Civil and Administrative Tribunal

New South Wales

Case Name:	Marinko v The Owners – Strata Plan No 7596
Medium Neutral Citation:	[2022] NSWCATAP 187
Hearing Date(s):	10 and 11 May 2022
Date of Orders:	07 June 2022
Decision Date:	7 June 2022
Jurisdiction:	Appeal Panel
Before:	P Durack SC, Senior Member D Robertson, Senior Member
Decision:	(1) The appeal is allowed. (2) The orders made by the Tribunal on 25 November 2021 and 10 February 2022 are set aside. (3) The proceedings are remitted to a differently constituted Tribunal for redetermination. (4) The redetermination of the proceedings is to be made upon the evidence already presented to the Tribunal at first instance and such further evidence as the parties may wish to present concerning events and circumstances that have occurred since 31 May 2021 (the last day of the hearing before the Tribunal), only. (5) No order as to the costs of the appeal.
Catchwords:	LAND LAW - Strata titles - application for the appointment of a compulsory strata manager under s 237 of the Strata Titles Management Act 2015 (NSW) (SMA) - alleged failure by the owners corporation to comply with consent orders made in earlier proceedings in respect of rectification work to be done for the benefit of a lot owner, including to raise special levies - alleged breach by the owners corporation of s 106 of the SMA - costs order made against the lot owner in dismissing his proceedings against the owners corporation on the

basis he was the unsuccessful party.

APPEAL - alleged errors of law, principally, by the Tribunal failing to respond to substantial and significant submissions and supporting evidence - whether Rule 38 of the Civil and Administrative Rules 2014 (NSW) was applicable to the proceedings at first instance and, hence, on appeal by reason of Rule 38A.

Legislation Cited:

Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited:

Allen v Tricare (Hastings) Ltd [2017] NSWCATAP 25
ARG 15 & Others v Minister for Immigration and Border Protection and Another [2016] FCAFC 174; 250 FCR 109
Bischoff & Ors v Rita Sahade & Anor [2015] NSWCATAP 135
Cripps v G & M Dawson Pty Ltd [2006] NSWCA 81
DYH v Public Guardian (No 3) [2022] NSWCATAP 34
Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; 77 ALJR 1088
Jabulani v Walkabout II Pty Ltd [2016] NSWCA 267
Lee v The Owners – Strata Plan No. 56120 [2021] NSWCATCD 8
Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120
Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67
Rice Marketing Board for the State of New South Wales v Forbidden Foods Pty Limited; Forbidden Foods Pty Limited v Rice Marketing Board for the State of New South Wales [2020] NSWCATAP 182
Rodger v De Gelder [2015] NSWCA 211
Secretary, NSW Department of Education v Gabriel's Family Day Care Pty Ltd [2021] NSWCATAP 263
The Owners - Strata Plan No 1813 v Keevers (No 2) [2021] NSWCATAP 229
The Owners – Strata Plan No 55773 v Roden (Costs) [2020] NSWCATAP 197
The Owners – Strata Plan No 58068 v Cooper (Costs) [2020] NSWCATAP 198
The Owners Corporation Strata Plan No. 63341 v

	Malachite Holdings Pty Ltd [2018] NSWCATAP 256 The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2) [2020] NSWCATAP 273 The Owners – Strata Plan No 76700 v Trentelman (No 2) [2021] NSWCATAP 268 The Owners – Strata Plan No 90189 v Liu (No 2) [2022] NSWCATAP 74
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Neville Marinko (Appellant) The Owners – Strata Plan No 7596 (Respondent)
Representation:	Counsel: D Knoll (Appellant) Solicitors: DEA Lawyers (Appellant) Chambers Russell Lawyers (Respondents)
File Number(s):	2021/00362501
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial
Citation:	Not applicable
Date of Decision:	25 November 2021; 10 February 2022
Before:	C Paull, Senior Member
File Number(s):	SC 19/56983

REASONS FOR DECISION

Overview

1 This is an appeal from the dismissal of the appellant's application in which the principal relief sought was the appointment of a compulsory strata manager under s 237 of the Strata Schemes Management Act 2015 (NSW) (SMA) to

carry out the functions of the owners corporation of a strata scheme in Sydney's lower North Shore (OC).

