Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 1813 v Keevers
Medium Neutral Citation:	[2021] NSWCATAP 130
Hearing Date(s):	8 and 17 December 2020
Date of Orders:	12 May 2021
Decision Date:	12 May 2021
Jurisdiction:	Appeal Panel
Before:	P Durack SC, Senior Member D Robertson, Senior Member
Decision:	(1) To the extent required, leave to appeal is granted. (2) The appeal is allowed. (3) The orders made by the Tribunal on 14 July 2020 concerning costs are set aside. (4) Within 14 days after the date of publication of these reasons, the SPG appellants are to provide written submissions concerning the form of the remaining orders the Appeal Panel should make in disposing of this appeal, addressing the matters raised in paragraphs 273 to 278 of these reasons for decision, as well as addressing any orders sought concerning the costs of the appeal and the question whether the remaining matters should be dealt with on the papers and without a further hearing. (5) Within a further 14 days, the respondents are to provide written submissions concerning the matters referred to in Order 4. (6) The SPG appellants may provide written submissions in reply to the respondents' submissions referred to in Order 5 within a further seven days.
Catchwords:	LAND LAW - Strata title - special levy - resolution for large amount in respect of common property works -

	whether special levy went beyond what required to carry out repair work required pursuant to s 106 of the Strata Schemes Management Act (SSMA) - whether resolution to impose special levy made for an improper purpose - controlling lot owners' objective to buy out other lots in order to redevelop - appointment of strata manager under s 237 of the SSMA - whether improper purpose an irrelevant consideration - variation of special levy under s 87 SSMA as excessive. APPEALS - Standing to bring appeal on behalf of Owners Corporation - errors of law - errors in fact-finding - absence of probative evidence for factual conclusions - appropriateness of finding suggesting dishonesty - availability of adverse credit finding - affidavit evidence from two witnesses about a conversation virtually identical - leave to appeal.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bell v Commissioner of Taxation [2012] FCA 1042 Bischoff v Sahade [2015] NSWCATAP 135 Collins v Urban [2014] NSWCATAP 17 James v The Owners - Strata Plan No 11478; The Owners - Strata Plan No 11478 v James [2016] NSWSC 1558 Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361 Macquarie Developments Pty Ltd & Anor v Forrester & Anor [2005] NSWSC 674 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Ridis v Strata Plan 10308 [2005] NSWCA 46; 63 NSWLR 449 Stolfa v Owners Strata Plan 4366 [2009] NSWSC 589 Unilodge Australia v SP 54026 [2020] NSWCATCD, unreported, 29 April 2020
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 1813 (First Appellant) Sarraf Property Group Pty Ltd (Second Appellant)

	Konn Palonis (Third Appellant) Francis John Keevers (First Respondent) Peta Bourke (Second Respondent) Joanne Fardell (Third Respondent)
Representation:	Counsel: G Sirtes SC and N Newton (Second & Third Appellants). S Philips (Respondents) Solicitors: Madison Marcus Law Firm (Appellants). JP Gould Solicitors (Respondents)
File Number(s):	2020/00370815 (AP 20/23648)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil & Administrative Tribunal
Jurisdiction:	Consumer & Commercial Division
Citation:	N/A
Date of Decision:	25 May 2020
Before:	G Ellis SC, Senior Member
File Number(s):	SC 19/28242; SC 19/28238; SC 19/28234

REASONS FOR DECISION

Overview

1 This is an appeal from a decision appointing a compulsory strata manager to exercise the functions of the Owners Corporation (**OC**) for a period of two years, and a decision to vary the amount of a special levy raised by the OC. There is also an appeal against the costs judgment which followed the decision in the substantive proceedings.

2 The effect of the variation ordered by the Tribunal was to disallow the raising of any amount referable to the building work the subject of the special levy but to allow a much smaller levy to be raised in respect of new work required in

respect of common property that had suffered damage long after the original special levy was raised.

3 A threshold issue raised by the respondents to the appeal was framed as a question as to the standing of the second and third appellants to bring the appeal. It was those appellants who prosecuted the appeal.

4 We have decided that the second and third appellants do have standing to prosecute the appeal for the reasons set out below.

5 The appeal was based upon alleged errors of both law and fact.

6 For the reasons set out below, in the substantive appeal, we have decided that orders should be made that the appeal be allowed and that the proceedings be remitted to a differently constituted Tribunal for redetermination. However, as we explain at the end of these reasons, we will not make complete final orders disposing of the appeal until we have heard from the parties about the complete orders we should make in light of the conclusions we have reached.

7 In view of our conclusions about the substantive appeal, the orders made by the Tribunal in its costs judgment will have to be set aside. We have also made directions concerning any determination that we need to make about the costs of the appeal.

Background

Resolutions of the AGM of the OC on 28 November 2017

8 The strata scheme consists of a block of four units in Maroubra that was built in the 1920s. The strata plan was registered on 9 November 1965.

9 At the heart of the dispute was a resolution passed at the Annual General Meeting of the OC held on 28 November 2017 for the raising of a special levy to the Capital Works Fund for a total amount of $980,000.00 (Resolution 19). Contributions were to be paid by one instalment on or before 1 February 2018. This resolution followed a resolution passed at the same meeting for the OC to carry out “rectification works to the common property as required under Section 106 of the Strata Schemes Management Act 2015….” as identified in the resolution by reference to a tender comparison document supplied with the notice of the annual general meeting (Resolution 14).

10 The tender comparison document concerned building work described in a building inspection report prepared by Mr Dakhoul of Strata Defect Specialists Sydney (the 2017 Dakhoul report). The report was dated 9 June 2017. It was based upon an inspection of the property on 13 May 2017. The report included a cost estimate for rectification work in the amount of $1,006,425.00. The rectification work proposed included work to the driveway, main entrance door and hall, common area stairs, fire stairs, walkway on west side of the building, exterior walls, roof, work identified in respect of each of the units, windows and garages.

11 The 2017 Dakhoul report stated that the building was found to be in poor repair and in need of immediate rectification and that the defects found were of a significant nature. It identified "inherent faults" consisting of no damp proof course in walls, inadequate stormwater management and drainage and the structure's design capturing and holding stormwater. It said that the roof of the building was flat, it had been covered at some time with a bitumen/polyester type membrane, was soft underfoot in places indicating rots in the structure below and had parapet walls surrounding the roof which were not capped and had clear indication of water ingress. The report said that a combination of these faults was responsible for water damage and dampness in the first-floor units.

12 The report did not include any opinion as to whether all or some of the rectification work was required by s106 of the *Strata Schemes Management Act* 2015 (SSMA) and, if so, which work fell into that category.

13 The resolutions passed at the meeting on 28 November 2017 were passed because of the voting power of the owners of two of the four lots, being Lot 15 (on the ground floor with street frontage) and Lot 18 (on the top floor with street frontage). Since January 2016, Sarraf Property Group Pty Ltd (SPG) and Mr Palonis (the SPG appellants) have been the owners of these two lots as tenants in common in equal shares. Lots 15 and 18 each had a unit entitlement of 13, whereas each of the remaining two lots had a unit entitlement of 12.

14 The remaining two lots were Lot 16 (on the ground floor at the rear the block) and Lot 17 (on the top floor at the rear of the block). Since 1978, Mr Keevers,

one of the respondents to the appeal, has been the owner of Lot 17. At the time when the resolutions were passed, Lot 16 was part of the estate of the father of Ms Bourke and Ms Fardell, the other respondents to the appeal, who became the registered proprietors of Lot 16 on 16 May 2018.

15 The Minutes of the AGM held on 28 November 2017 record that Lots 16 and 17, on a poll, voted against the resolutions.

16 Present at the meeting on 28 November 2017 were Mr John Sarraf (as representative for Lots 15 and 18), Mr Keevers, Ms Bourke and Mr Chris Haldezos, an employee of R D Wedd Pty Ltd trading as C.F. Strata Management (CF Strata). CF Strata was the strata managing agent for the property.

17 The Minutes also record that in attendance at the meeting were Mr Norm Sarraf, the father of Mr John Sarraf, and Mr P Love. Mr Norm Sarraf, Mr John Sarraf and Mr Love were the directors of SPG.

18 On 28 November 2017, before the AGM, there was a meeting between Mr Norm Sarraf and Ms Bourke at which the raising of the special levy was discussed, as was a proposal from Mr Norm Sarraf for the purchase of Lot 16.

19 In early December 2017, CF Strata issued invoices in respect of the special levy, which required payments of $235,200.00 by each of the owners of Lots 15 and 16 and payments of $254,800.00 by each of the owners of Lots 15 and 18. The payments were required to be made by 1 February 2018.

20 On 31 January 2018 the SPG appellants, as owners of Lots 15 and 18, paid their contributions to the special levy.

21 On 28 February 2018 there was a meeting at the Bourke Street Bakery in Alexandria between Mr Norm Sarraf, Mr Keevers and his wife, Ms Casabon. Significant aspects of their conversation were disputed. What was not disputed was that there was discussion about the payment of the special levy, and offers from Mr Norm Sarraf to purchase Lots 16 and 17.

22 In March and April 2018, steps were taken on behalf of the OC to recover contributions to the special levy required from Lots 16 and 17.

23 The proceedings determined by the Tribunal comprised, amongst other claims, first, a claim commenced on 30 May 2018, in the District Court, by the OC against Mr Keevers for the recovery of the amount of his contribution to the special levy, second, a like claim commenced on 3 July 2018, in the District Court, by the OC against Ms Bourke and Ms Fardell and, thirdly, claims advanced in existing proceedings in the Supreme Court, by Mr Keevers, Ms Bourke and Ms Fardell against the OC for orders, pursuant to s 87 of the SSMA, to vary the amount of the special levy and for an order, pursuant to s 237 of the SSMA, that a strata manager be appointed to exercise all the functions of the OC.

24 On 26 April 2019, at an EGM of the OC, it was resolved that one half of the special levy contributions paid by the SPG appellants be refunded to them.

25 The District Court proceedings came to be transferred to the Supreme Court and, by an order made on 14 June 2019, all the proceedings were transferred to the Tribunal for determination.

26 The Amended Points of Claim filed in the Supreme Court on 3 June 2019 included the following allegations under the topic of "Oppression of the Plaintiffs by the Defendant":

> 20A. The Special Levies were excessive, unreasonable and unnecessary in that no more than $100,000 was, in November 2017 or is now, required by way of capital works in order to ensure that the First Defendant complies with its obligations pursuant to s106 of the 2015 Act.
>
> ……
>
> 24. In the premises, the conduct of the First Defendant [OC] in convening and conducting the purported AGM, passing Resolutions 14, 15, 18 and 19, electing an ineligible person to and excluding the First Plaintiff [Mr Keevers] from the Strata Committee and raising the Special Levies and pursuing the Plaintiffs with respect to them (including by commencing proceedings), occurred for an improper purpose (namely the expropriation of the Plaintiffs proprietary rights and coercing the plaintiffs to sell their lots in the Strata Plan for less than proper market value) and oppressively in relation to a minority of lot owners in the Strata Plan (namely the Plaintiffs) and was therefore unlawful, invalid and should be set aside.
>
> ……

27 The particulars given in support of the allegation in 20A referred to a Building Condition Report by Mr Tony Berner arising from an inspection conducted on 12 February 2019.

28 Amended Points of Claim in the proceedings brought by the OC for the recovery of the contributions to the special levy, lodged pursuant to an order made by the Tribunal on 24 July 2019, included the following allegation:

> 5. On or about 9 June 2017, the Applicant obtained a report which identified that the Common Property required works to be done to repair, maintain and/or rectify parts of the Common Property that were in poor repair and in need of immediate rectification with the defects found to be of a significant nature.

29 The particulars to this allegation referred to the 2017 Dakhoul report.

30 In January 2020 serious defects with the common stairs in the block came to light. These were not defects referred to in the 2017 Dakhoul report. In late February 2020 Randwick City Council sent the OC a notice concerning rectification of these defects. By the time the hearing of these proceedings commenced in the Tribunal on 6 April 2020 these defects had not been rectified.

Dispute as to rectification work

31 It was common ground between the parties that some rectification work in respect of defects identified in the 2017 Dakhoul report needed to be carried out.

32 However, an important issue in the proceedings was whether a significant amount of the rectification work set out in the 2017 Dakhoul report was not required by s 106 of the SSMA because it was unnecessary or because it amounted to the alteration of or addition to the common property (as regulated in s 108 of the SSMA) and whether the costing of rectification work (whether necessary or not) was excessive.

