 and includes Lots 1-9. Lots 10 and 11 are owned by Mr Loneragan and are in a second building, which was constructed in about 1927.

5 At an Annual General Meeting (**AGM**) held by the Owners Corporation on 22 October 2019, a resolution was carried to raise a special levy of $400,000 (the **Special Levy Resolution**) to finance the replacement of the roof of Ormiston. By that resolution all owners, including Mr Loneragan, were required to pay the Special Levy in full by 1 January 2020.

6 In an application lodged with NCAT on 30 October 2019, Mr Loneragan sought various orders under ss 232 and 241 of the *SSM Act*, including orders that the Owners Corporation:

(1) refrain from undertaking the works the subject of the Special Levy Resolution, that is the replacement of the roof of Ormiston; and

(2) instead, undertake the repair and maintenance of the roof in accordance with "recommendations" made by AGC Roof Maintenance Pty Ltd (**AGC**) in a report dated 27 November 2019.

The Tribunal's Decision

7 In the context of s 106 of the *SSM Act*, the Tribunal at [36] identified the "critical issue in this case" to be:

> "...the question of whether the roof of Ormiston should be repaired or replaced ...".

8 In support of his contention that it was not necessary to replace the roof of Ormiston and that it could be repaired, Mr Loneragan relied on a report prepared by AGC dated 27 November 2019 (the **AGC Report**) and a quotation provided by AGC dated 15 January 2020 (the **AGC Quote**), both prepared by Mr Anthony Kendrick of AGC.

9 In support of its contention that it was necessary to replace the roof, the Owners Corporation relied on a report dated 9 December 2019 prepared by Mr Paul Senior of Sedgwick Building Consultancy.

10 Mr Senior stated in his report:

> "... the existing slate roof is near to, or at the end of its serviceable life and as such, replacement of the slates to the entire roof area is required."

11 The Tribunal decided at [36] to “place no weight on the report of Mr Senior" because Mr Senior was not made available for cross-examination, and no

explanation was given for his unavailability, referring to Civil and Administrative Tribunal Procedural Direction 3 (**PD 3**) and citing the Appeal Panel's decision in *Nationwide Builders Pty Ltd v Le Roy* [2019] NSWCATAP 220 at [34].

12 The Tribunal also decided to "place no weight on the AGC quote" because "there was no evidence that Mr Kendrick was an expert within the definition of PD 3" and because "Mr Kendrick expressed no opinion on the critical issue": at [41].

13 Referring to s 106 of the *SSM Act*, the Tribunal noted at [42] that Mr Loneragan accepted that he bore the onus of establishing that the decision to replace the roof of Ormiston breached s 106 of the *SSM Act*. The Tribunal concluded at [45] that "[i]n the absence of any evidence that it is unnecessary to replace the roof of Ormiston ... the applicant has not established that the Owners Corporation had breached s 106 of the *SSM Act*".

14 The Tribunal dismissed the application.

Grounds of appeal

15 In the Notice of Appeal filed on 9 February 2020, Mr Loneragan listed seven grounds of appeal. At the hearing of the appeal, Mr Loneragan advised that grounds 4 and 5 were not pressed and the remaining grounds had been re-categorised as follows:

(1) Grounds 1 and 7: that the Tribunal "mischaracterised the issues in dispute" and/or "failed to properly apply established legal principles".

(2) Ground 2: that the Tribunal failed to consider "all the evidence before it, in particular the AGC Report dated 27 November 2019 and accompanying photos and email".

(3) Grounds 3 and 6: that the Tribunal erred in affording "no weight to the AGC quote dated 15 January 2020" and "in exercising its discretion in a manner that was unreasonable or plainly unjust".

Statutory basis of the appeal

16 Mr Loneragan has a right to appeal against the decision under appeal as of right on any question of law or with the leave of the Appeal Panel: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the **NCAT Act**).

17 Where, as here, the decision the subject of the appeal is a decision of the Consumer and Commercial Division of NCAT, cl 12 of Sch 4 to the NCAT Act

limits the circumstances in which an Appeal Panel may exercise the power to grant leave to appeal:

> **12 Limitations on internal appeals against Division decisions**
>
> (1) An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

18 In *Collins v Urban* [2014] NSWCATAP 17 ("*Collins*"), an Appeal Panel of NCAT stated at [84] that there must be a "sound basis" for granting leave under s 80(2)(b) of the NCAT Act. The Appeal Panel stated that an appellant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at, or that there was a bona fide challenge to an issue of fact. Ordinarily it will only be appropriate to grant leave to appeal 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.
>
> (Citations omitted)

19 Mr Loneragan contends that Grounds 1, 2, 3 and 7 each give rise to questions of law. In the alternative, he seeks leave to appeal on each of these grounds. Mr Loneragan acknowledges that he requires leave for Ground 6.