2 The appellant lives in a unit on the top floor of the block of strata units of the strata scheme. He sought the appointment of a compulsory strata manager after the OC allegedly failed to carry out the remedial work in relation to his apartment and to raise certain levies that it was ordered to do under consent orders made by the Tribunal on 20 February 2019 (Consent Orders) in earlier proceedings between the parties. The remedial work concerned water ingress affecting the appellant's apartment.

3 The appellant commenced the proceedings in December 2019. After a hearing, which for various reasons took place on five days commencing in May 2020, then on 1 September 2020, 18 January 2021, 25 May 2021 and 31 May 2021, the Tribunal dismissed the application (which also included some additional relief sought by the appellant related to the appointment that he sought). After the proceedings commenced and, also, during this hearing period, the OC carried out works, purportedly, in compliance with the Consent Orders.

4 For the reasons set out below, we have decided that the appeal should be allowed and the proceedings should be remitted to a differently constituted Tribunal for redetermination.

Background

5 The strata scheme was registered in 1973 and comprised 32 lots and common property. The appellant's unit is Lot 31. It is one of two lots on the 15th floor of the building. Outside the boundaries of his lot are two balconies which the lot enjoys. One adjoins the southern end, facing in a south-easterly direction, and services the living/lounge room of the appellant's apartment. The other adjoins the northern end of the lot, faces in a north-easterly direction, and services the two bedrooms.

6 There has been water ingress into Lot 31 since at least 2015. This has resulted in a number of proceedings between the parties, including the proceedings the subject of the Consent Orders There were earlier proceedings before those.

7 In one of those earlier proceedings the OC brought a successful claim for the appellant to replace the sliding doors leading onto both balconies: decision of Adjudicator, 28 April 2015, SCS 15/02171. The new sliding doors were installed by the appellant's contractor in January 2016.

8 The Consent Orders were made in proceedings in the Tribunal SC 17/53991 and SC 18/10142. The SC 17/53991 matter was a proceeding commenced by the appellant in December 2017. It was concerned with allegations by the appellant that the OC had failed to carry out a settlement agreement between the parties concerning remedial work and that the OC had failed to comply with its obligation under s 106 of the SMA to maintain and repair the common property.

9 SC 17/53991 was the second proceeding in the Tribunal commenced by the appellant against the OC. The first (SCS 16/14610) had led to Heads of Agreement, dated 18 July 2016, under which, amongst other things, the OC had agreed to carry out repairs to the common property in relation to concrete cancer and other works.

10 SC 17/53991 had been concerned with remedial work carried out by the OC in relation to such work, concrete repair, and re-tiling and waterproofing work carried out on the balconies, as well as the partial removal of magnesite on the internal floors of the apartment. Chloride in magnesite on floors can leach into the concrete floor slab causing concrete cancer.

11 Expert evidence had been presented by the parties in SC 17/53991 leading to a joint report resulting from a conclave between the experts held on 29 October 2018 (the Joint Experts' Report). The experts were Mr Sam Parker, an engineer engaged by the appellant and Mr Alden, an engineer engaged by the respondent.

12 The report covered the subjects "Building Roof Waterproofing", "Building Internal Areas" and "Property Balconies".

13 It was uncontroversial that the Consent Orders, insofar as they concerned remedial action to property, were founded upon the matters agreed between these experts as reflected in the Joint Experts' Report.

14 The report, relevantly, included the following in relation to "Building Internal Areas":

> 2.8 Levelling Compound…. [Status] Agreed…… there are some locations where the levelling compound is not within the 4mm in 2mm tolerance. This is a matter which needs to be rectified by the builder when access is granted. A good opportunity would be to do this in conjunction with other works such as removal of the rest of the magnesite.
>
> 2.10 Wall cavities and patching…. [Status] Agreed….. The performance of the wall flashings needs to be investigated in order to establish the presence of a problem with the waterproofing of the perimeter walls. In the event that a problem is identified, the objective is to establish to the extent possible the nature of that problem and the location or locations of that problem. It is expected that investigations would include water testing, endoscopic inspections, and perhaps localised opening up of brickwork.
>
> 2.11 Moisture readings…. [Status] Agreed…… There have been several high moisture meter readings. These need to be addressed and not ignored.