33 The respondents' main expert in respect of rectification work and costing was Mr Berner. He prepared expert reports in February and October 2019 which took issue with a number of aspects of the 2017 Dakhoul report. He became unavailable to give evidence at the hearing. This was one of a number of matters advanced by the respondents in support of an application for the adjournment of the hearing at first instance, which application was refused.

34 Other expert evidence about rectification work came to be presented by each party at the hearing but none of this evidence comprehensively investigated and addressed the defects and costings identified in the 2017 Dakhoul report.

The Strata Schemes Management Act (SSMA)

35 The most relevant provisions of the SSMA are as follows.

36 The owners corporation is responsible for the management of the strata scheme: s 9.

37 The owners corporation must establish a capital works fund: s 74 (1). The owners corporation must pay into the capital works fund contributions levied on lot owners for payment into that fund: s 74 (2) (a). The owners corporation may pay money from the capital works fund only for prescribed payments, which includes payments of the kind for which estimates have been made under s 79 (2): s 74 (4) (a).

38 An owners corporation must at each annual general meeting estimate how much money it will need to credit to its capital works fund for actual and expected expenditure for various purposes, including to replace or repair the common property: s 79 (2). It must prepare and, in so far as practicable, implement a 10-year capital works plan including the detail and costing in respect of the works: s 80.

39 The owners corporation must determine the amounts to be levied as a contribution to the capital works fund to raise the amounts estimated as needing to be credited to that fund and levy on each person liable for such contribution: s 81. Such a contribution is, if the owners corporation so determines, payable by the regular periodic instalments specified in the determination setting the amount of the contribution: s 81 (5).

40 A contribution levied by an owners corporation becomes due and payable on the date set out in the notice of the contribution: s 83 (3).

41 Section 86 makes provision for recovery of unpaid contributions. The section, relevantly, provides:

86 Recovery of unpaid contributions and interest

(1) The Tribunal may order the owner of a lot in the strata scheme, or other person, to pay a contribution that is payable by the owner or other person under this Act that is not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.

(2) The Tribunal may make an order under subsection (1) only—

(a) on the application of the owners corporation, and

(b) if proceedings between the owners corporation and the owner of a lot in the strata scheme or other person are pending before the Tribunal.

(2A) An owners corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.

42 Section 87 makes provision for the Tribunal to vary a contribution. The section 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.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

43 The owners corporation is obliged to maintain and repair the common property. Section 106, relevantly, provides:

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.

44 The owners corporation must insure the building. Section 160, relevantly, provides:

160 Owners corporation to insure building

(1) The owners corporation for a strata scheme for the whole of a building must insure the building and keep the building insured under a contract of insurance, in accordance with this Division, that insures the building if it is

destroyed or damaged by fire, lightning, explosion or any other occurrence specified in the policy (a damage policy).

Maximum penalty—5 penalty units.

45 Section 237 of the SSMA, relevantly, provides:

237 Orders for appointment of strata managing agent

(1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation** The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent—

(a) to exercise all the functions of an owners corporation,

…..

(3) **Circumstances in which order may be made** The Tribunal may make an order only if satisfied that—

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

……

(c) an owners corporation has failed to perform one or more of its duties,

….

The Tribunal's decision

46 The hearing of the proceedings in the Tribunal occurred by telephone because of the Covid-19 pandemic. There were 4 days of hearing.

Appointment of strata managing agent- s237 (3) (a) and (c) satisfied

47 The Tribunal dealt first with the claim for a strata managing agent to be appointed under s 237 of the SSMA to exercise all the functions of the OC.

48 The Tribunal decided that such an appointment should be made because it was satisfied of the existence of the circumstances referred to in s 237 (3) (a) and (c): at [60].

49 In arriving at this conclusion the Tribunal applied the considerations set out in the decision of the Appeal Panel in *Bischoff v Sahade* [2015] NSWCATAP 135 as follows (at [122]):

Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

> 1. does not perform a required function, for example to maintain the common property;
>
> 2. exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;
>
> 3. fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and…….
>
> 4. raises levies and takes or defends legal action on behalf of the owners Corporation in circumstances where such action is unnecessary or not in the interests of the Owners Corporation or the Lot owners as a whole.

50 Applying these considerations, the Tribunal concluded that s 237 (3) (a) was satisfied because:

(1) There had been a failure to repair the stairs in breach of s 106 of the SSMA, which was a failure to perform a required function within the first of the four considerations referred to in *Bischoff* and also fell within the third consideration in *Bischoff*: at [56].

(2) The imposition of the levy, without any consideration of payment by instalments, was made for the improper purpose of putting pressure on the owners of Lots 16 and 17 to sell their lots to the owners of Lots 15 and 18 and thus fell within the second consideration referred to in *Bischoff*: at [57]. The objective of the owners of Lots 15 and 18 was to redevelop the site: at [55 (1)], [63], [86] and [109]. The Tribunal went on to say (at [109]:

> …. Simply stated special this levy (sic) said to have been made in order to carry out building work was not a levy but a lever designed to enable the owners of lots 15 and 18 to acquire lots 16 and/or lots 17 in order to be able to dismantle the strata scheme and redevelop the property.

(3) The imposition of the levy was neither necessary nor in the interests of the lot owners as a whole and thus fell within the fourth consideration referred to in *Bischoff*: at [59].

(4) The failure to repair the stairs and a failure to maintain insurance fell within the third consideration referred to in *Bischoff*: at [58].

51 The Tribunal concluded that s 237 (3) (c) was satisfied because of the OC's failure to repair the stairs and to maintain insurance: at [60], [56] and [58].

Appointment of strata managing agent, s237 (3) (a) - improper purpose

52 The Tribunal arrived at its conclusion about improper purpose in the following way:

(1) It said that its conclusion about improper purpose in connection with its consideration of s237 (3) (a) was "for the reasons indicated below": at [57].

(2) Those reasons appear to be as follows.

(3) It found (at [63]) that it was clear that the objective of the owners of Lots 15 and 18:

> …..was to acquire all four units, dismantle the strata scheme and redevelop the site and that remains an underlying motivation.

(4) This was said (at [63]) to be clear from matters *including*:

(a) the imposition of the special levy,

(b) the absence of a consideration of payment by instalments,

(c) the conversation with Ms Bourke prior to the 2017 AGM,

(d) the conversation with Mr Keevers after the 2017 AGM, and

(e) the absence of any consideration of an existing or proposed 10-year plan for capital works, being a plan required by section 80 of the SSMA.

(5) The following findings set out in [108] and [109]:

> 108 Relevant to this issue, the Tribunal makes the following findings:
>
> (1) The building work upon which the special levy was based went beyond the obligation under section 106 of the SSMA to maintain and repair.
>
> (2) The building work upon which the special levy was based derived from a report prepared by a close friend of Norm Sarraf.
>
> (3) The estimated cost of that building work was more than was reasonably required.
>
> (4) There was neither consideration of an existing 10 year plan for capital works nor preparation of a fresh 10 year plan for capital works.
>
> (5) No opportunity was provided for payment of the levy by instalments.
>
> (6) Immediately prior to the AGM in November 2017 at which a decision was made to impose the levy, Norm Sarraf put pressure on Ms Burke to sell lot 16 in order to avoid having to pay the levy.
>
> (7) In February 2018, after the AGM and shortly prior to the commencement of legal proceedings to recover the special levy, Norm Sarraf put pressure on Mr Keevers to sell lot 17.
>
> (8) During that meeting, Norm Sarraf offered to buy lot 17 for $1.5 million.
>
> (9) At that meeting Norm Sarraf asserted to Mr Keevers on 20 February 2018 that such building work would not be carried out.
>
> (10) Consistent with that assertion, that building work has not been carried out.
>
> (11) At both the meeting with Ms Burke and the meeting with Mr Keevers, Norm Sarraf made it clear that the owners of lots 15 and 18 wanted to own all four lots and would take steps to achieve that goal.
>
> (12) During his oral evidence, Norm Sarraf said that lots 15 and 18 were purchased with the intention to develop them at some time in the future.

(13) During his meeting with Mr Keevers, Norm Sarraf suggested that if Mr Keevers paid the levy but did not sell lot 17 then that money would be used to buy the remaining unit, i.e. lot 16.

(14) Norm Sarraf then asserted he had been involved in doing that a number of times previously.

(15) On 26 April 2019, half the special levies that had been received were refunded.

(16) Of the remaining amount of the special levies that have been received a substantial amount has been used to cover administrative expenses and the size of the deficit in the administrative fund, which was $164,308. 69 as at 31 October 2019. In those circumstances, it is not surprising that the lot owners submitted that money paid in response to the special levy is being used to fund the lawyers acting for the OC in these proceedings.

(17) None of the special levies that have been received has been used to carry out urgent repairs to the stairs and landing despite a notice from Randwick City Council.

(18) After difficulties in obtaining insurance, cover was only taken out for a period of six months ending in April 2020.

109 Based on those findings of fact, the Tribunal is satisfied that the special levy was imposed for an improper purpose, namely to put pressure on the owners of lots 16 and/or the owner of Lot 17 to sell their lot to the owners of lots 15 and 18 in order to facilitate a redevelopment of the property. Simply stated, special this levy (sic) said to have been made in order to carry out building work was not a levy but a lever designed to enable the owners of lots 15 and 18 to acquire lots 16 and/or lot 17 in order to be able to dismantle the strata scheme and redevelop the property.

53 We interpose to note that the SPG appellants criticise aspects of the fact finding concerning the conclusion about improper purpose. For the present, we note the following:

(1) Part of the basis for the conclusion about improper purpose was the findings in paragraphs 108 (1) and (3) of the reasons concerning the extent and cost of the building work upon which the special levy was based.

(2) Another part of the basis for the conclusion about improper purpose was the findings in paragraphs 108 (9) about the statement made by Mr Norm Sarraf at a meeting on 20 February 2018 concerning the carrying out of the building work.

(3) The Tribunal did not say that it found the relevant improper purpose regardless of these findings.

Appointment of strata managing agent, s237 (3) (a)- the levy of $980,000 was unnecessary

54 The Tribunal said that it arrived at the conclusion that the imposition of the levy of $980,000 was neither necessary nor in the interests of lot owners as a whole

"For the reasons indicated below": at [59]. It also said that it arrived at the conclusion that the building works on which the special levy was based went beyond the obligation imposed by section 106 "For the reasons indicated below": at [55 (2)].

55 It would seem that the reasons that bore upon these related conclusions substantially overlapped and were or included what was set out in the section of the reasons concerning "Special levy" (contained in paragraphs [73] to [97]).

56 Those reasons were as follows.

57 First, there was insufficient evidence in what the OC referred to as Mr Dakhoul's report prepared in 2003 or in relation to that report to arrive at a conclusion that it supported the imposition of the levy: at [77], [74]. We note that the respondents do not accept that this 2003 report was prepared by Mr Dakhoul and that there was no finding by the Tribunal on that point.

58 Secondly, (at [78]), Mr Dakhoul's 2017 report (dated 9 June 2017) did not provide a reliable basis for the levy because:

(1) He was a very close friend of Norm Sarraf: at [78 (1)] and [55 (3)].

(2) According to John Sarraf, SPG uses Mr Dakhoul for most of their work.

(3) SPG has used Mr Dakhoul to provide defect reports since the 1990s.

(4) Mr Haldezos, the strata managing agent, conceded in cross-examination that aspects of Mr Dakhoul's report went beyond the section 106 obligation.

(5) A number of Mr Dakhoul's cost estimates *appear* high, notably $85,800 for rising damp (despite evidence that there is a damp course in place), $84,700 for work on the roof (which includes replacing a membrane that the evidence establishes was replaced at a cost of $35,780 in 2015) and $23,100 for dealing with parapet walls.

(6) After arriving at a total amount of $552,495 for building work, Mr Dakhoul then adds 20% for preliminaries, 15% for the builder's profit and overheads, 20% for contingencies and 10% for GST with the effect that the sub- total of $552,495 becomes a total of $1,006,425.

(7) To that amount he adds a proposal dated 7 November 2017 for his project management at a total cost of $94,710 which would be payable to him if the work proceeds.

(8) A number of the items included in Mr Dakhoul's report do not *appear* to be urgent such as would require immediate payment in order to undertake that work.

(9) There was evidence from Mr Magro, who was cross-examined, that the schedule of defects is outdated as some of the major components have been rectified and the cost estimates appear exorbitant.

59 Thirdly, after setting out these reasons as to why it considered Mr Dakhoul's report did not provide a reliable basis for the levy, the Tribunal said:

> 79 The 2017 report of Mr Dakhoul is consistent with an objective to arrive at a high amount in a report prepared for a friend who uses him for most of their work and has used him since the 1990s. It is a report that was prepared for a friend who is more interested in redevelopment than refurbishment.