Grounds 1 and 7: the construction issue

20 The substance of grounds 1 and 7 is the contention that the Tribunal misapplied ss 106 and 108 of the *SSM Act*. Mr Loneragan contends that by formulating the critical issue as being "whether the roof of Ormiston should be repaired or replaced ..." the Tribunal failed to have regard to the principles governing s 106 and 108. He contends that the question raised by the initiating application he made to NCAT was not whether the roof "required" replacement but whether the roof "could" be repaired, citing in support *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 ("*Glenquarry*") per Parker J at [74].

21 Mr Loneragan contends that the Tribunal's characterisation of the critical issue "goes too far" and misstates the nature of the obligation imposed on an owners corporation by s 106 of the *SSM Act*. The proper question, he contends is that formulated by Parker J in *Glenquarry* at [74], whether "the item can no longer be kept in a state of good and serviceable repair".

22 Mr Loneragan submits that the AGC Quote and the AGC Report supports the inference being drawn that the roof could be repaired. In those documents, Mr Kendrick described the roof as being in "fair condition for its age". Mr Kendrick's "quote" of $54,120 was to remove rusted roof valleys and supply/install 2 Colorbond roof valleys, to repoint 12 ridge caps, to remove and replace approximately 132 defective roof slates and supply/install 15-20 anchor points.

23 The Owners Corporation rejects the contention that the Tribunal misapplied ss 106 and 108 of the *SSM Act*. It contends that the Tribunal's formulation of the critical issue was entirely orthodox and in line with established principles. It contends that there is no material difference between the Tribunal's formulation of the critical issue and that proposed by Mr Loneragan, the purported difference amounts to "a distinction without a difference".

24 In addition, the Owners Corporation contends that in circumstances where Mr Loneragan sought to have set aside a validly made resolution of the Owners Corporation authorising the replacement of the roof, Mr Loneragan bore the onus of establishing that the replacement of the roof was an "enhancement"

within the meaning of s 108 of the *SSM Act*. The Owners Corporation contends that there was no evidence that the roof could be repaired, less still that the replacement of the roof was an enhancement.

Sections 106 and 108 of the SSM Act

25 These provisions are central to grounds 1 and 7 of this appeal.

26 Section 106 of the *SSM Act* imposes a statutory duty on an owners corporation to maintain and repair common property:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> …

27 Section 108 governs the procedures for making changes to common property and provides:

> **108 Changes to common property**
>
> (1) Procedure for authorising changes to common property. An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.
>
> (2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.
>
> …

28 It is common ground that a roof is a "fixture" and “common property” for the purpose of s 106 and s 108, respectively.

29 The operation of the predecessors to ss 106 and 108 of the *SSM Act*, respectively ss 62 and 65A of the now repealed *Strata Schemes Management Act 1996* (NSW) (the **1996 Act**), have been the subject of extensive judicial consideration. Sections 62(1) and 62(2) of the 1996 Act are broadly in the same terms as ss 106(1) and 106(2) of the SSM Act. Similarly, ss 65A(1) and ss 65(2) of the 1996 Act and broadly in the same terms as ss 108(1) and 108(2) of the SSM Act.

30 In *Glenquarry*, Parker J reviewed the authorities which have considered ss 106 and 108 of the *SSM Act*, and/or their predecessors. The following summary of the authorities is largely taken from *Glenquarry*.

31 The scope of the obligation imposed by s 62 of the 1996 Act to "maintain and keep in a state of good and serviceable repair the common property" was considered by the Court of Appeal in *Ridis v Strata Plan 10308* [2005] NSWCCA 246 ("*Ridis"*). Mr Ridis sought damages against the owners corporation for an injury to his hand which he sustained when the glass in the front door of the building owned by the owner corporation shattered as he was opening the door. Mr Ridis claimed that in not replacing the glass pane with safety glass, the owners corporation had breached its statutory duties under s 62 of the 1996 Act.

32 As it is central to the Court's analysis of s 62 of the 1996 Act, we set out below the text of that provision:

> **62 What are the duties of an owners corporation to maintain and repair property?**
>
> (1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> > (a) it is inappropriate to maintain, renew, replace or repair the property, and
> >
> > (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

33 The majority in *Ridis* (Hodgson and McColl JJA) concluded that the owners corporation had not breached its obligation under s 62 of the 1996 Act. Tobias JA disagreed. In separate judgments, their Honours considered the nature and scope of the obligation imposed by s 62.