15 The report, relevantly, included the following in relation to "Property Balconies":

> 2.7 Remedial Action….. [Status] Agreed….. The following approach is considered appropriate in order to address the issues of freeboard (occurs at SE door-check for SW door), termination height, and perimeter joint.
>
> a) Remove tiles and screed along the full perimeter of north and south balconies excluding most of the length of the door hobs, being careful not to damage the water proof membrane and CFR strips.
>
> b) Remove SE door (check for SW door) for later replacement with new (reduced height) door. The reduction in height enables the new door to be installed higher in order to satisfy the freeboard requirement.
>
> c) At SE door (check for SW door) install new flashing angle at the back of the hob to the level of the top of the new sub- sill level, with returns at each end.
>
> d) Install new compatible membrane to all vertical surfaces (including new flashing angles at SE door) with particular attention to junctions at ends of hobs to a height of 80mm above finished tile level.
>
> e) Reinstall tiles and screed in accordance with AS 3958.1, ensuring that flexible joints are installed where stipulated in the standard (but not required along lengths of hobs).
>
> f) Install new SE door packed to new height.
>
> g) Make good on completion.
>
> h) All to detailed documentation.

16 With respect to the balconies, it was Mr Parker's opinion, in his report preceding the Consent Orders, that the waterproofing and tiling works carried out by the OC was defective.

17 The Consent Orders were, relevantly, as follows:

4. The Owners Corporation is to restore the floor levels in Lot 31 in areas where the Owners Corporation has removed the magnesite. Using qualified and licensed contractors the Owners Corporation will use a levelling compound so as to comply with clause 2.08 of the OFT Guide to Standards and Tolerances, as sought in the Amended Proposed Order 1 (a) (iii). The Owner of Lot 31 shall give the Owners Corporation sufficient access to undertake such works, provided the Owner of Lot 31 does not have to vacate his home to enable the works to proceed. The Owners Corporation is to commence the work within one week of being notified of such access and will complete that work within 14 working days after the work is commenced….

5. The Owners Corporation is to appoint an independent expert to carry out investigations (as set out in item 2.10 of the joint report) to the cavity flashings and the concrete column to the southern balcony, referred to in paragraphs 1 (c) (i),(ii) and (iii) of the Amended Proposed Orders to identify any water ingress issue and shall repair as necessary any such water ingress. The Owners Corporation shall commence such investigation by 31 July 2019 and shall complete any necessary repairs by 31 October 2019. (Subject to any application to the Tribunal for an extension of time).

6. The Owners Corporation shall make good any part of Lot 31 including the balconies damaged by any of the works referred to in the above orders or by previous works. The make good work shall include the work described at item 1 (h) (iv) of the Amended Application and will include the replacement of the external GPO on the northern balcony and connection of the replacement GPO to the existing power cables within the structure, and will also include repainting of the kitchen cornice and walls where mould stains remain. All work is to be completed by 30 November 2019.

…

9. (1) The Owners Corporation shall repair the balconies adjacent to Lot 31 so as to prevent further water ingress from the balconies into Lot 31, in accordance with the National Construction Code.

(2) These orders are without prejudice to the issue of whether the balcony hobs or doors are within Lot 31 or the common property. For clarity the Tribunal has not determined that issue.

(3) The work is to be completed by 30 November 2019.

…..

(5) The parties are to co-operate in good faith.

…..

(7) Dr Marinko is to provide the Owners Corporation's contractors reasonable access on 48-hour's notice.

….

(11) The Owners Corporation will raise a special levy to fund the cost of the work consequent on the final orders in these proceedings, other than the cost of the roof membrane which is already budgeted. The owner of Lot 31 will not be required to contribute to such special levy.

(12) In respect of the Owners Corporation's cost of the proceedings, to the extent not already budgeted, the Owners Corporation will raise a special levy

to fund those costs and the Owner of Lot 31 will not be required to contribute to such levy.

…..

18 Order 3 of the Consent Orders (not set out above) concerned the installation of a new roof membrane. No part of the appeal was concerned with the Tribunal's conclusions relating to this work.