60 Fourthly, the evidence of Mr O'Donnell (expert evidence presented by the SPG appellants) was not considered to provide a sufficient foundation for the special levy: at [80].

61 Fifthly, the three costings that were obtained (for the tender comparison) did not aid the appellant's case because they were based on a scope of works that was derived from the 2017 Dakhoul report: at [81].

62 Sixthly, the Tribunal was unwilling to make findings based on the reports of Mr Berner (expert evidence presented by the respondents): at [82]. Mr Berner had given a cost estimate of $218,851.00 for required building work in a report dated 2 October 2019 in response to the 2017 Dakhoul report.

63 Seventhly, the Tribunal said (at [83]) it was not satisfied that the "special levy should be confirmed" because:

(1) The expert evidence upon which the parties relied did not provide support for either the special levy amount or a reliable lesser amount.

(2) There was no evidence that the proposed building work upon which the special levy was based was considered by reference to either an existing or a new 10-year plan for capital works.

(3) There was no consideration of whether the special levy could be paid by instalments.

(4) The special levy was infected by the improper purpose of putting pressure on the owners of Lots 16 and 17 to sell their lots to the owners of Lots 15 and 18 so that the property could be redeveloped "for the reasons indicated below"-we take this to be a reference to the reasons in paragraphs 108 and 109, to which we have already referred.

64 Eighthly, it was clear that there was an urgent need for building work to be undertaken in relation to the stairs: at [87]. In this regard, the Tribunal referred to evidence which suggested that the main stairs are currently blocked off at

both the ground floor and first floor levels, there was a notice dated 27 February 2020 issued by Randwick City Council and Mr Haldezos had agreed during cross-examination that a special levy could be raised to undertake this work. Based upon a consideration of expert evidence concerning the stairs presented by the respective parties, the Tribunal came to the view that the special levy should be varied based upon a total cost of works in respect of the stairs of $80,000.00: at [94] and [96].

65 Having arrived at these conclusions, the Tribunal then said (at [97]:

> Beyond the work indicated above, notably the repair of the stairs and landings, the appointment of a compulsory strata manager should enable a proper consideration of what building work is required, at what cost, how that work fits within any existing 10-year capital works plan, what amounts are required to undertake that work, what levy or levies will be required and whether those levies should be paid as a lump sum or by way of instalments.

66 We interpose to note that the SPG appellants criticise a number of aspects of the above fact finding. For the present, we note that, whilst the Tribunal made findings that criticised Mr Dakhoul's report, the only conceivable support for a positive finding that the building work the subject of the special levy went beyond what was required by section 106, or that the cost estimates were excessive, were the 6 matters set out in (4), (5), (6), (7), (8) and (9) of paragraph 58 above, along with what the Tribunal said as reproduced in paragraph 59 above.

Appointment of strata managing agent, s237 - who it should be

67 The Tribunal resolved a dispute between the parties as to who should be the strata managing agent, if such an appointment was to be made under s 237. The Tribunal decided that the company put forward by the respondents should be appointed (Rollings and Tyrell Pty Ltd): at [65]-[72].

68 In so deciding, the Tribunal reasoned (at [69]):

> Given that it is the lot owners who sought an order under section 237, Rollings and Tyrell Pty Ltd are to be favoured unless there are reasons to displace its appointment and instead favour Think Strata Pty Ltd. Having considered the documents and submissions submitted by the parties, the Tribunal has determined that Rollings and Tyrell Pty Ltd should be appointed by reason of the proximity of their Coogee office and the fact that the brochure of Think Strata Pty Ltd refers to the services it provides to property developers.

Variation of the special levy - s 87 of the SSMA

69 As appears above, the Tribunal's reasoning concerning the special levy covered the overlapping issues as to whether the levy was unnecessary for the purpose of its consideration of the s 237 appointment and whether it should be varied under s 87 of the SSMA.

70 The Tribunal's variation was based upon a conclusion that building work was required of an entirely different nature to that which was the subject of the special levy. Accordingly, in making its assessment of a variation, the Tribunal rejected the totality of the special levy raised on 28 November 2017.

71 As already mentioned, the Tribunal directed itself to an issue as to whether it was satisfied that the special levy "should be confirmed": at [83]. The Tribunal had before it both claims by the OC for recovery of the contributions required to the special levy and claims in answer to such claims for the special levy to be varied.

72 In these circumstances, although not expressly mentioned, it may be that the Tribunal had in mind the Tribunal's discretionary power to order the payment of a contribution set out in s 86 of the SSMA (see above).

Key conclusions of fact

73 As we see it, the Tribunal's interrelated factual conclusions that the building work the subject of the special levy went beyond what was required by s 106 of the SSMA and that the special levy resolution was passed for an improper purpose were central to the outcome of the proceedings.

A Threshold Issue - allegation that SPG and Mr Palonis have no standing to appeal

74 The respondents submitted that the appeal should be dismissed at the outset because it was only the SPG appellants who were pursuing the appeal and it was said that they had no standing to do so because they had not been parties to the proceedings at first instance.

75 They said that this followed from s 80 (1) of the NCAT Act, which provides:

> **80 Making of internal appeals**
>
> (1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

76 For reasons which appear below, s 44 (1) is also relevant. It provides:

> **44 Parties and intervention**
>
> (1) The Tribunal may order that a person be joined as a party to proceedings if the Tribunal considers that the person should be joined as a party.

77 It was the OC under the control of the SPG appellants which had pursued its claims in the proceedings at first instance to be paid contributions to the special levy and had defended the claims for the appointment of a strata manager and for variation of the special levy. Nevertheless, at the heart of the dispute in these proceedings was a dispute between the SPG appellants, as majority lot owners, and the minority lot owners.

78 It was uncontroversial that since the appointment of the strata manager (which took effect on the date the Tribunal made the orders the subject of the appeal) the OC was under the control of the compulsory strata manager and, although an appeal had been lodged, purportedly on behalf of the OC on the day after the Tribunal made its orders, but not by the compulsory strata manager as agent for the OC, no steps were taken by the compulsory strata manager on behalf of the OC to prosecute the appeal.

79 Because of the effect of the appointment of the compulsory strata manager, as provided for in the SSMA, unless the compulsory strata manager chose to prosecute the appeal, or some means were put in place by which the majority lot owners could prosecute the appeal, no effective appeal right would exist in respect of the Tribunal's orders. Plainly, the compulsory strata manager had a personal interest that was in conflict with prosecuting an appeal which challenged to its appointment.

80 This was the situation because the appointment of the compulsory strata manager under s 237 was to exercise *all* of the functions of the OC and functions is defined in the SSMA to include a power or authority (Definitions in s 4). This wide authority conferred on the compulsory strata manager covered a decision to pursue an appeal. There was no carve out from the appointment concerning a decision to pursue an appeal.

81 However, as the SPG appellants pointed out, the appointment itself did not operate to terminate the OC's retainer of the solicitors who acted for it in the

proceedings at first instance and who lodged the Notice of Appeal as representative of the OC. We were not provided with any evidence as to the terms of such retainer, including whether or not it authorised the lodging of an appeal.

82 The respondents submitted as follows:

(1) The SPG appellants had declined the opportunity to become parties to the proceedings at first instance. This opportunity had been provided by orders made on 24 July 2019. It was submitted that it should be inferred that the SPG appellants did not take up the opportunity to be joined as parties because they were content to rely on their control of the OC and did not want to expose themselves to the possibility of an adverse costs order by being joined to the proceedings. It was also submitted that in these circumstances the SPG appellants had elected or waived any right to pursue an appeal.

(2) Since 25 May 2020 (the date of the Tribunal's orders) the powers and rights of the OC were reposed in the compulsory strata manager.

(3) There was no evidence that the OC consented to or approved the lodging of the appeal in its name on 26 May 2020. That Notice of Appeal was lodged by the solicitors who had acted for the OC in the proceedings at first instance and were the solicitors acting for the SPG appellants in relation to the appeal (Mr Moir from Madison Marcus Law Firm was named in the Notice of Appeal as the representative of the OC).

(4) Given that the compulsory strata manager has not taken any steps in the appeal and has informed the Tribunal that it does not wish to participate in the appeal, it should be inferred that the appeal was commenced without the consent or approval of the compulsory strata manager and, therefore, without the consent or approval of the OC.

(5) By orders made in the appeal proceedings by Deputy President Westgarth on 30 June 2020, the SPG appellants were added as appellants to the appeal pursuant to the Tribunal's power in s 44 (1) of the NCAT Act. The respondents had objected to this step on the basis that the SPG appellants were not parties to the proceedings below and, therefore, had no standing to appeal the decision.

(6) Section 80 (1) of the NCAT Act provides that an appeal against an internally appealable decision may be brought *by a party to the proceedings* in which the decision is made and there is no provision for an appeal to be made by an entity which was not a party to the proceedings in which the decision was made.

83 The respondents then submitted:

> It follows that the Appellants, not being parties to the proceedings in which the decision subject to challenge was made, do not have any standing and cannot, by dint of s 80, bring the present appeal.
>
> In these circumstances, given that the Owners Corporation, through the Strata Manager, does not wish or seek to press the appeal, it should be dismissed at the threshold on the basis that it is not properly brought by a person with standing to do so.

84 Significantly, neither before Deputy President Westgarth on 30 June 2020, nor before us, did the respondents contend that the appeal was invalid (because it had been commenced without the authority of the OC) and that, as a consequence, the Appeal Panel constituted by Deputy President Westgarth, had no power to make any order for the joinder of any party. In saying that, we do not suggest that such a contention would have been available to the respondents on this appeal since it was a contention that ought to have been advanced before Deputy President Westgarth, if it was to be made.

85 After a hearing on 30 June 2020, the Appeal Panel, constituted by S Westgarth, Deputy President, made orders that included the following:

> 1) Sarrof Pty Ltd and Conn [sic] Palonis are joined to the Appeal as additional Appellants.
>
> 2) Madison Marcus Solicitors have leave to represent the additional Appellants.
>
> 3) The Registrar is directed to serve the Notice of Appeal and these orders upon [the compulsory strata manager] within 7 days.
>
> 4) The appeal is listed for a further call over on 30 July 2020 at 9:30 a.m.
>
> 5) The Owners Corporation is directed to be in attendance at the next call over.
>
> …..

86 No appeal against the making of any of these orders has been brought.

87 In our opinion, the short answer to the respondents’ objection to the appeal on the basis that the SPG appellants have no standing is that the contrary position has already been determined by the decision made by the Deputy President on 30 June 2020, from which there has been no appeal, and the respondents do not suggest that we should revoke the interlocutory decision of the Deputy President by reason of a change of circumstances or other reason.

88 As appears from the respondents’ submissions to us, in arriving at this decision the Deputy President rejected the submission that the SPG appellants had no

standing to be joined as appellants because they were not parties to the proceedings at first instance.

89 Not only were the SPG appellants made parties to the appeal by that decision, they were made parties as (additional) appellants. It is implicit in that decision that the SPG appellants were placed in a position to pursue the appeal, in circumstances where it was obvious that the SPG appellants may be the only persons who wished to do so.

90 The decision of the Deputy President to permit joinder of the SPG appellants as appellants was not conditional upon the OC, through the compulsory strata manager, deciding to pursue the appeal. On the contrary, the obvious rationale for the decision was that the compulsory strata manager may decide not to do so or may decide not to actively participate in the appeal.

91 In substance, as the SPG appellants submitted, the respondents' submissions ignored the effect of the decision of the Deputy President and amounted to an impermissible collateral challenge to that decision.

92 In these circumstances, it is unnecessary for us to consider other courses that might have been available so as to permit the SPG appellants to prosecute the appeal. One alternative put forward by the SPG appellants, which Mr Philips accepted was theoretically possible, was that the Appeal Panel order that the SPG appellants be joined as parties to the proceedings at first instance pursuant to s 44 (1), along with associated orders granting an extension of time in which to appeal and for the OC to be joined as a party to the appeal. Another potential course put forward by the SPG appellants was that the Appeal Panel order that the SPG appellants, in the interests of justice, may bring the appeal on behalf of the OC in accordance with the fifth exception to the rule in *Foss v Harbottle* (again with associated orders for an extension of time in which to appeal).

93 We should also mention that there was some consideration at the hearing of the appeal as to whether the compulsory strata manager had ratified any unauthorised decision to commence the appeal. However, again, it is unnecessary for us to come to any decision about such a question.