34 Hodgson JA stated at [3]-[4]:

> [3] In my opinion, the circumstances that the words "where necessary" do not appear in subsection (2) does not mean that the obligation under that

> subsection has no qualification, apart from that provided by subsection (3). Suppose that there is a light-fitting in the common property. Subsection (2) cannot mean that this light-fitting must be continually replaced, unless there is a determination by special resolution that this is inappropriate. This view is confirmed by the consideration that the terms of subsection (3) indicate that there cannot be a standing resolution not to replace a light-fitting. Paragraph (b) of subsection (3) indicates that such resolutions are to be directed towards particular occasions when replacement is under consideration.
>
> [4] Accordingly, in my opinion, either words such as "where necessary" or "where appropriate" must be implied, or alternatively subsection (2) must be read together with subsection (1) to the effect that renewal or replacement must be undertaken whenever appropriate in the course of properly maintaining the common property and keeping it in a state of good and serviceable repair, as required by subsection (1). It probably makes little difference in this case which of the two alternatives is chosen, but in my opinion the latter is the preferable view.

35 McColl JA stated at [169], [171]:

> [169] Turning to s 62(2), it is apparent that it conveys the sense of repairing fixtures or fittings which have deteriorated, are damaged or are operating inadequately. "Renew" as relevantly defined by the Macquarie Dictionary means "to make new, or as if new, ... restore to a former state", while "replace" carries both the connotation of providing a substitute or equivalent or restoring or making good (Macquarie Dictionary).
>
> [171] It is apparent from this analysis that subs 62(1) and (2) do not impose an obligation on the respondent to insert new glass in a door which, as in the present case, was relevantly operating as intended (and, therefore, did not require maintenance or repair) – let alone an obligation to procure experts to assess the premises to determine whether any of the materials of which the common property was constructed could be made safer. The appellant contends and Tobias JA has accepted, however, that the addition of s 62(3) enlarges the prima facie scope of those duties.

36 The interrelationship between ss 62 and 65A of the 1996 Act was considered in *Stolfa v Owners Strata Plan 4366 & Ors* [2009] NSWSC 589 (*Stofla*). There, Brereton J concluded at [68] that the subject works did not require the authority of a special resolution under s 65A because they were "neither enhancement or improvement" but "appropriate repairs to common property that was in disrepair, within s 62". On the interrelationship between ss 62 and 65A Brereton J stated:

> [65] … A comparison of s 62 and s 65A indicates that the latter is concerned with controlling and regulating alterations and additions to common property, other than repairs and maintenance that an owners corporation is bound to effect under s 62. Section 65A applies to additions or alterations that will improve or enhance (as distinct from repair and maintain) the common property. **Thus, if works fall within s 62, they do not require special authorisation under s 65A.**

(Emphasis added.)

37 In *Stolfa v Hempton* [2010] NSWCA 218 Allsop P (Basten and Young JJA agreeing) concluded that Brereton J was correct to reject the submission that even where s 62 required repair and maintenance to be undertaken, because that work improved or enhanced the common property, a special resolution was required at [10]:

> [10] If, as a matter of fact, all the work satisfied the description in s 62 as repair and maintenance, they were not subject to any additional requirement of a special resolution in s 65A. The statute should not be construed so as to require the owners corporation to act, but then to place a voting barrier in its path in complying with the statute."

38 In *Thoo*, after referring to the above passage from *Stolfa v Hempton,* Barrett JA commented:

> [4] Replacement is a large concept. If a modest single-bulb light fitting is removed and a grand crystal chandelier is installed in its place, the former has obviously been replaced by the latter. There is also replacement if a substantial brick wall is erected on a site previously occupied by a flimsy brushwood fence. Replacement connotes no more than the installation of one thing in the place of another to achieve functional equivalence.
>
> [5] While s 65A does not curtail the duty imposed by s 62(2) or impede performance of that duty, the existence of s 65A does serve to shape the s 62(2) duty so that, in the ordinary course, anything amounting to alteration or addition for the purpose of improving or enhancing is beyond the concept of renewal or replacement with which s 62(2) is concerned.
>
> …
>
> [7] Generally speaking, renewal or replacement of fixtures or fittings will, of its nature, involve improvement because old will be superseded by new. It may also entail alteration or addition, in that the new or replacement item may be large than or otherwise different from the old. To the extent that alteration or addition is, in that way, incidental to renewal or replacement, s 62(2) both requires and allows it. But s 62(2) does not, at a particular time, impose a positive requirement for superior functionality, compared with that inherent in the nature and quality of the relevant part of common property as most recently fixed in the way I have mentioned.