19 The first order sought by the appellant in the proceedings the subject of this appeal was an order pursuant to s 237 of the SMA for the appointment of Advanced Community Management Pty Ltd as strata managing agent for a period of 24 months, or in the alternative 12 months, to exercise all functions of the owners corporation. Later, this was amended to be an appointment for the period of 12 months only.

20 Various other orders were, or came to be, sought in the application related to the order for the appointment of a strata manager, as well as relief sought concerning some by-laws, which relief it became unnecessary for the appellant to pursue.

21 Ultimately, the orders sought by the appellant were those filed on 20 January 2021. These included an order (Order 3) that the appointed strata managing agent cause the OC to undertake and complete without delay the works required to be performed under the Consent Orders. There followed specification as to what such work must include. Order 4 sought an order that the appointed strata managing agent cause the OC to comply with Orders 9 (11) and 9 (12) of the Consent orders by raising the required special levies. With respect to the special levy in Order (12) a specific amount was stated.

22 Witness statements from Dr Burman, as Chairman of the Strata Committee of the OC, presented by the OC in the proceedings, dated 6 March 2020, 28 August 2020 and 22 September 2020, made reference to investigative and remedial works contracted to be carried out after the Tribunal proceedings were commenced. This evidence also made reference to the issue as to the completion of these works. The position that came to be presented was that all remedial works the subject of the Consent Orders had been completed by 9 September 2020, except for some work the subject of Order 5, which work was otherwise almost complete and, in respect of which, the OC was ready, willing

and able to complete the works within a few days of being provided with access to Lot 31.

23 The issue of completion of the works in the Consent Orders remained in dispute. For the present, suffice to say that evidence as to completion of the works, which to a considerable extent was most readily able to be given by the OC (they engaged the contractors in respect of the work), was less than clear.

24 One of these steps taken by the OC (the subject of Order 5), which was addressed by Dr Burman, resulted in two expert reports from Mr Blair. The first, dated 6 March 2020, was a preliminary report only, following verbal instructions received from Dr Burman. The second report from Mr Blair, dated 21 May 2020, followed results of testing he carried out on the façade of the building and unit interior. The report contained moisture testing results after water testing to the exterior eastern and western walls, which included one location in respect of the east wall that indicated it was wet and three other locations in respect of the east wall that indicated they were considered "at risk".

25 Mr Blair identified some deficiencies in the common property and set out (at 1.25 (a)-(j)) 10 items that he proposed in respect of what he described as "this alternative scope for identification and subsequent rectification of the alleged defect if found". The items were as follows:

> (a) Remove and reinstall all elastomeric seals where degraded to the brick panel perimeter on the eastern and western panels….
>
> (b) If the brick panel is forward of the roof slab a drip edge of aluminium angle or flat bar should be installed and sealed to the concrete slab edge…..
>
> (c) Allow to re-seal any fixings in parapet where degraded.
>
> (d) Allow to replace or over flash the parapet capping where cracked….
>
> (e) Allow to remove salt effected render within the apartment to both the east and west walls….
>
> (f) Allow to reapply a proprietary cement render… to the removed area.
>
> (g) A skim coat shall be applied to the entire wall to the nearest architectural break to remove evidence of the render junction….
>
> (h) Prime the surface ready to receive final paint finishes (by Lot owner).
>
> (i) Allow to monitor the efficacy of works by taking moisture readings and thermal imaging in the subject walls over a three-month period (reporting to coincide with rain events)….

(j) If and only if evidence of water ingress is found to be affecting the inner skin. …. then further rectification options should be considered. Based on the boroscope inspection this work would entail cavity cleaning and if required cavity flashing installation by external skin access…

Sections 237 and 106 of the SMA

26 Section 237 of the SMA, 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, or
>
> (b) to exercise specified functions of an owners corporation, or
>
> (c) to exercise all the functions other than specified functions of an owners corporation.
>
> (2) **Order may confer other functions on strata managing agent** The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—
>
> (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.
>
> (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
>
> (b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
>
> (c) an owners corporation has failed to perform one or more of its duties, or
>
> (d) an owners corporation owes a judgment debt.
>
> …..
>
> (8) **Persons who may make an application** The following persons may make an application under this section—
>
> (a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

> (b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,
>
> …..