The limited right of appeal

94 The appellant has a right of appeal on any question of law (s 80(2)(b) of the *Civil and Administrative Tribunal Act* 2014) (the **NCAT Act**). The appellant requires leave to appeal on any other grounds, in respect of which cl 12 of schedule 4 of the NCAT Act is applicable because this is an appeal from a decision of the Consumer and Commercial Division of the Tribunal.

95 Clause 12 of Schedule 4 provides:

> **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).

96 We adopt what the Appeal Panel said in *Collins v Urban* (at [76]) that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 may have been suffered where, because of any of the circumstances referred to in cl 12 (1) (a), (b) or (c):

> ... [T]here 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."

97 As confirmed by the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17, leave to appeal is usually only granted in matters that involve:

(1) issues of principle;

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

(3) 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;

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

(5) 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.

Outline of our conclusions concerning error by the Tribunal

98 As appears below, in view of our rejection of the threshold challenge to the appeal on the grounds of standing, the disposition of this appeal turns upon our assessment of important aspects of the Tribunal's fact-finding in respect of the inter-related conclusions that the work the subject of the special levy went beyond what was required by s 106 of the SSMA and about improper purpose.

99 We have found it necessary to examine the fact-finding in some detail in order to determine the merits of submissions concerning both errors of law and leave to appeal in respect of errors of fact.

100 We have not found that the Tribunal made any errors of law in the sense of misunderstanding the law.

101 However, in respect of the Tribunal's key conclusion that the work the subject of the special levy went beyond what was required by s 106, we have found that the Tribunal's conclusion was affected by errors of law in the sense that factual conclusions said to support the ultimate factual conclusion were made without probative evidence to support them.

102 In respect of the Tribunal's key conclusion about improper purpose, we have decided that this conclusion cannot be sustained because of the errors of law affecting the conclusion that the work the subject of the special levy went beyond what was required by s106 and also because the conclusion involved plain error of fact on an important matter, or was unreasonably arrived at such that it was likely to produce a result that was unfair.

103 Because of the significance of the improper purpose conclusion to the Tribunal's conclusion that the work the subject of the special levy went beyond what was required by s 106, we consider the latter conclusion also cannot be sustained because of the problem with the improper purpose conclusion that we have just referred to This is so, even if we be wrong about errors of law affecting the conclusion that the work the subject of the special levy went beyond what was required by s 106.

104 To the extent that leave to appeal is required to raise errors of fact, we think that the Tribunal's decision was not fair and equitable (within the meaning in cl 12 of Schedule 4) because of our decisions about the way these two key factual conclusions were arrived at and because we consider that the SPG appellants *may* have suffered a substantial miscarriage of justice as a consequence. This is because, in our opinion, there is a significant possibility, or a chance which is fairly open, that, absent the errors we have identified, a compulsory strata manager would not have been appointed and the OC would have achieved a more favourable result in respect of the claim for a variation of the special levy.

105 What also favours the exercise of the discretion in favour of a grant of leave to appeal is that errors of law of the nature we have referred to are raised in respect of one of two key interrelated factual conclusions with the consequence that a review of the justification for the one factual conclusion is required in any event.

106 Accordingly, we have decided to grant leave to appeal to the extent that such leave is required.

Notice of Appeal and Grounds of Appeal

107 Many grounds of appeal were advanced in the Amended Notice of Appeal lodged on 20 October 2020. The grounds took the form of contentions of error by the Tribunal set out in 15 paragraphs, in a number of which more detailed allegations of error were set out in multiple sub-paragraphs. There was no specification as to whether errors alleged were errors of law or errors of fact. As to the latter, although leave to appeal was requested and the Notice of Appeal indicated that it was contended that the decision was not fair and equitable and was against the weight of the evidence, there was no description as to why such contentions were made.

108 Nevertheless, greater clarity and detail as to the nature of the alleged errors in the Tribunal decision and the reasons why leave to appeal should be granted emerged from the written and oral submissions provided on appeal, including a submission in table form directed at the discretionary matters concerning leave

to appeal supplied by the SPG appellants following the first of the two days of hearing of the appeal.

109 Because of the conclusions we have arrived at, it is unnecessary to attempt to summarise all of the grounds of appeal. It is sufficient to refer to the following grounds derived from the Amended Notice of Appeal and the SPG appellants' submissions:

(1) [**Ground 1**] The Tribunal erred by incorrectly finding that the building work upon which the special levy was based went beyond the obligation under section 106 of the SSMA to maintain and repair.

(2) [**Ground 2**] The Tribunal erred in finding that the 2017 Dakhoul report did not provide a reliable basis for the special levy.

(3) [**Ground 3**] The Tribunal erred in finding that the 2017 Dakhoul report was consistent with an objective to arrive at a high amount in a report prepared for a friend.

(4) [**Ground 4]** The Tribunal erred by, effectively, reducing the special levy to $0, despite uncontested evidence that substantial work needed to be done.

(5) [**Ground 5**] The Tribunal erred in finding that the special levy was struck for an improper purpose.

(6) [**Ground 6]** The Tribunal erred in deciding that it preferred the evidence of Ms Casabon and Mr Keever to that of Norman Sarraf about what transpired at their meeting on 20 February 2018.

(7) [**Ground 7**] The Tribunal erred by relying upon an alleged failure to repair and maintain the stairs in the property as a basis for the appointment of a strata manager under s 237 of the SSMA.

(8) [**Ground 8**] The Tribunal erred in its selection of the party nominated by the respondents as the strata manager to be appointed under s 237 of the SSMA.

(9) [**Ground 10**] The Tribunal erred by failing to make an order that Ms Bourke pay the outstanding ordinary levies that she owed.

(10) [**Ground 11**] The Tribunal erred in the making of costs orders.

110 The nature of the errors advanced by the SPG appellants appears from our consideration below of the various grounds of appeal.

111 As is apparent from our account of the Tribunal's reasons, whilst Ground 1 was relevant to the issues concerning variation of the special levy, that ground was also relevant to the improper purpose issue the subject of Ground 5.

112 As to the outcome of the appeal, the SPG appellants in their Amended Notice of Appeal sought orders that the respondents' claims for the special levy to be varied and for the appointment of a strata manager under s 237 of the SSMA be dismissed and that the orders sought by the OC for recovery of the contributions to the special levy be made.

113 However, the thrust of the grounds of appeal and the submissions was that, because of errors of law and fact, the Tribunal's decision making miscarried, the decision should be set aside and the proceedings re-determined. As to the latter, it was not suggested that we should conduct a new hearing in order to re-determine the matter.

114 Plainly, given the factual areas of dispute, the extensive fact-finding that appears to be required, the importance of witness evidence and issues concerning the credibility of witnesses, it would not be practical for us to do so.

The parties' submissions on appeal

115 The active parties provided extensive written appeal submissions as follows: written submissions from Mr Sirtes SC and Mr Newton, Junior Counsel, on behalf of the SPG appellants, dated 30 September 2020; written submissions from Mr Philips of Counsel, on behalf of the respondents, dated 28 October 2020; written submissions in reply by Mr Sirtes SC and Mr Newton dated 27 November 2020. These were supplemented by oral submissions from Mr Sirtes SC and Mr Philips over two hearing days of the appeal.

Grounds 1, 2, 3 and 4, alleged errors relating to conclusions about the size of the special levy- Consideration

116 As appears from our account of the Tribunal's reasons, Grounds 1, 2, 3 and 4 are interrelated. This is because the rejection of the 2017 Dakhoul report as a reliable basis for the special levy and the reasons for that rejection appear as an integral part of the reasoning in respect of the conclusion that the building work the subject of the special levy went beyond the requirements of s 106 of the SSMA. Our summary below of the matters put forward in support of Ground 1 confirms this connection. These conclusions are also an integral part of the reasoning leading to the Tribunal's conclusion that no levy amount can be based upon any rectification work other than that associated with the stairs.

117 As to Ground 1, the SPG appellants submitted that the Tribunal's conclusion that the building works on which the special levy was based went beyond the obligation imposed by s 106 was made in error because:

(1) It was based upon an incorrect finding that there had been a concession to that effect by the strata manager, Mr Haldezos.

(2) It was based upon an incorrect and unfair dismissal of the significance of the 2017 Dakhoul report.

(3) It was not based upon an assessment of all the relevant evidence.

(4) It was based upon the rejection of the 2017 Dakhoul report as a reliable basis for the special levy which was a conclusion that was unreasonably arrived at.

(5) The Tribunal failed to provide adequate reasons for the conclusion.

(6) The Tribunal's conclusion was made without probative evidence, or was an inference that was not open on the primary facts.

(7) The conclusion was against the weight of the evidence.

118 As will be seen, we agree with the contentions in (1), (2), (4) and (6) above. Because of this we find it unnecessary to address the contentions in (3) and (7). We disagree with the contention in (5), which raised a question of law.

119 The contention in (6) also raised a question of law, as did, the contention in (1): see *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13(7)] and *Bell v Commissioner of Taxation* [2012] FCA 1042 at [84]. Included in the contention in (2) was also a question of law about making a finding without probative evidence and also a question of law concerning fair dealing in providing an opportunity to respond to a potential adverse finding.

"Concession" from Mr Haldezos

120 As we have already mentioned, the "concession" from Mr Halzedos appears as one of only a few matters referred to by the Tribunal which might conceivably justify the Tribunal's positive conclusion that the building works on which the special levy was based went beyond the obligation imposed by s 106.

121 CF Strata, which employed Mr Halzedos, was appointed as the strata managing agent for the property on or about 29 May 2016. Mr Halzedos chaired the annual general meeting held on 28 November 2017. He swore a number of affidavits that went into evidence before the Tribunal.

122 In his affidavit of 20 September 2018 he said that since approximately early to mid-2017 he had known that there were problems with the property that required repair (at paragraph 4). He also said that he received the Dakhoul 2017 report on or about 9 June 2017, he read it and saw that it listed numerous defects in the property requiring repairs and that it annexed a schedule of the repairs needed with an estimate of costs (at paragraph 10).

123 At the hearing before the Tribunal he was cross-examined by Mr Philips, Counsel for the respondents to the appeal. The cross-examination included questions about the 2017 Dakhoul report (commencing at line 11 on page 1399 of Volume 3 of the appeal bundle). The transcript of the cross examination reveals the following exchange (at lines 3 to 19 on page 1400):

> P Mr Halzedos, as an experienced strata manager you are aware, are you not of the legal obligations of an Owners Corporation to keep the common property of a strata building in a state of good and serviceable repair, that correct?
>
> H Fair comment.
>
> P And, you are aware of s106 of the Strata Schemes Management Act 2015?
>
> H Repair and maintain the common property, yep.
>
> P And, you're also aware that the obligation under s106, doesn't go as far as to require expenditure on renovations which go beyond keeping the common property in a state of good and serviceable repair, correct?
>
> H You have to be more specific because with a renovation or repair, I don't know without being presented with the facts.
>
> P I want to suggest to you that there are aspects of this Dakhoul report of June 2017 which go well beyond the obligation of keeping the common property in a state of good and serviceable repair, do you agree with that?
>
> H *With your statement, yeah? If you want to expand.* [Our emphasis]
>
> P I might, Mr Halzedos, give you some specific examples of what I'm getting at. Can you please go to paragraph 6 of Mr Dakhoul's report?

124 The parties accepted that it was the above passage in italics (at line 17) that contains the source of the Tribunal's finding of a concession by Mr Haldezos.

125 In our opinion, the Tribunal erred in law in finding a concession by Mr Halzedos of the nature referred to in the reasons because there was no evidence for that conclusion.

126 In the first place, the response from Mr Halzedos was in the form of a question followed by a request for the questioner to be more specific. Secondly, when Mr Philips, subsequently, did put specific matters to Mr Halzedos he made it clear that he was not qualified to answer (see the transcript at line 25 on page 1402, and line 7 on page 1403).

127 Nevertheless, the respondents submitted that absent the finding concerning the concession from Mr Halzedos there were sufficient other reasons advanced by the Tribunal to support its conclusion that the building work the subject of the special levy went beyond what was required by s106 (RS 20). They pointed out that the "concession" was only one of the 9 matters set out in paragraph [78] of the reasons (set out in paragraph 58 above). We examine these additional reasons in paragraphs 143 to 166 below..

Incorrect and unfair dismissal of the significance of the 2017 Dakhoul report

128 The SPG appellants criticised the Tribunal's conclusions in paragraph 79 of the reasons (set out above). They submitted that these were conclusions that implicitly questioned Mr Dakhoul's integrity, and that of Norm Sarraf, in the preparation of the report and were conclusions that should never have been made because they were not put to any of Mr Dakhoul (he did not give oral evidence-see further below), Mr Norm Sarraf or Mr John Sarraf in cross-examination and, in any event, were conclusions that were not open on the evidence.