39 In *Glenquarry* at [63] Parker J considered the "different approaches" taken by the Court of Appeal in *Ridis* to "the degree to which sub-section (2) [of s 62 of the 1996 Act] should be read as being controlled by the obligation in sub-section (1)". Parker J considered that the view of McColl JA in *Ridis* at [169] "best reflects the ratio of the Court's decision" so that the test under sub-section (2) was whether the relevant fixture or fitting had deteriorated, been damaged or was operating inadequately: at [64].

40 After a detailed consideration of the authorities dealing with the relationship between ss 62 and 65A of the *1996 Act*, Parker J at [74] stated that it was implicit from the analysis of Tobias AJA in *Thoo* that the obligation in s 62(2) to renew or replace common property is limited by a concept of reasonable necessity. His Honour stated at [129] that the obligation is only engaged where the item can no longer be kept in a state of good and serviceable repair. He went on to say that the provision is only directed to circumstances where the item "is no longer operating effectively or at all, or has fallen in to disrepair".

41 Parker J at [71] found "force in the contention" that once part of the common property was in need of repair and maintenance work, or replacement work, within s 62, "practicality requires allowing a degree of judgment and latitude to an owners' corporation in determining how far to go with repair and replacement work in a maintenance context":

> [71] [O]ften, the replacement of an old and obsolete item may be cheaper and more effective in the long run than continuing to try to patch it up. There is also a textual basis for allowing a degree of latitude to an owners' corporation in deciding what and when should be replaced. Maintenance is not necessarily confined to responding to a breakdown; the term usually also includes preventative maintenance, that is, replacing something which has reached the end of its service life before it fails.
>
> [73] On the other hand, the purpose of s 65A was clearly to protect minority owners in a building from having the costs of enhancement imposed on them by the majority. The minority may prefer to continue to eke out the existing facilities even if in the longer run, that may prove more expensive or inefficient. They may have less money to spend, or their priorities may be different. The legislative purpose behind s 65A could arguably be subverted if unnecessary costs could be imposed on the minority at the discretion of the majority just because some, much less extensive, repair or maintenance is required.
>
> [74] In my view, it is implicit in what Tobias AJA said in Thoo that the obligation in s 62(2) to renew or replace items of common property is limited by a concept of reasonable necessity. His Honour stated at [129] that the provision is only engaged where the item can no longer be kept in a state of good and serviceable repair. He went on to say that the provision is only directed to circumstances where the item "is no longer operating effectively or at all, or has fallen in to disrepair".
>
> (Citations omitted)

Consideration

42 Citing in support the above passages from the judgment of Parker J in *Glenquarry*, in particular [74], Mr Loneragan contends that the question the Tribunal should have asked itself, is "whether the roof is able to be repaired?".

Mr Loneragan contends that if the answer to that question is “yes”, anything else said to give effect to the obligation imposed by s 106(1) of the *SSM Act*, to “properly maintain and keep in a state of good and serviceable repair the common property”, here the replacement of the roof, is an enhancement within the meaning of s 108 of the *SSM Act*.

43 We do not agree that *Glenquarry* is authority for the proposition that where the obligation imposed by s 106(1) is engaged to “properly maintain and keep in a state of good and serviceable repair the common property” if the subject property is capable of being repaired, replacement must necessarily be considered to be an enhancement. Whether replacement will amount to an enhancement within the meaning of s 108(1) will depend on the facts of the particular case. As Parker J acknowledged at [71] “practicality requires allowing a degree of judgment and latitude to an owners corporation in determining how far to go with repair and replacement work”. In deciding whether to replace or repair, a range of matters will be relevant to inform a decision made by an owners corporation, such as the costs of repairs versus the cost of replacement and the estimated life of the repaired item versus the life of the replaced item.

44 We are not persuaded that in identifying the "critical issue" as whether “the roof of Ormiston should be repaired or replaced", the Tribunal misapplied s 106 of the *SSM Act*. The Tribunal noted at [42] that Mr Loneragan accepted that he bore the onus of establishing that the roof *could and should be repaired*. Having decided to give no weight to the AGC Quote and noting that Mr Kendrick had not expressed an opinion about the critical issue, the Tribunal concluded at [45] that Mr Loneragan had failed to establish that the Owner’s Corporation had breached s 106 of the *SSM Act*.