27 Section 106 of the SMA, 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...

Grounds of appeal

28 Under s 80 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) a party may appeal as of right to the Appeal Panel in an internal appeal on any question of law. In respect of any other grounds, in the case of an appeal from the Consumer and Commercial Division of the Tribunal, as this is, the appellant must satisfy the Appeal Panel that leave to appeal should be granted under cl 12 of Schedule 4 of the NCAT Act on the basis that:

> …..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)

29 Whilst there were numerous grounds of appeal, it became apparent at the hearing of the appeal that the principal ground was that the Tribunal had failed to engage with significant aspects of the appellant's case. This was a contention that the Tribunal had made an error of law. Other grounds of appeal included that the decision was legally unreasonable, that there were findings that were unsupported by any evidence and that where leave to appeal was required this ought to be granted because the decision was not fair and equitable and was against the weight of the evidence.

30 There will be a failure to accord natural justice or a constructive failure to exercise the Tribunal's jurisdiction, or both, where the Tribunal does not respond to substantial submissions, squarely raised and seriously advanced:

Rice Marketing Board for the State of New South Wales v Forbidden Foods Pty Limited; Forbidden Foods Pty Limited v Rice Marketing Board for the State of New South Wales [2020] NSWCATAP 182 at [170]-[175]; *Secretary, NSW Department of Education v Gabriel's Family Day Care Pty Ltd* [2021] NSWCATAP 263 at [108]-[111]; *Rodger v De Gelder* [2015] NSWCA 211 at [93], [107]-[110]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088, at [24] per Gummow and Callinan JJ (Hayne agreeing at [95]) .

31 As was said by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 (at [34]; see also *ARG 15 & Others v Minister for Immigration and Border Protection and Another* [2016] FCAFC 174; 250 FCR 109 at [65]-[67]):

> …. Where a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the applicant's claims and the findings and evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight…"

32 We consider, first, this principal ground of appeal.

The parties' cases before the Tribunal

33 In broad terms, the case for the appellant before the Tribunal was that there had been egregious failures by the OC to comply with the Consent Orders, persistent failure by the OC to perform its obligations under s106 of the SMA and patent failures in the functioning of the governance and management structure in relation to compliance with the Consent Orders and the statutory obligation in s106. The failures demonstrated dysfunctionality and a persistent and obstinate refusal to comply with Tribunal orders: [8] and [9] of the appellant's written submissions in reply at first instance (ARS). It was contended that the appointment by the Tribunal of a statutory managing agent was necessary in order to ensure that the Consent Orders are fully carried out.

34 The appellant contended that there had been failures to comply with Orders 3, 4, 5, 6, 9 (1), 9 (11) and 9 (12) of the Consent Orders. He presented to the Tribunal expert reports from Mr Parker and Mr Alden, various witness statements from himself and documentary evidence.

35 In answer, the OC contended that it had "wholly or substantially complied" with the Consent Orders: see [10] of the respondent's closing written submissions at first instance (RCS). The respondent also contended that it was satisfactorily exercising all its functions under the SMA and that the appellant had failed to establish reasonable grounds for the appointment of a compulsory strata manager: RCS [7].

36 The OC presented expert reports from Mr Blair (concerning Order 5 of the Consent Orders) and Mr Straw (concerning Order 9 (1) of the Consent Orders) and various witness statements, including from Dr Burman (the then Chairman of the Strata Committee, concerning compliance with the Consent Orders), Mr Bowen (the Managing Director of the strata managing agent, concerning the functioning of the strata scheme) and Mr Larrson (from Direct Building Pty Ltd, concerning Orders 4 and 5 of the Consent Orders), as well as documentary evidence.

37 At the request of the Tribunal, the parties prepared a "Joint Schedule of Completed Works", dated 24 November 2020, containing a summary of the parties' positions concerning the status of works in relation to Orders 3, 4, 5, 6 and 9 (1), along with information as to the issues in dispute and the evidence the parties relied upon. This included the following:

(1) It was agreed that the roof membrane works the subject of Order 3 had been completed on 30 July 2020.

(2) There was a dispute as to whether the floor levelling works the subject of Order 4 had been completed.

(3) There was a dispute as to whether both the external and internal works the subject of Order 5 had been completed.