129 The SPG appellants relied upon the following observations by French CJ and Gummow J in *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 at [67]:

> It is not sound judicial technique to criticise a party-witness for deliberately withholding the truth in a fashion crucial to a dismissal of that party's claim unless two conditions are satisfied. First, reasons must be given for concluding that the truth has been deliberately withheld. Secondly, the party-witness must have been given an opportunity to deal with the criticism.

130 In their reply submissions, presumably, in response to the respondents point that no statement, affidavit or oral evidence was presented from Mr Dakhoul, the SPG appellants emphasised that the adverse allegation was not put to the Sarrafs (who did give evidence). They submitted (Reply submissions at [23]):

> The difficulty with the Respondents' submission… is that it was not put to either of Norman Sarraf or John Sarraf that they'd asked Mr Dakhoul to inflate his costings … We should be clear about this. Such a request would have been fraudulent. It is based on the flimsy proposition that friendship would induce Mr Dakhoul to engage in fraud. Yet just such a proposition is implicit in the Senior Member's finding that Mr Dakhoul had inflated his costings because of his association with the Sarrafs (Decision at [79]). At the very least, the rules of fair dealing prescribed by *Browne v Dunn* (1893) 6 R 67 at [60] as affirmed in *Kuhl* at [71] required that such an allegation be put squarely to the Sarrafs to give them an opportunity to respond. Also had such an allegation been put to the Sarrafs, the Owners Corporation may have called Mr Dakhoul to give oral evidence so that he could respond to the smear against his character. That indictment on his professionalism and integrity is now contained in a publicly available judgment of this Tribunal.

131 Mr Sirtes SC, in his oral submissions, pointed to the cross-examination of Norm Sarraf about his friendship with Mr Dakhoul which did not proceed beyond that point and, in particular, did not extend to putting an allegation to the effect that Mr Norm Sarraf had sought to procure an untruthful report from Mr Dakhoul in order to achieve his redevelopment objective. Mr Sirtes SC also pointed out that no submission was made by the respondents to the Tribunal that impugned Mr Dakhoul's integrity or suggested he was part of a conspiracy to achieve the Sarrafs' objective.

132 Prior to the hearing, in accordance with an order made by the Tribunal, the respondents required Mr Dakhoul to attend the hearing for cross-examination: see letter from the respondents' solicitor to the OC's solicitor dated 7 February 2020. Presumably, that occurred because the respondents expected the 2017 Dakhoul report to be part of the evidentiary material to be relied upon by the OC. At the commencement of the hearing, Mr Newton, Junior Counsel for the OC, identified the 2017 Dakhoul report as evidence to be relied upon by the OC (albeit not as an expert report prepared for the purpose of the proceedings) and informed the Tribunal that Mr Dakhoul was available for cross-examination (transcript, line 30 on page 1272 to line 6 on page 1273: see also at lines 6 to 10 on page 1289). Mr Dakhoul was not cross-examined at the hearing in the Tribunal.

133 In the context of the reasons in [78], and the Tribunal's conclusions that the building work the subject of the special levy went beyond what was required by s 106 and that the costing for such work was more than was reasonably required, the conclusions in [79] intimate that Mr Dakhoul had set out to

achieve an inflated cost estimate in order to serve the interests of his friend, Norman Sarraf. In turn, these conclusions raise the suggestion that Norman Sarraf was, or may have been, knowingly involved in such a course.

134 These reasons are seriously adverse to both Mr Dakhoul and Norman Sarraf.

135 They are suggestive of untruthfulness and unprofessionalism by Mr Dakhoul, not as a witness, but in his 2017 report. The conclusions are also suggestive of impropriety by Mr Norm Sarraf in seeking to take advantage of his friendship to obtain an untruthful report.

136 If the conclusions had been confined to what was set out in [78] of the reasons there would have been a conclusion that the 2017 Dakhoul report was not a reliable basis for the special levy for reasons that remained consistent with Mr Dakhoul holding an honest opinion as to need for and costing of the rectification work.

137 The conclusions in [79] stand in contrast to the opening and closing written submissions from the respondents to the Tribunal at first instance that:

> 12 In this regard, the Lot Owners repeat the matters set out in paragraph 33 of their Opening Submissions in relation to the Dakhoul Report, and in particular that the express purpose of the Dakhoul Report was to comprehensively identify all defects in the building (regardless of materiality) but not to distinguish between any repairs necessary to properly maintain and keep in good and serviceable repair the common property and those which may be less critical or more cosmetic in nature.

138 The respondents submitted to the Tribunal at first instance that Mr Dakhoul had no level of objectivity or professional independence given that he was a close friend of Norman Sarraf and that in preparing his report he had sought to identify each and every possible defect in the building rather than identifying only those repairs which were necessary to keep the common property in a safe and serviceable condition. However, no submission was made by the respondents to the Tribunal at first instance to the effect that Mr Dakhoul had acted dishonestly, improperly or unprofessionally in the preparation of his report.

139 In our opinion, it was unfair to Mr Dakhoul, Norm Sarraf and to the SPG appellants for the Tribunal to say what it did in [79] of the reasons in circumstances where such adverse findings were not put to Mr Norm Sarraf in

cross-examination and were not advanced in the respondents' submissions to the Tribunal and, thereby, providing the SPG appellants with the opportunity to address these matters.

140 This was an error of law because it was procedurally unfair.

141 Furthermore, in our opinion, as we now explain (in paragraphs 143 to 166, the conclusions in [79] were unjustified because, on the basis given by the Tribunal, it was not open to it to conclude that the cost estimate in the 2017 Dakhoul report was inflated, or that Mr Dakhoul had set out to achieve an inflated cost estimate, because there was no probative evidence for such conclusions.

142 In our opinion, the Tribunal erred in law in doing so.

143 Plainly, the fact that Mr Dakhoul was one of Norm Sarraf's best friends and that SPG had used Mr Dakhoul extensively for many years was not a sufficient basis upon which to arrive at such conclusions: see [78 (1) to (3)] of the reasons.

144 We have already explained that the Tribunal was incorrect to conclude that Mr Haldezos had made the concession referred to: at see [78 (4)] of the reasons.

145 The first of the remaining five matters relied upon by the Tribunal was that three of the components of Mr Dakhoul's cost estimate (a cost of $85,500 for rising damp, a cost of $84,700 for work on the roof and a cost of $23,100 in respect of parapet walls) *appeared* high [our emphasis]: see [78 (5)] of the reasons.

146 As to these three components, the SPG appellants made the following submissions.

147 They submitted that there were no actual findings by the Tribunal that the work the subject of these costs was unnecessary or that the costs were otherwise inflated.

148 In addition, as to the Tribunal's reference to the rising damp cost estimate, the SPG appellants submitted that the Tribunal intimated that the cost was or appeared to be unnecessary because there was a damp course in place.

However, they submitted that the Tribunal missed the point because it made no reference to the “overwhelming” evidence in relation to the need to replace the damp course, including evidence about moisture ingress and that damp courses deteriorate and lose their effectiveness (at AS 28).

149 The respondents disputed that there was overwhelming evidence as to the need to replace the damp course because Mr Berner had said in his report (report, dated 2 October 2019, at 6c, page 11) that investigation of the sub-floor area showed that there was a damp course installed to both inner and outer skins of brickwork and, therefore, injecting a new damp course, as proposed by Mr Dakhoul, was not considered necessary.

150 However, the respondents’ submissions about rising damp provided no answer to the absence of any finding by the Tribunal that the damp course work was unnecessary and the absence of any reference by the Tribunal to the evidence that it needed rectification. Furthermore, the reference to Mr Berner’s report could not be given any weight in view of the Tribunal’s conclusion that it was not willing to make any findings based upon his reports: at [82].

151 Further, as to the Tribunal’s reference to a cost estimate in respect of roof work, the SPG appellants submitted that the Tribunal criticised the cost estimate because it included the cost of *replacing* a membrane, which the evidence established was replaced at a cost of $35,780 fairly recently in 2015, but that this missed the point because the 2017 Dakhoul report referred to *removing* the membrane, not replacing it because it was defective.

152 In this regard, the SPG appellants pointed to the treatment of this subject in the 2017 Dakhoul report (at item 7) where reference was made to *removing* the membrane only in order to carry out further investigation and that the cost estimate of $84,700, which the Tribunal criticised, was for “Rectify existing S/W ponding & draining problems evident in entire roof area” (at page 1037 of AB). They also pointed to the evidence given by Dr O’Donnell in cross-examination, to which the Tribunal did not refer, that the roof membrane had to be removed to make the whole roof comply with Australian Standards (at transcript, lines 12 to 23 on page 1461).

153 Further, as to the Tribunal' reference to a cost in respect of roof work, the respondents pointed to the evidence from their expert, Mr Magro, in which he did not accept that it was necessary to remove the membrane in order to repair the roof defects. They also submitted that Mr Magro's evidence "suggests" that the extensive work recommended by Mr Dakhoul "may not" have been necessary or reasonable (at RS [42]).

154 However, the respondents' submissions provided no answer to the absence of a finding that some component of the roof work was unnecessary and the absence of any reference to the evidence that the work needed to be done. Furthermore, their submissions provided no answer to the SPG appellants' point that their evidence was referring to removal of the membrane rather than to replacement because the membrane was defective.

155 Further, as to the Tribunal's reference to a cost in respect of parapet walls, the SPG appellants submitted that this subject could not be a source of criticism of the 2017 Dakhoul report because, as both parties accepted, the capping work which the 2017 Dakhoul report said was required was carried out *after* the time of that report.

156 Plainly, therefore, the parapet walls cost estimate could not provide the basis for the conclusions we are dealing with.

157 The next two of the remaining five matters relied upon by the Tribunal were statements about the quantum of amounts in the 2017 Dakhoul report for such matters as preliminaries, builder's profit and a fee proposal for Project Management: [see 78 (6) and (7) of the reasons].

158 However, there were no findings that these amounts were inflated or as to why that was the case.

159 The next of the five remaining matters was the Tribunal's conclusion that "[A] number of the items included in Mr Dakhoul's report did not *appear* to be urgent such as would require immediate payment in order to undertake that work": [see 78 (8) of the reasons].

160 However, there was no finding by the Tribunal that identified matters were not urgent. Nor was there any explanation as to how a lack of urgency led to

criticism of the 2017 Dakhoul report in circumstances where the report addressed defects as a whole, and where, as the SPG appellants submitted, urgency was not the test for compliance with s 106 of the SSMA: see *Ridis v Strata Plan 10308* [2005] NSWCA 46 at [52]; 63 NSWLR 449; *Stolfa v Owners Strata Plan 4366 & ors* [2009] NSWSC 589 at [63]**;** James v The Owners - Strata Plan No 11478; The Owners - Strata Plan No 11478 v James [2016] NSWSC 1558 at [128].

161 The last of the five remaining matters relied upon by the Tribunal was that "[T]here was evidence from Mr Magro, who was cross-examined, that this schedule of defects [in the 2017 Dakhoul report] is outdated as some of the major components have been rectified and the cost estimates *appear* exorbitant" [our emphasis]: [see 78 (9) of the reasons].

162 However, there were no findings by the Tribunal about these matters. Having regard to the preliminary nature of Mr Magro's report and its qualifications, this was understandable.

163 Mr Magro's report consisted of a letter (four pages) to Mr Keever's solicitor dated 23 March 2020. It was headed "Preliminary Inspection" of the premises and it referred to a "preliminary visual inspection" on 20 March 2020. It said that the report was for discussion purposes only.

164 The evidence from Mr Magro that the Tribunal was referring to (in [78 (9)]) was the following passage:

> In my opinion, the schedule of defects [in the 2017 Dakhoul report] is outdated as some of the major opponents have been rectified, and on the surface, the associated costs appear exorbitant. *This area is outside my area of expertise* and I strongly recommend that a new schedule be compiled and costed by an experience (sic) remedial works investigator. A remedial investigator would prepare a Scope of Works and call tenders to establish the order of total cost [our emphasis].

165 Only one matter is capable of being identified as an outdated aspect (as referred to by Mr Magro) and that is the capping to the parapet walls on the roof. (In his report, Mr Magro stated that a new capping over the roof parapet had been installed). However, as we have already mentioned, this work post-dated the 2017 Dakhoul report and is not capable of justifying any criticism of that report.

166 In our opinion, the material from Mr Magro referred to by the Tribunal was not capable of supporting a conclusion that the cost estimate in the 2017 Dakhoul report was inflated, or that Mr Dakhoul had set out to achieve an inflated figure.