45 In its formulation of the critical issue, the Tribunal implicitly acknowledged the tension between s 106(1) and s 106(2) and, in addition that the nature of the obligation imposed by s 106(1) is shaped by s 108 (see Barrett JA in *Thoo* at [5]). While arguably the Tribunal should have expressly addressed whether the replacement of the roof amounted to an enhancement or improvement within the meaning of s 108, in the absence of any evidence on that issue or whether

the roof could be kept “in a state of good and serviceable repair”, its failure to do so did not disclose error.

46 Finally, the Tribunal's characterisation of the critical issue reflected the case put by Mr Loneragan before the Tribunal. Mr Loneragan’s (then) counsel submitted to the Tribunal (at T5: 221-225):

> "The test laid down in *Glenquarry Park Investments Pty Ltd v Hegyesi* is clear. The Tribunal needs to determine whether the roof can be fixed with a patch and fix method, or whether it has reached the end of its serviceable life that it needs to be renewed or replaced. That's the ultimate issue with respect."

(See also T25: 1178-1179).

47 The Tribunal summarised those submissions at [42]:

> "The applicant submitted that s 106 of the *SSM Act* is to be interpreted in accordance with *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 at [74], namely the obligation in s 106(2) to renew or replace items of common property is limited by a concept of reasonable necessity and is only directed to circumstances where the item "is no longer operating effectively or at all, or has fallen into disrepair”. The applicant accepted that he had the onus of establishing that the respondent has breached s 106 of the *SSM Act*. He submitted that replacement of the roof of Ormiston was unnecessary..."

48 It is not appropriate for Mr Loneragan to now argue on appeal a case that is different to that put to the Tribunal by his counsel, particularly when one of the findings made by the Tribunal that Mr Loneragan now seeks to impugn was a finding that upheld that aspect of the case advanced by Mr Loneragan before the Tribunal.

49 In *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

50 Grounds 1 and 7 are not established.

Ground 3: giving no weight to the AGC Quote

51 By ground 3, Mr Loneragan challenges three key findings made by the Tribunal:

(1) that "there was no evidence that Mr Kendrick is an expert";

(2) that "Mr Kendrick expressed no opinion on the 'critical issue'"; and

(3) that there was no evidence that the replacement of the roof was unnecessary.

52 Mr Loneragan contends that each finding (the **challenged findings**) was based on a mistake of fact. He contends that having considered the AGC Quote it was not open for the Tribunal to conclude that there was no evidence that the replacement of the roof was unnecessary. He describes that finding as "obviously mistaken and erroneous at law".

53 Mr Loneragan contends that an incorrect finding that there was "no evidence" for a given proposition is an error of law, citing in support *Sittingbourne Urban District Council v Lipton* [1931] 1 KB 539 at 544. The High Court in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 confirmed that a "no evidence" ground of appeal raises a question of law. Hayne, Heydon, Crennan and Kiefel JJ held at [91]:

> "Whether there was no evidence to support a factual finding is a question of law, not a question of fact."

54 As we explain below, it could not reasonably be argued that there was no evidence to support each of the challenged findings. In truth the complaint raised by this ground is that each challenged finding was "factually incorrect" or "mistaken". The premise on which this ground rests is not established. In any event, a "factually incorrect" or "mistaken" finding does not give rise to a question of law: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, Mason CJ (Brennan J agreeing) at [88]-[89].

Finding 1: Mr Kendrick is not an "expert"

55 Admitted into evidence over the objection of the Owners Corporation, the Tribunal stated at [41] that it gave no weight to the AGC Quote because:

(1) "there was no evidence that Mr Kendrick was an expert within the definition of NCAT Procedural Direction 3, being 'A person who has specialised knowledge based on the person's training, study or experience and who gives evidence of an opinion based wholly or substantially on that knowledge'.

(2) Mr Kendrick expressed no opinion on the critical issue."

56 Mr Loneragan attacks the finding that Mr Kendrick was not an expert on two bases. First, he contends that the Tribunal erred in concluding that NCAT Procedural Direction 3 applied to these proceedings. Second, he contends that there was no evidence for the finding that Mr Kendrick was not an expert.

Did the Tribunal err in concluding that Procedural Direction 3 applied to the proceedings?