(4) There was a dispute as to whether the make good works the subject of Order 6 had been completed.

(5) The position of the parties in relation to Order 9 (1) was stated as follows:

Applicant:

a. No work done to balconies and water ingress continues

Respondent:

a. No water ingress from the balcony. Installation of the doors is defective and not the responsibility of the owners corporation.

38 With regard to Order 9 (1), it is important to note that the respondent did not take issue with the applicant's (appellant) statement in the joint schedule that no work had been done to the balconies.

39 At hearings after the preparation of this joint schedule, witnesses for the respondent, including Mr Straw and Mr Larrson, were cross-examined and, with his closing written submissions, dated 15 June 2021 (ACS), the appellant presented a table with a summary of the contended status of the remedial work the subject of Orders 3,4,5,6 and 9 (1) of the Consent Orders.

40 Relevantly, the table presented with the ACS contained the following:

> [**Order**] 4 [**Status**] On 11 September 2019 Dr Marinko provides notice of access. Works undertaken in the living room commenced only on 22 October 2019 (4 weeks after the earlier orders required it to do so). Further work occurred in July and September 2020. As at 27 September 2020, the floor levelling work in the living room and main bedroom is still defective. The floor levels have not been restored not least because Mr Larrson was never instructed to restore the levels.
>
> [**Order**] 5 [**Status**] Mr Blair's attendance at Lot 31 was arranged only in May 2020 (10 months after the earlier orders required it to do so). In his report dated 21 May 2020 he set out a scope of that which needed to be done, but the Respondent owners corporation has not produced evidence of compliance with a substantial portion of that scope.
>
> [**Order]** 6 [**Status**] Some of the works undertaken pursuant to Order 5 resulted in render (and paint) being removed from the Lot 31 living room walls. The walls were re-rendered and given an undercoat, but not made good by restoring the original paint colour and finishes on the walls. On 1 November 2019 a painter attended and painted the kitchen and the balconies. On 20 November 2019 Dr Marinko reports to the strata committee and provides them with photographs of the poor standard of painting. The owners corporation accepted that those works were poor and needed to be redone. The repainting on 20 and 21 July 2020 was no closer to satisfactory. The owners corporation has replaced the skirting tiles on the northern balcony, but it has not made good the internal walls and skirting damaged by the previous removal of magnesite by the owners corporation, and the attempted but defective floor levelling work. As noted above, the living room ceiling is cracked and stained by black marks likely to be mould. The skirting boards in the living room and bedrooms have large gaps between them and the floor due to the floor levels not having been restored, when that work is done, they will need to be made good including by repainting. Also, the Carpet smooth edge strips-the carpet smooth edge strips have not been affixed to the floor.

[**Order**] 9 (1) [**Status**] The owners corporation has not done any work on the balconies (even that proposed by Mr Straw, albeit based on doors without sub sills when it is common ground that the doors on the balconies have subsills) but rather arranged for some water testing which first occurred on 22 July 2019. Dr Marinko continues to report water ingress from the balcony.

41 The ACS and ASR contained detailed submissions expanding upon the matters referred to in this status of remedial works table, along with submissions, including:

(1) With respect to Order 9 (11) of the Consent Orders, no levy had been raised for any of the works ordered in the Consent Orders, the respondent had proffered no explanation for its failure to comply and the only way compliance could be addressed was by appointing a strata managing agent under s 237. In the reply submissions (ASR) it was submitted that the OC failed to take the opportunity to raise the special levy at the general meetings of the OC on either 20 November 2020 or 11 January 2021 and that the statutory scheme for raising levies was, sensibly, forward facing and not a reimbursement scheme after the work had been done.

(2) With respect to Order 9 (12), Dr Burman's generalised and unexplained statement (the only evidence presented on the matter) that the motion passed for a levy for the sum of $39,551.35 on 4 March 2020 was in accordance with the requirements of the order, was patently wrong. The costs of the proceedings, to the extent that a search of the OC's records could discover bills, were $205,692.59 and only some of $3000.00 could be found in the only two relevant budgets that preceded the Consent Orders. There had been a contumacious breach of this order, which still today had not been complied with. In the reply submissions (ASR) a detailed argument (in 19 paragraphs) was set out as to why the OC's submissions in their closing written submissions (RCS) were not open on the evidence or were undermined by demonstrable error. The OC's reliance on the figure of $75,000.00 was referred to in the relevant budget as "Capital Works Fund-"Maint Bldg-Consultants" $75,000", which provided no support for the assertion that this was legal costs of the proceedings, all the more so when the relevant budgets included separate line items for legal costs and no witness had supported such an assertion. The detailed submissions in the ASR culminated in a conclusion that an amount of $118,205.15 needed to be raised by the special levy.