167 Furthermore, in our opinion, the Tribunal's rejection of the 2017 Dakhoul report as a reliable basis for the special levy was a conclusion that is impugned by the unfair and unjustified conclusions in [79] of the reasons. It is a conclusion that is also affected by the plain error concerning the "concession" by Mr Haldezos.

The Tribunal's conclusion that the work the subject of the special levy went beyond what was required by s 106 was made without probative evidence

168 For the same reasons as set out in paragraphs 143 to 166 (except for our reasons concerning the matters in [78 (6) and (7)], which concern costs only and not the building work to be carried out), in our opinion, it was not open to the Tribunal to conclude that the building work the subject of the special levy went beyond what was required by s 106 of the SSMA, because there was no probative evidence to support such a conclusion.

169 This was an error of law.

The Tribunal's conclusion that the work the subject of the special levy went beyond what was required by s 106 was made without adequate reasons

170 We disagree with the submission that the Tribunal's conclusion that the building work the subject of the special levy went beyond what was required by s 106 of the SSMA was made without adequate reasons.

171 The essential basis for the conclusion appears amongst the reasons in [78] and [79], in particular, the matters concerning the "concession" from Mr Haldezos [78 (4)], the rising damp, roof membrane and parapet walls work [78 (5)], the non-urgent work [78 (7)], the evidence from Mr Magro [78 (9)] and Mr Dakhoul's objective and friendship with Norman Sarraf [79].

172 Our conclusion that these reasons do not permit the conclusion that the work went beyond what was required by s 106 does not mean that the Tribunal did not comply with the requirement to provide adequate reasons: as to this requirement, see, in particular, *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 per Bell P at [66] and [71].

Conclusions about Grounds 1, 2, 3 and 4

173 For the above reasons, we uphold Grounds 1, 2, and 3 of the appeal.

174 As to Ground 4, it follows from our agreement with Grounds 1, 2 and 3 that the Tribunal's implicit conclusion that the special levy raised on 28 November 2017 should be reduced to zero cannot be sustained. In that respect, we uphold Ground 4.

175 Ground 4 also appears to go further and imply that the Tribunal erred in relation to the variation claim because instead of reducing the special levy raised on 28 November 2017 to zero it ought to have identified the items in the 2017 Dakhoul report that went beyond what was required in order to comply with s 106 and then determined a varied special levy by reference to the remaining items that was substantially in excess of an amount of $0.

176 We see considerable force in the contention that the Tribunal erred by not making findings as to the specific items in the 2017 Dakhoul report that went beyond the work that was required by s106. However, we are not in a position to say anything more than, absent the errors we have identified in respect of these grounds of appeal, there is a significant possibility, or a chance that is fairly open, that the OC would have achieved a more favourable outcome on the variation claim than to have the special levy raised on 28 November 2017 reduced to $0.

177 In support of these grounds of appeal the SPG appellants made other submissions, including that the Tribunal erred in failing to consider what was said to be various incontrovertible facts, which provided *positive support* for the *reliability* of the 2017 Dakhoul report and which, as submitted by Mr Sirtes SC, showed that the 2017 Dakhoul report was relatively sound. However, in view of the conclusions we have arrived at it is unnecessary that we address such additional matters.

178 In this regard, although the SPG appellants seek orders on appeal upholding their claim for the respondents to pay their contributions to the special levy, as well as the dismissal of the respondents claims for a variation of the special levy and for an appointment of a strata manager, they did not advance as grounds of appeal that the Tribunal erred by not making positive findings that

the building work the subject of the special levy was required in order for the OC to comply with s 106 of the SSMA and that the amount of the special levy was a reasonable amount to cover such work.

Grounds 5 and 6, alleged errors relating to improper purpose conclusion – Consideration

179 Each of these grounds concerns the improper purpose finding by the Tribunal concerning the raising of the special levy. This finding is part of the reasoning which led to the Tribunal's conclusion that a strata manager should be appointed under s 237 the SSMA. It was also one of the reasons for the conclusion that the Tribunal was not satisfied that special levy "should be confirmed" (at [83] and [86] of the reasons).

180 An account of this finding is set out in paragraphs 52 and 53 above. In providing that account, we have already mentioned that the following conclusions form part of the basis for the improper purpose conclusion:

(1) the building work the subject of the special levy went beyond what was required by s 106 of the SSMA.

(2) The estimated cost of that building work was more than was reasonably required.

181 We also noted that the Tribunal did not say that the improper purpose finding was justified by reasons which did not include these conclusions.

182 In dealing with Grounds 1, 2, 3 and 4, we have concluded that there was no probative evidence for these conclusions concerning the building work the subject of the special levy and the estimated cost of that building work and, accordingly, the Tribunal erred in law in arriving at these conclusions.

183 In these circumstances, the SPG appellants submitted that the improper purpose finding was flawed because these errors about the extent and cost of the building work the subject of the levy carried through into the improper purpose finding.

184 Furthermore, the SPG appellants submitted that the issue of improper purpose was irrelevant and the Tribunal erred in law by considering it. They submitted that the only real question was as to the extent and cost of the building work required to comply with s 106 of the SSMA (in circumstances where it was

common ground that some such work was needed). They submitted that if the special levy was justified by what was required to comply with s 106 then whether the resolution was struck for an improper purpose was beside the point. They described the improper purpose as being to create leverage to enable unfinancial lot owners to be bought out (at AS 39).

185 In this regard, at the hearing of the appeal, Mr Sirtes SC made submissions that there was legal error by the Tribunal in applying a notion of fraud on a power to the operation of s106 of the SSMA.

186 We address these submissions later in these reasons.

187 For now, however, we think that the SPG appellants describe the improper purpose too narrowly, as they appear to acknowledge in their subsequent document which addressed the discretionary aspects of leave to appeal. In this document, whilst it is said, correctly, that there was no express finding by the Tribunal that the OC did not intend to do the work the subject of the special levy, the SPG appellants refer (at Point 2 (d)) to an implicit finding as to the passing of the special levy resolution for repair work that would never be executed.

188 In this regard, the SPG appellants refer to the following finding by the Tribunal (at [109]):

> ….. Simply stated, special this levy (sic) said to have been made in order to carry out building work was not a levy but a lever designed to enable the owners of lots 15 and 18 to acquire lots 16 and/or lot 17 in order to be able to dismantle the strata scheme and redevelop the property.

189 Particularly, when read with the Tribunal's reliance on findings in [108] and [45] as to what Norman Sarraf had said at the meeting on 20 February 2018, it would appear that the Tribunal based its conclusion about improper purpose (in part) on an implicit finding that those controlling the OC did not intend for the building work to be carried out despite the raising of a special levy to cover the cost of such work.

190 If it was the case that those controlling the OC passed the special levy resolution but intended that the building work the subject of the levy would not be carried out because they wanted to redevelop the property rather than repair the common property, then that might well support a finding of improper

purpose even if the building work the subject of the levy needed to be done in order to comply with s 106 of the SSMA and its cost was justified.

191 The findings in [108] as to what Norman Sarraf said at the meeting on 20 February 2018 to which we have just referred were:

> ….
>
> (9) At that meeting Norm Sarraf asserted to Mr Keevers on 20 February 2018 that such building work would not be carried out.
>
> ….
>
> (13) During his meeting with Mr Keevers, Norman Sarraf suggested that if Mr Keevers paid the levy but did not sell lot 17 then that money would be used to buy the remaining unit, i.e. lot 16.

192 These findings pick up earlier findings by the Tribunal when it addressed the controversy as to what was said at the meeting on 20 February 2018 as follows (at [45]):

> Having regard to the evidence and submissions made by the lawyers for the parties, the Tribunal makes the following findings of fact in relation to this meeting:
>
> ….
>
> (2) During that conversation, Norm Sarraf:
>
> > ….
> >
> > (b) asserted that if Mr Keevers paid the levy but did not sell then that money would be used to buy the remaining unit;
> >
> > ….
> >
> > (f) stated more than once that the renovations would not proceed;
> >
> > ….

Ground 6

193 We put to one side for the moment the SPG appellants' challenge to a finding about the OC's purpose based solely upon the state of mind of Norman Sarraf.

194 The SPG appellants challenged the findings about what Norman Sarraf had said at the meeting on 20 February 2018. They submitted it was based upon plain error leading to the Tribunal's conclusion that his uncorroborated evidence was unreliable: at [32 (1)] of the reasons. They also submitted that it overlooked an important text message that corroborated Norman Sarraf's denial that he made such a statement. They also submitted that the Tribunal

had erred in its approach to the almost identical evidence about this conversation in the affidavits from Ms Casabon and Mr Keevers.

195 In his affidavit sworn on 20 September 2018 Norman Sarraf denied that he said words to the effect that the "renovations will not go ahead" or "we will never renovate". He also said that at one point in the meeting he outlined 3 scenarios, the first of which was that Mr Keevers did not pay his contribution and the building stayed empty because no one would insure it, the second was that all lot owners paid the special levy contributions and the renovation works were done, and the third was that Mr Keevers paid his contribution, but Ms Bourke did not pay, the SPG interests acquire Ms Bourke's lot, then acquire Mr Keevers lot under the 75% rule and then once the transaction is complete the OC can elect to terminate the strata scheme and not do the works.

196 The Tribunal found that it preferred the evidence of Ms Casabon and Mr Keevers to Norman Sarraf's evidence for the following five reasons (at [44]):

(1) Mr Sarraf's evidence was recollection unaided by any contemporaneous record and contained a concession that he cannot recall specifics of the conversation. (His concession was somewhat more limited - he gave an account of what he said about the three scenarios and then said he did not remember the specifics of the rest of the conversation as it was mainly "chit chat" about the current market prices).

(2) The evidence of Ms Casabon and Mr Keevers was aided by notes made shortly after the conversation occurred.

(3) The tenor of the conversation was consistent with Norman Sarraf's earlier conversation with Ms Bourke.

(4) Ms Casabon's evidence served to corroborate that of Mr Keevers as did the evidence of Ms Bourke in relation to the earlier meeting.

(5) The evidence of Ms Casabon and Mr Keevers was not diminished in cross-examination.

(6) For reasons indicated above, the Tribunal did not consider the uncorroborated evidence of Norman Sarraf to be reliable.

197 The respondents submitted that the Tribunal made no error in deciding to prefer the evidence of Ms Casabon and Mr Keevers to that of Norman Sarraf. They relied on all of the six reasons given by the Tribunal. If the Tribunal erred by relying upon the point that the evidence of Ms Casabon and Mr Keevers was aided by notes (reason (2)) then this was not a highly significant matter

because the other reasons, they submitted, provided an ample and proper basis for its conclusion.

198 We disagree and begin by addressing reason (6) above concerning Norman Sarraf's reliability as a witness.

199 This conclusion was made in the context of the Tribunal's consideration of the earlier conversation with Ms Bourke and was expressed as follows (at [32 (1)]:

> …. and his [Norman Sarraf] exaggeration of the number of text messages he sends on a daily basis favours the assessment of his uncorroborated evidence as unreliable.

200 That conclusion followed the Tribunal's earlier account about this evidence from Norman Sarraf as follows (at [31]):

> ….. When questioned about one of the sms messages exchanged with Ms Bourke, Norm Sarraf sought to deflect the question by suggesting he sends 3,000 messages a day which was plainly an exaggeration.

201 The respondents submit that this finding was plainly open to the Tribunal. However, when the evidence referred to by the Tribunal is considered we find it impossible to see how it could reasonably lead to the adverse conclusion about the general reliability of Norman Sarraf's evidence.

202 Our conclusion is reinforced by the absence of any suggestion in the cross-examination of Norman Sarraf or in the written closing submissions by the respondents to the Tribunal that the relevant evidence was adverse to him in any way.

203 The relevant exchange was as follows (transcript, line 30, page 1440 to line 23, page 1441):

> P You sent another text message to Ms Bourke in December 2017 soon after the invoices for the special levies had been sent out, didn't you?
>
> S Can you refer me to the page please, Mr Phillips?
>
> P Well, before I do that, do you recall sending the text message along those lines?
>
> S *Can you refer me to the page Mr Phillips so I can have a look at what I sent because I send 3,000 messages a day to people, so if you could just refer me to the page please, I'll answer the question.* [Our emphasis]
>
> P Mr Sarraf, I'll just try and get a page number for you.
>
> S I've got the text in front of me, if you just refer me to which text.