57 Headed "Expert Evidence" and made under s 26 of the NCAT Act, NCAT Procedural Direction 3, 28 February 2018 (**PD 3**) sets out at [4] a code of conduct for expert witnesses. As Mr Loneragan points out, PD 3 applies only in a limited class of proceedings in NCAT: proceedings in which the rules of evidence apply; proceedings involving claims under the *Home Building Act 1989* (NSW) with a value greater than $30,000; and proceedings in the Occupational Division for a "profession decision". The subject proceedings did not fall into any of these categories. In addition, PD 3 applies in any other proceedings in which "the Tribunal directs that this Procedural Direction is to apply". On the available material it is not possible to say whether the Tribunal directed that PD 3 applied to the proceedings.

58 The contention that PD 3 did not apply in the proceedings before the Tribunal was not raised in the grounds of appeal nor in Mr Loneragan's written submissions in support of the appeal. The contention was raised for the first time in oral submissions and falls outside the issues raised in the grounds of appeal. However, for completeness we will address the contention.

59 PD 3 at [10] defines an expert to mean:

> A person who has specialised knowledge based on the person's training, study or experience and who gives evidence of an opinion based wholly or substantially on that knowledge.

60 PD 3 relevantly provides:

> 1. The Tribunal may rely on evidence from expert witnesses to reach a conclusion about a technical matter or area of specialised knowledge that is relevant to an issue to be determined in proceedings. It is important that experts' opinions are soundly based, complete and reliable.
>
> …
>
> 3. In proceedings where the Tribunal is not bound by the rules of evidence, the acceptability of expert evidence is a question of weight not admissibility. Nonetheless, if those proceedings involve complex or difficult expert issues, it

> is appropriate to require expert evidence to be prepared and presented in a manner, which seeks to ensure its usefulness.
>
> …
>
> 7. In non - Evidence Rules Proceedings [as defined in PD 3], a failure to comply with the code of conduct does not render any expert report or evidence inadmissible but it may, depending on the circumstances, adversely affect the weight to be attributed to that report or evidence.

61 The definition of expert in PD 3 largely reflects the rules governing the admissibility of expert evidence embodied in s 79(1) of the *Evidence Act 1995* (NSW) and the common law: *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85].

62 Even if it is accepted that the Tribunal erred in determining that PD 3 applied to the subject proceedings, in deciding what if any weight to give the AGC Quote the Tribunal was entitled to consider the question of whether Mr Kendrick was an "expert". While "not bound by the rules of evidence" (s 60(2) of the *NCAT Act*), the Tribunal was nonetheless entitled to have regard to those rules. PD 3 does not operate to prevent the Tribunal from having regard to the rules of evidence which govern the admissibility of expert evidence, in proceedings where PD 3 does not apply. PD 3 at [8] makes that clear:

> Nothing in this Procedural Direction prevents the Tribunal from giving any directions concerning expert witnesses or expert evidence that the Tribunal considers appropriate in any particular proceedings before the Tribunal.

63 The Tribunal was entitled to consider whether Mr Kendrick had specialised knowledge, whether that knowledge was based on his training, study or experience and whether the opinion he is said to have expressed in the AGC Quote was based on that specialised knowledge.

Was there "no evidence" for the finding that Mr Kendrick was not an expert?

64 In support of this proposition Mr Loneragan relies on the description of Mr Kendrick as "our estimator" in the AGC Quote and the AGC Report. In addition, he relies on the email exchanges between Mr Loneragan and AGC, in particular, an email sent by Mr Loneragan to Mr John Burgess (apparently the principal of AGC) on 15 November 2019, requesting an inspection of the roof:

> "The purpose of the inspection is to advise if it is possible to continue to repair the roof and if there are any alternatives to total replacement."

65 Mr Loneragan submits that the above material permitted the Tribunal to draw the inference that Mr Kendrick was authorised by AGC, an entity holding a licence authorising it to undertake roofing work, to provide the requested opinion. It follows that the Tribunal was permitted to draw the inference that Mr Kendrick held the requisite specialised knowledge to provide an opinion on whether “it is possible to continue to repair the roof and if there are any alternatives to total replacement”.

66 The Owners Corporation contends that the Tribunal was correct to conclude that there was no evidence to support the conclusion that Mr Kendrick was an expert and points out that Mr Loneragan made that concession in the original proceedings.

Consideration

67 In the proceedings before the Tribunal it fell to Mr Loneragan the person seeking to rely on the purported opinion contained in the AGC Quote, to establish that Mr Kendrick had "specialised knowledge based on [his] training, study or experience” and that that opinion was based on that knowledge.

