Civil and Administrative Tribunal

New South Wales

Case Name:	Burbank Montague Pty Ltd v The Owners – Strata Plan No. 8531 and Ors (No 2)
Medium Neutral Citation:	[2021] NSWCATAP 15
Hearing Date(s):	On the papers
Date of Orders:	28 January 2021
Decision Date:	28 January 2021
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member M Gracie, Senior Member
Decision:	(1) The application for a different costs order is refused. (2) The appellants are to pay the respondents' costs of the appeal, on the ordinary basis, as agreed or assessed.
Catchwords:	COSTS – Amount in dispute – Rule 38 – Rule 38A
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	Burbank Montague Pty Ltd v The Owners – Strata Plan No 85312 [2020] NSWCATAP 100 Northern Territory v Sangare [2019] HCA 19; 265 CLR 164 Oshlack v Richmond River Council [1998] HCA 11; 193 CLR 72 The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256
Texts Cited:	Nil

Category:	Costs
Parties:	Burbank Montague Pty Ltd and Gornoa Pty Ltd (Appellants) The Owners – Strata Plan No. 85312 (First Respondent) Anne Lewinsky and Sidney Lewinsky (Second Respondents) Ronald Allen Zucker (Third Respondent)
Representation:	Counsel: Mr R Cheney SC with Mr D Neggo (Appellants) Mr M Pesman SC (First Respondent) Mr 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
Decision under appeal:	
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 Our reasons for decision in respect of the substantive issues on the appeal were published on 2 June 2020: *Burbank Montague Pty Ltd v The Owners –*

Strata Plan No 85312 [2020] NSWCATAP 100. The background to the dispute is set out in our reasons for decision.

2 Relevantly, the appeal concerned a decision made by the Tribunal in respect of separate applications brought by the appellants. These applications are:

(a) SC 19/21348, which was filed on 7 May 2019, in which the appellants sought an order under s 237 of the Strata Schemes Managing Act 2015 (the SSM Act) seeking the appointment of a different compulsory strata manager;

(b) SC 19/29191, which was filed on 25 June 2019, which sought orders under s 87 of the SSM Act in relation to a special levy struck by the Owners Corporation (OC) in the amount of $901,286. The appellants sought an order that the levy be revoked or in the alternative that the amount and method of contribution be amended. On 1 August 2019 the appellants amended this application to also include an order under s 237 of the SSM Act.

3 An application for interim orders was also made on 25 June 2019 in respect of the s 87 application. That application was given file number SC 19/29190 and was dismissed on 19 July 2019.

4 The Tribunal dismissed both applications on 26 September 2019 and made costs orders against the appellants in respect of all three applications on 3 January 2020.

5 We dismissed the appellants' appeal against the substantive orders and ordered them to pay the respondents' costs of the appeal. This was because the respondents were the successful parties on the appeal and we concluded that by operation of rule 38A of the Civil and Administrative Tribunal Rules, rule 38 applied to the cost of the appeal. Orders were made in the event that a party sought a different costs order.

6 On 10 June 2020, the appellants sought an extension of time in which to apply for a different costs order. On 18 June 2020, orders were made granting that application. The application for a different costs order was filed and served with supporting submissions on 19 June 2020. In accordance with order 4 made on 2 June 2020, the order that the appellant pay the respondents' costs ceased to have effect.

7 The appellants appealed our decision in the substantive proceedings to the NSW Supreme Court. The appeal was finalised on 9 November 2020, with the appeal proceedings being dismissed and the appellants being ordered to pay the respondents' costs.

8 The appellants seek an order that the parties pay their own costs of the appeal.

Submissions and evidence

9 In deciding whether to make a different costs order, we have had regard to the following:

- The appellants' submissions dated 19 June 2020;
- The first respondents' submissions dated 1 July 2020;
- The second and third respondents' submissions dated 3 July 2020;
- The appellants' submissions in reply dated 10 July 2020;
- The material before us and our decision in the substantive appeal proceedings;
- The reasons for the decision of the Tribunal below in respect of both the appellants' substantive applications and the respondents' costs application.