> P It's actually-if you go to page 16 to 27 Mr Sarraf in Item 19.
>
> S Yes. If you can just give me the first line, because I think maybe our pages are a bit different but is it the one, "Hi Peter, I hope it wasn't too stressful, is that the one you're referring to?
>
> P Yes.
>
> S Okay. Yep. Yep.
>
> P Just before you read that, in the question I just asked you a minute ago, I suggested that you sent a text message in early December after the invoices had been sent out. Mr Sarraf, I just want to withdraw that suggestion and put to you that this is a text message which you're now looking at which I had in mind and I want to suggest to you that you actually sent this text message on the afternoon or evening of the AGM on 28 November 2017. Do you agree with that?
>
> S Yes. Mr Philips. That's why I asked you to confirm. I was a bit confused as to what you were saying, but now, yes.
>
> P I'm sorry for confusing you Mr Sarraf, I didn't mean to do so.
>
> S No. I'm sure you didn't, I was just confused, because I know I sent a message the following-either that afternoon, or the following day with what I'm looking at in front of me, yes.

204 The question that led to the response in issue was innocuous and what it suggested was incorrect. The witness's answer was both understandable and insignificant, as the response from the cross examiner confirms - the latter, appropriately, apologising to the witness for, incorrectly, suggesting the witness had sent a text message at a time when he had not done so. The reference to sending 3000 text messages a day presents as an obvious and inconsequential exaggeration by which the witness indicated he sent a lot of text messages each day.

205 Ms Bourke's evidence of her conversation contained no reference to Norman Sarraf saying anything along the lines that renovation work would never be carried out or that if Mr Keevers paid his contribution the money would be used to buy Ms Bourke's unit. Accordingly, reasons (3) and (4) were not correct insofar as they suggest otherwise.

206 It was also relevant that Norman Sarraf had sent a text message subsequent to his conversation with Ms Bourke on 28 November 2017 stating, amongst other things:

> … As the levy is due in about 3 weeks, if we were going to do something it's (sic) needs to be done in the next week or so. If not, then it's no issue, we would just move forward with the remedial works and pay the special levy.

207 On the face of it, the text message is inconsistent with a belief held by Norman Sarraf that the remedial works would never be carried out. However, the Tribunal did not refer to this text message. (In the context of other evidence, the reference in the text message to "going to do something" was a reference to Ms Bourke selling her unit to the Sarraf interests).

208 Finally, we address the reasons that the evidence of Ms Casabon and Mr Keevers was aided by notes and that they corroborated each other: reasons (2) and (4).

209 Related to these reasons were the following findings by the Tribunal:

(1) The cross-examination of Ms Casabon revealed that she made some notes of the conversation *at* that meeting *and used them* to prepare her affidavit but did not thereafter keep those notes: at [39].

(2) Ms Casabon indicated that her affidavit was prepared by their solicitor asking her questions which she answered: at [39].

(3) Mr Keevers' account of the meeting *is similar* to Ms Casabon's account but not without differences: at [40].

(4) According to Mr Keevers, his wife made hand written notes *after* the meeting, he later prepared a typed version of those notes about a week later and that although they both looked at their notes, their affidavits were prepared separately but by the same solicitor: at [40].

(5) As to the OC's submission that their evidence was unreliable because there was little or no difference in their evidence, the clear explanation for the similarities in their evidence was that their affidavits were based on the *same* notes and were prepared by the same solicitor. The fact that their evidence matches does not mean their version of the conversation should be rejected: at [43].

210 As to (1), (2) and (3) above, Ms Casabon's evidence in cross-examination was clear in one respect about the preparation of her affidavit, namely that the contemporaneous notes she said she had prepared of the meeting (*after* the meeting) were *not* used in the preparation of her affidavit because she had disposed of such notes (transcript, line1, page 1296 and lines 2-10, page 1298). She went on to say that she had prepared other notes later on from her memory of the meeting before her affidavit was prepared, but it was not clear what role these notes played in the preparation of her affidavit, which she indicated had been prepared with her solicitor asking questions about what

happened (transcript, line 27, page 1298-line 35, page 1299). She did not keep these later notes (transcript, line 3, page 1300).

211 As to (3), it is more accurate to describe the accounts given by Ms Casabon and Mr Keevers of the critical parts of conversation at their meeting as virtually identical. As was said by Palmer J in *Macquarie Developments Pty Ltd & Anor v Forrester & Anor* [2005] NSWSC 674 at [90], this is:

> …. Highly suggestive either of collusion between the witnesses or that the person drafting the affidavit has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason.

212 In the *Macquarie* case, a specific explanation from the relevant solicitor about how the identical wording had come about assisted to overcome the challenge to the credibility of the witnesses.

213 There was no such explanation from the relevant solicitor in this case. Furthermore, the evidence in cross-examination from these witnesses about the preparation of their affidavits did not support a conclusion that their evidence was based upon the same contemporaneous notes of the meeting, yet this appears to have been what the Tribunal understood to have occurred.

214 As we have already noted, Ms Casabon said she had not used her contemporaneous notes. She also said that her affidavit had been prepared by giving answers to questions from her solicitor. On the other hand, Mr Keevers' evidence in cross-examination was that their solicitor did no work on the paragraph of the affidavit concerning the conversation (transcript, line 31, page 1323). He said he had typed up the content working from hand written notes *he* had made about a week after the meeting (transcript, line 21, page 1322-line 28, page 1323). He said Ms Casabon had worked from notes as well, but not his notes (transcript, lines 3-14, page 1324).

215 The respondents submitted that even if there were some inconsistencies between the various accounts of how the affidavits were prepared, there could be no doubting the correctness of the Tribunal's finding that the affidavits were prepared by the same solicitor and that alone accounted for the similarities and this did not detract from the Tribunal's remark that the fact that their evidence

matches does not mean that their version of the conversation should be rejected.

216 However, preparation by the same solicitor does not in itself provide an explanation for the identical nature of the evidence that might assist to overcome the prejudice to the value of the evidence to which Palmer J referred. Furthermore, it was Mr Keevers' evidence in cross-examination that their solicitor had had nothing to do with the preparation of the relevant paragraph of his affidavit.

217 For all these reasons, in our opinion, the Tribunal's conclusion about preferring the evidence of Ms Casabon and Mr Keevers to that of Norman Sarraf was impugned by material errors of fact and, accordingly, we uphold Ground 6 of the appeal.

218 Most significantly, these errors undermine the finding that Norman Sarraf said at the meeting on 20 February 2018 that the renovation work would never be carried out.

Ground 5

219 In turn, in our opinion, the improper purpose conclusion was undermined because it was supported by both the finding that Norman Sarraf said at the meeting on 20 February 2018 that the renovation work would never be carried out and by the material errors of law concerning the conclusions that the building works the subject of the special levy went beyond what was required by s106 of the SSMA and that the estimated costs of the works was more than was reasonably required.

220 The respondents submitted, however, that even if the Tribunal erred in deciding to prefer the evidence of Ms Casabon and Mr Keevers to that of Norman Sarraf about the conversation on 20 February 2018, it would have had no impact on its ultimate conclusion about improper purpose for the following reasons:

(1) Only 6 of the 18 separate findings (in [108]) which supported the ultimate conclusion of improper purpose were founded upon accepting the evidence of Ms Casabon and Mr Keevers over that of Norman Sarraf, namely those in (7), (8), (9), (11), (13) and (14) (see paragraph

52 (5) above). They submitted that the other 12 findings provided a proper and rational basis for the ultimate conclusion;

(2) Further as to (1), they submitted that in particular the findings in (6), (12), (15), (16) and (17) of [108], strongly supported the ultimate conclusion, as also did the findings in [63] (1), (2), (3) and (5) of the reasons;

(3) Various aspects of Norman Sarraf's evidence were consistent with the existence of the improper purpose found by the Tribunal;

(4) Given aspects of this evidence from Norman Sarraf, the better and only proper inference is that during the meeting on 20 February 2018 Norman Sarraf did seek to pressure Mr Keevers into selling his unit, including by indicating that one possible outcome was that the work the subject of the special levies would not be undertaken.

221 We disagree. In our opinion, the Tribunal's findings about the scope and cost of the proposed building work behind the special levy and the finding that Norman Sarraf said that such work would never be carried out were critical aspects of the improper purpose conclusion.

222 The remaining findings and the other aspects of Norman Sarraf's evidence, which the respondents point to, leave open the prospect that at the time when the special levy resolution was passed the building works behind the special levy did need to be carried out in order to comply with s 106 and that the SPG appellants, whilst keen to acquire the respondents lots and prepared to exert pressure upon them to sell, did intend to cause the OC to carry out such works if the special levy contributions were paid and the respondents did not sell.

223 If these were the facts, we do not see how the raising of the special levy was affected by an improper purpose. The fact that there had been neither consideration of an existing 10 year plan for capital works nor preparation of a fresh 10 year plan for such works would be immaterial to the question of improper purpose, as would also be the fact that no opportunity had been provided for payment of the special levy by instalments. If the latter issue was a problem, then lot owners could seek relief under s 87 of the SSMA.

224 We are not in a position to make a determination about the facts concerning improper purpose one way or the other. However, as we have said, in our opinion, absent the impugned findings we have mentioned, the prospect remains that there was no such improper purpose.

225 For these reasons, we uphold Ground 5 of the appeal.

226 Accordingly, it is strictly unnecessary for us to address the additional arguments made by the SPG appellants in challenging the improper purpose conclusion.

227 However, in deference to the argument that improper purpose was an irrelevant consideration we will address that issue, albeit, briefly. We focus, particularly, upon the argument as put by Mr Sirtes SC orally at the hearing of the appeal, which differed, to some extent, from the written submissions on the subject.

228 According to this argument, the only questions for the Tribunal were whether the building works the subject of the special levy were required by s 106 of the SSMA and, if so, whether the cost of such works was reasonable. If the answer was that the works went beyond what was required by s 106 then it followed that the special levy resolution was invalid. If the only problem was that the cost was unreasonable, then the remedy was to vary the amount of the special levy because the OC had no alternative but to carry out the works.

229 We were referred to various authorities about the scope of the notion of fraud on a power in the context of s 106 of the SSMA. However, understandably, none of these authorities ruled out entirely any scope for the misuse or abuse of power in connection with a decision by an OC to carry out works in accordance with that section.

230 Importantly, the main role for improper purpose in the Tribunal's decision was in respect of its consideration whether to appoint a strata manager under s 237 of the SSMA. That led to the Tribunal's consideration of the functioning of the management of the strata scheme which, in turn, led to its consideration of improper purpose in connection with the exercise of the OC's power to raise a special levy, in accordance with the *Bischoff* decision. It was not suggested to us that *Bischoff* was wrong in identifying such a factor as a circumstance relevant to the question whether the management is not functioning or not functioning satisfactorily.

231 It may be accepted that a resolution to raise a levy for works purportedly required by s 106 when such works were not, in fact, required would result in an invalid resolution. However, that does not mean that propriety of purpose associated with achieving the levy is for all purposes irrelevant. It is capable of being relevant, at least, to a question about the satisfactory functioning of the management of the scheme for the purpose of the application of s 237.

232 For example, if those controlling the decision-making of the OC set out to raise a substantial special levy for repair works, with no intention that they would cause the OC to carry out such works, for the purpose of applying pressure to other lot owners to sell their lots to them rather than pay their contributions to such a levy, then, in our view, this would be capable of being a circumstance involving impropriety of the kind referred to in *Bischoff*.

233 Accordingly, we do not accept the SPG appellants' submission that the Tribunal was wrong to consider the improper purpose issue.

234 The SPG appellants also submitted that the Tribunal made an error of law in treating the lack of consideration of any existing 10 year plan in the preparation of a fresh 10 year plan as relevant to the question of improper purpose. Again, it is unnecessary for us to address this question. Nevertheless, we can see that such circumstances are capable of providing part of the context for an assessment of the bona fides of a proposal for extensive repair work to be carried out.

235 Because it is unnecessary to do so, we will not deal with the SPG appellants' submission that the Tribunal erred in conflating Norman Sarraf's purpose with the purpose of those controlling the OC. In this regard, we also note that this issue did not appear to be advanced by the SPG appellants before the Tribunal at first instance, thereby, giving rise to the question (which we do not need to address) whether it was an argument that we should permit to be advanced on appeal.

Ground 7, alleged error about failure to repair the stairs - Consideration

236 The Tribunal's finding about a failure to repair the stairs was one of the reasons given in support of its conclusion that a strata managing agent should be appointed under s 237 of the SSMA.

237 This was an issue that arose well after the proceedings for such an appointment were commenced and not long before the hearing in the Tribunal. The work that was needed to repair the stairs was not identified in the 2017 Dakhoul report.