68 The description used by AGC of Mr Kendrick as "our estimator" at its highest establishes that Mr Kendrick may have expertise in providing cost estimates for roofing repair work. It does not establish that he had expertise to provide an opinion about the question asked by Mr Loneragan. Nor does it follow, as Mr Loneragan appears to contend, that because AGC was requested to provide an opinion about whether the roof could be repaired, a matter he concedes required specialised knowledge, that the person who provided an opinion in answer to that request possessed such knowledge.

69 In the proceedings before the Tribunal counsel for Mr Loneragan conceded that Mr Kendrick was not an expert:

> "There's two quotes that are provided by AJC [sic] Roofing. True it is, it's not an expert. But the fact that someone who is licensed is prepared to go and issue a quote to fix this roof is some evidence that it can be fixed." (T25: 1183-1185)
>
> …
>
> "I accept that I bear the onus, and I accept I haven't got an expert opinion to deploy." (T35:1681)

70 Further, counsel submitted:

> "I don't have an expert opinion to deploy. ... I can't take it any higher than those quotes, and the photos that are attached to those quotes. Which were following obviously an inspection of the roof." (T35: 1713:1717)

71 The Tribunal found that Mr Loneragan had failed to establish that Mr Kendrick had "specialised knowledge". The proposition that there was no evidence to support a finding that Mr Kendrick was not an expert is rejected. So too is the proposition that in making that finding the Tribunal was "obviously mistaken". That finding was open to the Tribunal on the available material.

Finding 2: Mr Kendrick expressed no opinion on the critical issue

72 While formulated as a "no evidence" ground, in written submissions Mr Loneragan contended that the finding made by the Tribunal that "Mr Kendrick expressed no opinion on the critical issue" was "factually incorrect". In support Mr Loneragan points to the request he made to AGC to conduct an inspection (see [64] above) together with the AGC Quote and Report.

73 In the AGC Quote Mr Kendrick wrote:

> "The slate roof covering appeared overall to be in fair condition for its age, requiring maintenance repairs to slate pieces, being cracked slipped and broken, approx. 132 pieces identified.
>
> Terracotta ridge capping pieces will be disturbed during slate tile replacement.
>
> Ridge capping pieces require resealing, with flexi point, coloured sealer.
>
> The colorbond valley irons at the rear of the property require replacement, due to corrosion, with hoiles [sic] appearing.
>
> AGC advise that annual inspections be carried out, identifying maintenance issues, before they become larger required repairs, keeping this roof covering in optimum condition, for its age.

74 In addition, the Quote contains a description of the scope of the repair works and a quotation for the costs of that work. The following notation is contained under the heading "terms and conditions":

> "This is *not* a complete building report". (Emphasis added.)

75 The passage set out at [75] above is reproduced in the AGC Report.

76 As is apparent, Mr Kendrick did not express an opinion on whether "the roof of Ormiston should be repaired or replaced". It was open to the Tribunal to find that Mr Kendrick did not express an opinion on the "critical issue".

Finding 3: An "absence of any evidence that it is unnecessary to replace the roof"

77 The third finding challenged by Mr Loneragan is the finding that there was an "absence of any evidence that it is unnecessary to replace the roof at Ormiston": [45].

78 Mr Loneragan submitted that as a consequence of the Tribunal's decision to place no weight on the opinion expressed by the Owners Corporation's expert, Mr Senior, "it was not open to the Tribunal to conclude that there was no evidence that replacement of the roof was unnecessary". Mr Loneragan repeats the submission referred to above that taken together the AGC Report and Quote support the finding that the roof could and should be repaired and not replaced. In the appeal Mr Loneragan accepted that he bore the onus of establishing that the roof could be repaired rather than replaced.

79 Having rejected the evidence of Mr Senior, the Tribunal was not required to accept the proposition Mr Loneragan contends is established by the AGC Quote and Report. It was open to the Tribunal to find that there was an "absence of any evidence that it is unnecessary to replace the roof at Ormiston". No error of law is disclosed.

Conclusion

80 Ground 3 of the appeal fails.

Ground 6

81 Ground 6 states:

> "The Tribunal erred in exercising its discretion in a manner that was unreasonable or unjust."

82 In the appeal, Mr Loneragan explained that the "discretion" referred to in ground 6 is the discretion to give weight to the AGC Quote. He conceded that grounds 3 and 6 overlap. Mr Loneragan acknowledges that ground 6 does not give rise to a question of law and urges the Appeal Panel to grant leave to appeal on this ground.

83 Mr Loneragan contends that the decision not to give any weight to the AGC Quote in circumstances where the case "turned on the quality of the evidence" was not fair and equitable. In circumstances where there was no other

evidence on this point and a fair reading of the AGC Quote reveals that the roof was capable to being kept in “good and serviceable repair”, the decision not to give any weight to that quote was not “fair and equitable". He contends that there was a “chance which was fairly open” that had it not been for that decision, he would have achieved a different and more favourable result.