Relevant legislative provisions and principles in relation to costs

10 Section 60 of the Civil and Administrative Tribunal Act 2013 (the NCAT Act) states:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—
>
> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36(3),

(g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section—

costs includes—

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

11 In proceedings in the Consumer and Commercial Division, s 60 is subject to rule 38 of the Rules which provides:

Costs in Consumer and Commercial Division of the Tribunal

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

(a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or

(b) the amount claimed or in dispute in the proceedings is more than $30,000.

12 Rule 38A provides:

38A Costs in internal appeals

(1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs

provisions) differed from those set out in section 60 of the Act because of the operation of—

(a) enabling legislation, or

(b) the Division Schedule for the Division of the Tribunal concerned, or

(c) the procedural rules.

(2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

13 The Appeal Panel considered the interpretation of s 38A(2) in *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 (*Malachite Holdings*):

> 86 [T]he expression "the amount claimed or in dispute in the proceedings" used in r 38(2)(b) suggests that the rule is concerned with the relief being directly sought in the proceedings in respect of a specific amount. It does not speak of any property or other civil right that might be at issue or any question of valuation in relation to such rights.
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> 87 In this regard, the meaning of the rule needs to be considered in the context of the NCAT Act and the fact that r 38 operates as an exception to s 60 of the NCAT Act. Section 60 states that a party is to pay their own costs, however the Tribunal may make an order for costs if special circumstances are established: see *Bonita v Shen* [2016] NSWCATAP 159 at [41] and following. That is, but for r 38 (or provisions in other enabling legislation conferring power to award costs in particular circumstances), the general position under s 60 is that each party is to pay their own costs: see s 60(1) of the NCAT Act.
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> 88 Also, the expression in r 38(2)(b) needs to be considered in light of the enabling legislation by which the Tribunal is given jurisdiction to hear and determine particular disputes. It is an expression reflective of some of the types of orders which the Tribunal might make in connection with claims brought before it.
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> 89 For example, in dealing with a consumer claim, an applicant for relief might seek an order for the payment of money or to be relieved from an obligation to pay money in a consumer claim: see s 79N(a) and (d) of the *Fair Trading Act*, 1987 (NSW) (FT Act). Similarly, in a building claim, an applicant for relief might seek an order for the payment of money or to be relieved from an obligation to do so; see s 48O(1)(a) and (b) of the HB Act. Other examples include the order making power of the Tribunal under ss 72(1)(a) and (b) of the RL Act.
>
> 90 In cases where an amount is claimed by an applicant, an award of money may be made. In cases where an applicant seeks relief from payment, no amount is claimed as an order for payment is not sought.

Rather, an order is made for relief from payment. However, “the amount in dispute” is the specific amount from which relief from payment is sought, there being a dispute about whether the applicant for relief is liable to pay the particular sum or should otherwise be relieved from the obligation to pay. In each case, “the amount” is identified and, where it is greater than $30,000, r 38(2)(b) is engaged.

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

….

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

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

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

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

Tribunal's costs decision

14 The Tribunal ordered the appellant to pay the respondents costs of the proceedings below. In the reasons for decision, the Tribunal relevantly stated that:

> 12. All the respondents make submissions that rule 38(2)(b) applies in the case involving the s87 application relating to the set aside of the levies on the basis that what was being claimed was in effect an order to be relieved from an obligation to pay an amount that is more than $30,000. The relief sought in the interim application and s87 application was for the setting aside, varying or invalidating a levy struck of about $900,000, which the applicants' had an obligation to pay 60% of based on their unit entitlements – being approximately $540,000 and well in excess of the $30,000 threshold.
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> 13. The respondents agree that in relation to the application for compulsory management of the scheme, special circumstances would apply and the Owners Corporation have provided submissions in that regard. The second and third respondents have made submissions in relation to special circumstances in the event the Tribunal finds that rule 38 does not apply to any of the applications. It can only be inferred from the applicants brief submissions which refer to all three case numbers, that they presume that rule 38 applies because they do not address special circumstances in the submissions and only sought to make submissions in the event the Tribunal proposed to award indemnity costs. They have referred to other matters in response to the respondents submissions and were clearly on notice of the issues.
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> 14. The orders sought by the applicants in relation to appointment of a strata managing agent cannot be said to be about an amount in dispute of over $30,000. It is also possible, that even on the test in The Owners Corporation Strata Plan No. 63341 V Malachite Holdings Pty Ltd, that rule 38 does not apply to the s87 application, because the actual order sought was for declaring invalid or setting aside the relevant levy. On the other hand it may be argued that the orders were aimed at relieving the applicants of an obligation to pay their unit entitlement proportions of the relevant levy, which exceed $30,000.
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> 15. If rule 38 applied to the s87 application, then there appears no reasons why the Tribunal would not follow the ordinary course and award costs as agreed or assessed against the applicant as the respondents were wholly successful in defending the claim. For completeness however I have also dealt with the test of special circumstances and concluded that there are special circumstances in all three applications which warrant the awarding of costs against the applicants.

Appellants' submissions

15 In summary, the appellants submit that rule 38A of the Rules does not apply to the appeal proceedings, because rule 38 did not apply to either of the proceedings before the Tribunal. In relation to the appeal in respect of the levy, the appellants submit that because the Tribunal did not apply rule 38 when awarding costs, the Appeal Panel is unable to do so. The appellants submit that special circumstances do not warrant an order for costs.

First respondent's submissions

16 The first respondent does not dispute that rule 38 did not apply to the application for compulsory appointment proceedings. Nor does it dispute that the Tribunal awarded costs in those proceedings on the basis of special circumstances. In summary, the first respondent submits that:

- A proper reading of rule 38A(1) causes rule 38A to apply to an internal appeal where the availability of the costs provisions in the proceedings before the Tribunal differ from s 60. It does not require an exercise of those differing provisions to enliven the rule.
- Rule 38(2) imposes a mandatory obligation on the Appeal Panel to apply the first instance costs provisions when deciding costs of the appeal. As the first instance costs provisions included rule 38, the Appeal Panel must apply the same provisions in the appeal.
- The costs provisions that applied to the Appeal Panel was s 60 as modified by rule 38, regardless of how the Tribunal exercised its discretion on costs.
- Given the primary contention of the appellants in the levy proceedings that the levy was excessive, had the matter been determined in their favour, it would have resulted in them being relieved of the obligation to pay their unit entitlement contributions in whole or in part. Any amount so relieved would have exceeded $30,000.

Second and third respondents' submissions

17 The second and third respondents support the submissions made on behalf of the first respondent. They submit that the appellants clearly sought relief from an obligation to pay a specific amount of money, being their proportion of the special levy raised in the sum of $901,286. The amount claimed or in dispute could be clearly identified and did not require an exercise in the valuation of the rights being affected by the order. They further submit that the position of the appellant in relation to the amount claimed or in dispute in the present appeal is not only consistent with their position in the proceedings below, but is

articulated in order 4 of the orders sought in the Notice of Appeal filed on 24 October 2019:

> In the alternative to order 3, pursuant to s 81(1)(d) Civil and Administrative Tribunal Act 2013 and s 87 Strata Schemes Management Act, the special levy of $901, 286 struck on or around 20 May 2019 be varied by reducing the amount of the levy to $Nil, or such lower amount as determined.

18 In the alternative, the second and third respondents submit that it is open to the Appeal Panel to make an order that the appellants pay the respondents' costs pursuant to s 60(2) of the NCAT Act. They argue that the appellants failed to comply with the orders made by the Appeal Panel on 1 November 2019 to file and serve an agreed bundle containing all the evidence to the Tribunal below on which the appellants intended to rely, any fresh evidence, the transcript and submissions by 29 November 2019. Rather, they did not file their submissions until 5 December 2019 and the bundle was only served electronically on 17 December 2019 and not in accordance with the orders made on 1 November 2019. They submit that the appellants' bundle did not contain all the evidence before the Tribunal below, the respondents were put to the expense of providing those documents in their bundle and the respondents were also put to the expense of chasing the appellants in relation to their compliance with Appeal Panel orders, including having the matter re-listed. The second and third respondents rely on the affidavit of their solicitor Colin Cunio dated 18 December 2019 in relation this aspect of their submissions.