238 There was very little reference to this issue in the closing written submissions to the Tribunal. Consistently with this, the Tribunal's findings about the issue are brief.

239 The Tribunal's chronology of events referred to a letter from the solicitors for the SPG appellants to the OC dated 14 February 2020 which threatened to sue the OC for failure to repair the staircase (at [27]). The chronology also referred to a notice sent to the OC by Randwick City Council on 27 February 2020 in relation to the stairs. Next, the Tribunal referred to the fact that despite the threat of legal action, the notice from Randwick City Council and money being available, no work had been commenced in relation to the repair of the stairs. The Tribunal said the failure to repair the stairs was consistent with the assertion by Norm Sarraf at the meeting on 20 February 2018 that no renovations would be carried out: at [55 (10)].

240 The Tribunal then concluded that the failure to repair the stairs was a failure to maintain the common property (at [56]). It did so as part of its consideration as to whether the situations referred to in *Bischoff* concerning the circumstances for appointment of a strata managing agent under s 237 were satisfied.

241 Later in the reasons, when addressing the questions whether the special levy "should be confirmed" and whether it should be varied, the Tribunal said that it was clear there was an urgent need for building work to be undertaken in relation to the stairs since the evidence suggested that the main stairs are currently blocked off at both the ground floor and first floor levels, that access now is via the fire stairs and there is a notice from Randwick City Council (at [87]).

242 Whilst the Tribunal expressed a potential link between the absence of repairs to the stairs and the impugned finding that Norman Sarraf had said that no renovations would be carried out, the finding of a failure to repair the stairs

appears to be, principally, based upon the short objective facts that we have just referred to.

243 The SPG appellants submitted that the Tribunal's finding that the OC had failed to repair the stairs was clearly wrong given that (as appeared from the uncontroversial evidence from Mr Haldezos), at the time of the hearing, the staircase had only recently collapsed in January 2020, the strata manager was actively seeking to address the situation, immediately arranging for an engineer to assess the stairs and to undertake emergency propping, the strata manager had obtained an engineer's report as to the scope of the work necessary and obtained quotes for undertaking the work. The SPG appellants also submitted, but without reference to any supporting evidence from Mr Haldezos, that the Covid-19 pandemic had prevented or delayed to work.

244 The SPG appellants submitted that at the time of the hearing the real problem for the OC was that the lot owners would not pay their share of the special levy which was preventing the OC from undertaking the necessary remedial works.

245 The respondents' submitted that the finding of a failure to repair the staircase was open to the Tribunal and, in any event, was incontrovertibly true because on the evidence of Mr Haldezos it had been damaged in a storm in January 2020, had been subject to a works order by Council, but had not been repaired, even though, as found by the Tribunal (at [55 (10)]) there was sufficient funds available to undertake the remedial work.

246 The SPG appellants did not base their challenge to this finding upon any error of law or error as to the primary facts that the Tribunal made reference to.

247 In particular, they did not challenge the Tribunal's finding that there were sufficient funds to do the repair work - a finding that was made despite the fact that the respondents had not paid their contribution to the special levy and half of the special levy paid by the SPG appellants had been refunded to them (at [55 (8)]). Accordingly, we do not accept the SPG appellants' submission that the real problem for the OC was that the lot owners had not paid their share of the special levy - a levy that was directed at other repair work.

248 Although the Tribunal did not refer to the evidence from Mr Haldezos about the steps he had taken toward repairing the stairs, the fact remained that the work, which was significant and pressing, had not been carried out.

249 For these reasons, we reject Ground 7 of the appeal.

Consequences of our conclusions concerning Grounds 1 to 7

250 We have found that key factual conclusions about the size of the special levy and improper purpose in raising that special levy are impugned by error.

251 These key factual conclusions were important elements of the decisions by the Tribunal to appoint a strata manager under s 237 of the SSMA and to vary the amount of the special levy (the latter decision involving a decision to disallow any amount in respect of the building work the subject of the special levy raised on 28 November 2017).

252 It follows, in our opinion, that the Tribunal erred in making the orders the subject of this appeal.

253 As to the order appointing a strata manager, the respondents, however, contended that the Tribunal's conclusion about the failure to repair the stairs and failure to maintain insurance, being findings that were independent of the findings with respect to the special levy and improper purpose, were sufficient to justify that appointment. They submitted that *Bischoff* shows that it is sufficient to establish that any one of the relevant circumstances exists. They also referred to the Tribunal's decision in *Unilodge Australia v SP 54026 [2020] NSWCATCD*, unreported, 29 April 2020, where one of the three grounds for appointing a compulsory strata manager was a failure to repair common property and in which case the Tribunal found that a prolonged failure to carry out urgent repairs was evidence that the scheme was not functioning satisfactorily.

254 However, it is clear from the reasons and the closing submissions of the parties that the findings concerning repair of the stairs and insurance played a minor role in the decision to appoint a strata manager under s 237 of the SSMA. This is borne out by the Tribunal's outline of the respondents' case on the s 237 issue which was said to be based upon the fact that the relationship between

the respective interests had irretrievably broken down, that there was an absence of trust between the two groups and that there was oppression by the SPG appellants who held control of the management (at [52]). It is also borne out by the predominance of the issues concerning the size of the special levy and improper purpose in the Tribunal's reasons.

255 A question whether to appoint a strata manager under s 237 solely on the grounds of the failure to repair the stairs and maintain insurance, unassociated from the findings about the special levy, the matter at the centre of the dispute between the parties, is a very different question to the issue addressed by the Tribunal.

256 Based upon the short facts found by the Tribunal, absent any examination as to why they had occurred and the steps taken toward rectification, we do not accept that such failures would on their own justify the appointment. Furthermore, the facts in *Unilodge* were distinct from the present findings (the failure to repair common property had extended over a significant period, despite the OC having received expert advice, detailed work and funding proposals and a notice from the relevant local council, and was a consequence of a break down in the management of the OC) and the failure to repair was not found on its own to be sufficient to warrant the appointment of a compulsory strata manager. Also, with respect to the insurance issue, it was not the case that the building was uninsured-the concern was that policy which had been arranged was only for a period of six months and was due to expire on 19 April 2020 (see at [55 (11)].

257 The claims in the proceedings before the Tribunal must be re-determined. As we have already said, a redetermination requires extensive fact-finding based in part on the evidence of the lay and expert witnesses and involves assessments of the credibility of, at least, some of those witnesses.

258 Furthermore, fresh exercises of the discretion concerning appointment of a strata manager under s 237 and concerning variation of the special levy will be required. As to the discretion concerning appointment of a strata manager, we anticipate that there may be new, relevant evidence available about events that have occurred since the hearing last April, including, possibly, assessments of

the repair work made by the strata manager that was appointed, as well as up-to-date information about the repair of the stairs.

259 Accordingly, the redetermination should be made upon the basis of the evidence already adduced to the Tribunal and such further evidence as the Tribunal may now allow. Because of the significance of controversial findings of fact to the outcome of the proceedings, including a finding concerning the credibility of Norman Sarraf, the redetermination will need to be made by a differently constituted Tribunal.

260 As we discuss at the end of these reasons, after dealing with the remaining grounds of appeal (Grounds 8, 9 and 10), we refrain, at this stage, from making final orders disposing of the appeal, including an order setting aside the orders made by the Tribunal,

Ground 8, error concerning who was to be appointed strata manager

261 Because of our conclusions about Grounds 1 to 7 and about the consequences of those conclusions, it is unnecessary for us to address Ground 8 of the appeal.

Ground 9, appeal against costs judgment

262 In a costs judgement issued on 14 July 2020, the Tribunal made orders in each of the three proceedings the subject of the hearing at first instance, that the OC pay the other side's costs on the ordinary basis (as agreed or as assessed) and that the OC was not to recoup its costs from any levy or fund that included moneys contributed by the relevant opposing party.

263 Those orders were made on the basis that the minority lot owners were the successful parties in each of those proceedings. In view of the conclusions we have reached on the appeal, those orders cannot be sustained and the question of costs of the proceedings at first instance will have to be determined in the light of the redetermination of the substantive proceedings.

Ground 10, error in failing to determine the OC's claim for payment of ordinary levies against Ms Bourke

264 A claim for an amount of $3980.10 in respect of what was said to be unpaid ordinary quarterly levies was included in the OC's claim (SC 19/28238) against

the owners of Lot 16 for unpaid levies (the larger amount sought was payment of the required contribution to the special levy). The Tribunal did not deal with this claim. The Tribunal erred in not doing so, despite the circumstances that we now refer to.

265 The written closing submissions of the SPG appellants to the Tribunal dated 6 May 2020 finished with a very short submission about "Relief". It was said that the respondents' proceedings should be dismissed with costs. It was then said that the respondents should be ordered to pay "their share of the Special Levy together with interest in the terms claimed in the originating process.

266 No reference was made to the claim in respect of the allegedly unpaid ordinary quarterly levies. This would explain why the Tribunal did not deal with this claim. However, the claim was not abandoned and it needed to be determined.

267 At the hearing of the appeal, we asked whether there was any dispute about the claim. Mr Philips indicated that he was not in a position to concede that there was no dispute that this amount was due and owing to the OC.

268 In the circumstances, this claim will need to be determined as part of the redetermination of the proceedings.

The Tribunal's finding about the validity of the appointment of Mr Love to the strata committee

269 An additional ground of appeal was that the Tribunal incorrectly found that the election of Mr Love to the strata committee on 28 November 2017 was in breach of s 31 of the SSMA.

270 However, the Tribunal made no order in relation to that appointment, explaining that:

> However, since a subsequent AGM was held on 7 March 2019, Mr Love is no longer a member of the strata committee by reason of what occurred at the AGM held on 28 November 2017 and since the Tribunal has determined that a strata managing agent should be appointed pursuant to section 237 of the SSMA, there is no utility in making an order declaring the election of Mr Love to the strata committee at the AGM on 28 November 2017 invalid.

271 On appeal, the SPG appellants contended in their written submissions (the matter was not addressed in oral submissions) that the alleged error contributed to the Tribunal's findings of improper purpose and the need to

appoint a compulsory strata manager. In this respect, they pointed to a finding by the Tribunal that the OC was not operating democratically. The respondents contended that because no order was made in relation to this issue and the finding did not contribute to his findings on improper purpose or the need to appoint a compulsory manager this ground of appeal “goes nowhere”.

272 Whilst it is difficult to see how this finding did contribute to the Tribunal’s findings of improper purpose and the need to appoint a compulsory strata manager, in view of the conclusions we have already arrived at about these issues, it is unnecessary for us to deal with this ground of appeal.

Orders to be made on appeal

273 We refrain from making complete final orders on the appeal for two reasons.

274 First, because we wish to hear from the parties about the making of an order setting aside the appointment of the strata manager in circumstances where the strata manager has been in place and, presumably, acting under that appointment for nearly 1 year. This was an issue that was raised by the Appeal Panel in *Bischoff* in which an appeal against such an appointment was upheld: see at [157]-[169] of that decision. In that case, after hearing from the parties about the form of order, for the reasons there indicated, the Appeal Panel made an order which varied the term of the appointment so that it expired on the date of the Appeal Panel’s orders. At present, we would be minded to make an order of the same nature.

275 The second issue concerns the terms of the orders for a variation of the amount of the special levy.

276 The Tribunal did not make an order in terms that the special levy raised on 28 November 2017 be set aside, although the order that it made for variation achieved the same outcome.

277 In order to achieve the outcome that follows from our reasons, it is necessary that we order that the orders made by the Tribunal for variation be set aside. We recognise, however, that such an order may have implications concerning the levies that were assessed by the Tribunal (as part of the variation orders) and, presumably, paid for the necessary repair work in respect of the stairs.

278 We wish to hear from the parties about such implications and about any consequential effect on the form of the orders we should make.

279 For now, we make the following orders:

(1) To the extent required, leave to appeal is granted.

(2) The appeal is allowed.

(3) The orders made by the Tribunal on 14 July 2020 concerning costs are set aside.

(4) Within 14 days after the date of publication of these reasons, the SPG appellants are to provide written submissions concerning the form of the remaining orders the Appeal Panel should make in disposing of this appeal, addressing the matters raised in paragraphs 273 to 278 of these reasons for decision, as well as addressing any orders sought concerning the costs of the appeal and the question whether the remaining matters should be dealt with on the papers and without a further hearing.

(5) Within a further 14 days, the respondents are to provide written submissions concerning the matters referred to in Order 4.

(6) The SPG appellants may provide written submissions in reply to the respondents' submissions referred to in Order 5 within a further seven days.

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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

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