84 As we discussed above it was open to the Tribunal to decide to place no weight on the AGC Quote. The reasons given by the Tribunal for that decision were cogent and intelligible. That the decision was in effect fatal to Mr Loneragan’s claim, did not render the decision “not fair and equitable”.

85 In any event we are not persuaded that any of the factors listed in *Collins*, which might warrant granting leave, apply. The Tribunal went about its role as fact finder in an entirely orthodox manner. The decision could not be said to have resulted in an injustice which is reasonably clear. While the decision is of great importance to the parties, it raises no question of public importance or general application and is confined to the specific facts of the case.

86 Leave to appeal on this ground is refused.

Ground 2: failure to consider "all the evidence before it, in particular the report of AGC Roof Maintenance Pty Ltd dated 27 November 2019 and accompanying photos and email"

87 Mr Loneragan contends that the Tribunal "made no express finding as to any weight to be given to the AGC Report (as distinct from the AGC Quote), nor indeed did the Tribunal make any comment as to the AGC Report at all". In addition, he contends that the Tribunal failed to consider the AGC Report.

88 The AGC Report was prepared following written instructions given to AGC by Mr Loneragan in his email dated 15 November 2019. (See [66] above.) That Report and a series of photographs of the roof apparently taken by Mr Kendrick were attached to an affidavit sworn by Mr Loneragan on 13 December 2019.

89 The only material difference between the AGC Quote and the AGC Report is that the former contained a description of the scope of the repair works and a quotation for the cost to undertake those works, the AGC Report did not. Of the two documents the AGC Quote was the most useful, detailed and relevant document for the Tribunal’s consideration.

90 In circumstances where there is no material difference between the two documents and there is no suggestion that the Tribunal failed to consider the AGC Quote, it is not apparent how the Tribunal's purported failure to consider the AGC Report could be said to result in Mr Loneragan being disadvantaged or give rise to a question of law.

91 This ground of appeal fails.

Leave to appeal

92 In the Notice of Appeal Mr Loneragan asserted that each ground of appeal raises a question of law. In an Annexure to that notice he contended that leave to appeal was not necessary but "alternatively, if leave is required", the Tribunal's decision was "not fair and equitable" because:

(1) The Tribunal erred in the exercise of its discretion in failing to order the respondent to undertake "repair and maintenance work in accordance with the recommendations in the "AGC Report";

(2) The amount of the contribution was "significant and excessive for works that do not need to be performed" and for which Mr Loneragan was liable for 25.6% of the contribution; and

(3) The decision of the Tribunal was against the weight of the evidence, in particular by not affording any weight to the AGC Report.

93 In the hearing of the appeal, the arguments advanced in support of leave and those in support of the contention that each ground except ground 6, raised questions of law were somewhat conflated.

94 The primary contention advanced in support of the application for leave, is that the decision not to give weight to the AGC Quote/AGC report was not fair and equitable. We have dealt with that argument above. We are not persuaded that that decision or the ultimate decision made by the Tribunal was not fair and equitable. Leave to appeal is refused.

Disposition of the appeal

95 None of the grounds of appeal are established. Leave to appeal is refused. The appeal is dismissed.

Costs

96 The Owners Corporation seeks its costs of the appeal and has provided written submissions in support. As noted by the Owners Corporation, the Tribunal did

not make a costs order in the proceedings before it or provide directions for making submissions on costs. The Owners Corporation indicated in its Reply that in the event the appeal was dismissed, it proposed to seek its costs of both the appeal and the proceeding below.

97 If the parties are unable to agree on the issue of costs, they may apply to the Tribunal within 28 days of this decision and provide brief written submissions in support. Any party opposing that application must file and serve any submissions in reply within 14 days of receipt of the costs applicant's submissions. The parties agreed at the hearing that any application for costs could be dealt with "on the papers" as permitted by s 50 of the *NCAT Act*. If having considered each other submissions a party is no longer of that view they must advise the Registrar within seven days of receiving any submissions opposing the order of costs.

Orders

98 We make the following orders:

(1) Leave to appeal refused.

(2) Appeal dismissed.

(3) Any party seeking an order for costs must file and serve an application for costs together with supporting submissions within 28 days of the date of this decision.

(4) Any party opposing that application must file and serve any submissions in reply within 14 days of receipt of the other party's submissions.

****

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