Issues

19 The issues to be determined are:

(a) Which costs provisions applied to the Tribunal proceedings?

(b) Which costs provisions apply to the appeal?

(c) If rule 38 applies, should an order for costs be made against the appellants?

(d) If s 60 applies, should an order for costs be made against the appellants?

Consideration

Which costs provisions apply to the Tribunal proceedings?

20 As noted above, the appeal concerned orders made by the Tribunal in respect of two applications: SC 19/21348 (in which the appellants sought an order in relation to a compulsory strata manager only) and SC 19/29191 (in which the appellants sought the revocation of a special levy in the sum of $901,286 and orders in relation to a compulsory strata manager).

21 It is not in dispute that special circumstances need to be established to warrant the Tribunal making an order for costs in respect of the compulsory strata management application. In our view, rule 38 applied to the Tribunal proceedings concerning the special levy.

22 In relation to this, we are satisfied that there was an amount in dispute in the special levy proceedings and that amount exceeded $30,000. Although the appellants did not seek a money order, the orders they sought were orders which, had they been made in their favour, would have had the direct effect of relieving them from payment of their share of a $901,286 special levy.

23 The appellant's primary position was always (both before the Tribunal and on appeal) that the special levy should be reduced to nil, which would have meant that the appellants sought an order that their contribution be reduced to nil, meaning that they would have had to pay nothing. Their alternative position was that the levy should be reduced, which would have reduced substantially (on the appellants' argument) their contribution to the levy. In this regard, we note the following from the Tribunal's reasons for decision:

> 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.

24 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.

25 Had the Tribunal found in favour of the appellants, in accordance with s 87(1)(a), it could have made an order that they pay a contribution to a special levy of a lower amount than the contribution they would otherwise have paid in respect of the special levy struck by the Owners Corporation.

26 Contributions levied in respect of lots in a strata scheme are - with exceptions which did not apply in this case - payable by lot owners in shares proportional to the unit entitlements of their lots: s 83(2) SSM Act. It is not in dispute that the appellants between them have a unit entitlement equal to 60% of the unit entitlements within the scheme. The amount the appellants would be obliged to pay if the special levy was not reduced was therefore 60% of $901,286. While the appellants' primary position was that the levy should be reduced to nil, their alternative position before the Tribunal was apparently that the levy should have been reduced to the amount of a revised quote for rectification works, which was $688,096.

27 Given the amount of the levy, the alternative quote and the appellants' unit entitlement, had the appellants been successful, an order made by the Tribunal under s 87 would have reduced the appellants' contribution by an amount that exceeded $30,000. The direct outcome of orders made in the appellants' favour would have been that the appellants were relieved from payment of a sum that exceeded $30,000.

28 Reaching this conclusion does not require the evaluation of evidence about "the value of particular property" or a determination "of other rights as part of determining whether there is an entitlement to relief" as discussed in *Malachite Holdings* at [95]. Rather, by seeking an order under s 87(1), the appellants were in effect seeking an order for relief from payment of their contribution to the special levy. Had they been successful, relief from payment of an amount of money calculated on the basis of their unit entitlement and set out in the relevant notice of the contribution payable and issued to the appellants under s 83(1) of the SSM Act, would have flowed directly from the Tribunal's order.

This outcome would be achieved without any need to evaluate evidence or determine property rights.

29 We are therefore satisfied that there was an amount in dispute in the proceedings which exceeded $30,000. It follows that rule 38 applied to the proceedings before the Tribunal which concerned the special levy.

30 The fact that the Tribunal found that special circumstances warranted an order for costs does not alter this position. This is because in cases where it applies, rule 38 allows the Tribunal to make an order for costs in the absence of special circumstances. It does not preclude the Tribunal from finding that special circumstances are established and that an order for costs is warranted on that basis. Rather, it relieves the Tribunal from the obligation of finding that special circumstances warrant an order for costs in accordance with s 60(2).