(3) With respect to Order 9 (1), it was Dr Marinko's unchallenged evidence that water ingress into his unit from the balconies continues when there is rainfall. Mr Straw's testing was a limited exercise which did not attempt to contradict the remedial action on the balconies agreed in the Joint Expert's Report and, in any event, was defective. Furthermore, Mr Straw's first flood test had led to a significant drop in the water level over a period of time. To the extent that water ingress was caused by a defect with the hobs, these were part of the balcony and part of the common property for which the OC was responsible. In the reply

submissions (ASR) it was submitted that for the OC to suggest that no balcony repairs were required, having consented to doing them and having admitted that they have not been attended to, beggared belief. As to contentions that it had not been shown that the source of the water ingress was from the balcony, rather than the doors or the walls, this was answered by evidence from Mr Parker in his reports that was not challenged in cross-examination. Also, it was submitted that the OC had made no attempt to defend Mr Straw's defective testing.

(4) With respect to Order 4, in breach of the order Mr Larrson had been instructed not to restore floor levels but rather to smooth them (transcript, Appeal Book page 2891, lines 3500-3521) and that was more than 12 months after the order had been made. Astonishingly, Dr Burman said in cross-examination that the OC was not obliged to restore the floor levels to the state they were in before the work commenced (transcript, Appeal Book page 2757, lines 2223-2245). Mr Larrson had accepted in cross-examination that before he commenced his work the bottom of the skirting board was level with the magnesite and that he had left a sizeable gap between the floor and the skirting. Furthermore, before 25 February 2020, Mr Larrson had only been instructed to do work in the lounge room (transcript, Appeal Book page 2879, line 2922). In the reply submissions it was pointed out, correctly, that the OC had not engaged with these submissions.

(5) With respect to Order 5, it took until seven months after the agreed deadline for Mr Straw and Mr Larrson to attend and commence an investigation of the cavity flashings. It was only on the eve of the first hearing day that Mr Blair produced a final report dated 21 May 2020. Only 1.25 (a) of Mr Blair's work items was attended to. There is no evidence that any of the work items suggested by Mr Blair in paragraphs 1.25 (b)-(j) have been undertaken and completed. The scope of work Korrect Pty Ltd was engaged to carry out by Dr Burman was not to complete all that Mr Blair required. In the reply submissions it was submitted that whilst Mr Larrson from Direct Building Pty Ltd did do some of the internal works required by Order 5 the work was left incomplete.

(6) With respect to Order 6, the make good painting work on the northern balcony was unsatisfactory (as established by photographs) and work the subject of Order 5 had led to make good work in re-rendering and under coating the living room walls but this had not been made good by restoring the original paint colour and finishes on the walls, as established by evidence from Dr Marinko.

(7) No explanations were provided for the extensive delays in taking any steps toward meeting the ordered time requirements.

(8) There was a considerable degree of dysfunction with the running of the OC. The strata committee appeared not to be in control of complying with the Consent Orders. No one owned up to taking responsibility for ensuring compliance with the consent orders. An email sent on 19 August 2019 by Mr Bradhurst (who died on 9 October 2019) to the

Strata Committee illustrated the problem. The email expressed concern that there was now a credible risk of their failing to meet the deadlines in the Consent Orders and he offered to undertake more responsibility for achieving compliance, but there was no evidence of the Strata Committee taking control and matters were left in the hands of Dr Burman.

(9) Furthermore, opposition by Dr Burman and "his group" to attempts to require strata committee members to share communications and to require committee members to obtain the approval of the strata committee before taking action that incurred costs illustrated dysfunction.

(10) An appointment of a strata manager under s 237 was the only way to ensure there was compliance with the Consent Orders.