What costs orders apply on the appeal?

31 There is no dispute that the costs of the appeal concern an internal appeal filed after 1 January 2016. The appellants' primary argument in relation to this issue is that rule 38 cannot apply to the appeal proceedings because rule 38A does not apply. The appellant submits:

> [R]ule 38A operates to direct the Appeal Panel to apply the law so applied by the Tribunal in the lower proceedings. Rule 38A(1) clearly if the provisions tht applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out set in section of 60 of the Act". Essentially, it is our submission that rule 38A only applies (subject to an internal appeal being lodged after 1 January 2016, which is satisfied) if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance differed from those set out in section 60.

32 The appellants go on to submit (emphasis in the original):

> The key wording in rule 38A is "the provisions that applied to the determination of costs", not the provisions that could have or were open to be applied by the Tribunal to the determination of costs. Furthermore, in our submission, the word applied is used in the past tense, meaning that it has already taken place, which in this case relates to the first instance decision in the Tribunal".

33 We do not accept the appellants' argument in this regard.

34 First, the phrase “the provisions that applied” in rule 38A is a reference to the powers and limits imposed by legislation on the Tribunal’s power to determine an application for costs. This is clear from a reading of rule 38A(1) as a whole, which states (emphasis added):

> (1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of —
>
> (a) enabling legislation, or
>
> (b) the Division Schedule for the Division of the Tribunal concerned, or
>
> (c) the procedural rules.

35 In our view, it is clear from this wording that the phrase “the provisions that applied” in rule 38A(1) is not a reference to the basis on which the Tribunal exercised its power to award costs. If that were the case, paragraphs (a), (b) and (c) would have no work to do.

36 Second, the effect of the appellants’ submission is that the phrase “the provisions that apply" should be read as “the provisions the Tribunal applied” or “the provisions that were applied by the Tribunal”. This is not the wording of rule 38A(1).

37 Third, if the appellants’ interpretation of rule 38A were correct, it would mean that an Appeal Panel would be obliged to apply the costs provisions applied by the Tribunal, even if the Tribunal incorrectly applied the law: for example, if the Tribunal awarded costs without finding special circumstances in a case in which rule 38 did not apply and the Tribunal’s costs decision was not appealed. This would be a perverse outcome.

38 As we have found above, rule 38 applied in the Tribunal proceedings because the amount in dispute in respect of the application concerning the special levy was more than $30,000. As also noted above, this did not preclude the Tribunal from finding that special circumstances warranted an order for costs and making an award on that basis. The fact that the Tribunal did not exercise the costs discretion by reference to rule 38 does not mean that rule 38 did not apply.

39 As the costs provisions that applied in the Tribunal differed from s 60 because of rule 38, rule 38A therefore applies to costs of the appeal. In accordance with rule 38A(2), we must apply the first instance costs provisions when deciding whether to award costs in relation to the appeal.

40 On the appeal, the appellants effectively sought the same relief as they had at first instance; that is, the reduction of the special levy to nil or (in the alternative) an order for payment of contributions in a reduced amount. We conclude that the amount in dispute on the appeal was more than $30,000, as it was in the proceedings at first instance. Rule 38 therefore applies to the costs of the appeal. The fact that the appellants also appealed the Tribunal's decision not to change the compulsory strata manager does not alter the position that the amount in dispute in the appeal proceedings exceeds $30,000.

41 This means that we can order costs in the absence of special circumstances. The appellants have not advanced any arguments as to why they should not be ordered to pay costs in the event that rule 38 applies to costs of the appeal.

42 The appellants were completely unsuccessful on the appeal. The correct exercise of the costs discretion is to order them to pay to pay the respondents' costs: per McHugh J in *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 at [66]:

> By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. A successful litigant is generally entitled to an award of costs

43 This principle was recently reaffirmed in *Northern Territory v Sangare* [2019] HCA 19; 265 CLR 164 (per Kiefel CJ, Bell, Gageler, Keane and Nettle JJ) at [24] – [25].

44 The appellants' application for a different costs order is therefore refused.

Orders

(1) The application for a different costs order is refused.

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

****

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