42 The OC's submissions in its written closing submissions (RCS) included:

(1) The OC was satisfactorily exercising all its functions under the SMA and the applicant had failed to establish reasonable grounds for the order sought under s 237. The OC had complied with its requirements to issue agendas, hold meetings, vote on and pass motions, raise levies, issue minutes of meetings, maintain valid insurance and was in a healthy financial position.

(2) The OC had wholly or substantially complied with the Consent Orders. To the extent there was any question as the scope of that compliance or the time within which that compliance was achieved, these factors did not go to whether the OC was satisfactorily functioning in a forward-looking sense.

(3) Such orders as were sought in the amended orders which sought to make further provision as to the manner in which the Consent Orders were to be carried out were not within the jurisdiction of the Tribunal since the application was not a renewal application, nor an application for the enforcement of the Consent Orders or an appeal from those orders.

(4) If a compulsory strata manager was appointed, it was not open to the Tribunal to make orders requiring the strata manager to carry out specified steps.

(5) As to compliance with Order 9 (11) of the Consent Orders, as was stated by Dr Burman, the OC had not raised a special levy for the works because the full extent of those works had yet to be finalised. (We note that this was a reference to Dr Burman's statement in his witness statement dated 6 March 2020, at [48], that "… The Owners Corporation says that the work consequent to the final orders in these proceedings has yet to be finalised and therefore, the full extent of the cost of these works is yet to be determined"). It was also submitted that it was appropriate for the OC to raise such a levy at the completion of all the works required under the Consent Orders. In this regard, it was noted that Order 9 (11) did not provide for any timeframe for raising the levy.

(6) As to compliance with Order 9 (12) of the Consent Orders, the OC had complied with this order. It submitted that the OC's costs of the proceedings had been $145,526.35 and that the special levy in the amount of $39,551.35 raised at the general meeting on 4 March 2020 was the balance needed after account was taken of the costs paid in the 2017/2018 year and the costs budgeted in the 2018/2019 year for "building maintenance consultants" in the sum of $75,000.

(7) As to compliance with Order 9 (1), the order required the OC to prevent water from entering from the balcony into Lot 31 and the applicant had not met its onus to prove that water ingress stems from the balcony and not some other source. In this regard, the applicant's evidence had not differentiated between the balcony, the doors, or the walls as to the source of water ingress. Furthermore, the wall and doors between the interior and the balcony were not common property and it was clearly implied in the order that the work required to be undertaken was to the balcony and not to the door, the frame or the wall. Also, in this regard there had been a decision by an Adjudicator in the 2015 proceedings between the parties that the balcony doors were not common property and this gave rise to a binding issue estoppel between the parties as to the ownership of the subject walls and doors. Also, the hob had been installed by Windowline at an inadequate level and this was part of the wall and not part of the common property.

(8) As to compliance with Order 4 of the Consent Orders, whilst the OC acknowledged there were delays in attending to the floor levelling works, the OC came to complete the required remedial works in July 2020, as stated by Mr Larsson, and the applicant had failed to establish that the works were incomplete or unsatisfactory. In particular, the applicant had provided no expert evidence that such works were not completed in July 2020, the only evidence being photographs provided by the applicant himself, which were inconclusive.

(9) As to compliance with Order 5 of the Consent Orders, these works were completed as a result of work done by the OC's contractor, Kerrect Group Pty Ltd, in June 2020, and, subsequently, by its contractors Direct Building Pty Ltd and Permatec. The applicant relied solely on the delays in carrying out the works or that such works were not undertaken strictly in accordance with the scope of works outlined in the Blair report dated 21 May 2020. However, it is not established that the works required by the order are incomplete or that there are any ongoing issues with the cavity flashings.

(10) As to compliance with Order 6 of the Consent Orders, the applicant had failed to establish that works which were done were incomplete or satisfactory and that the OC had not satisfied its obligations under this order.

43 In opening submissions on the first day of the hearing of the proceedings at first instance (22 May 2020), Mr Russell, solicitor, who appeared for the OC, submitted that the "non--compliances" as they stand do not warrant the

appointment of a compulsory manager, which was a draconian step, and that, whilst these were not ideal they were explicable, and the OC's progress and intention to proceed made the ordering of a compulsory appointment at this stage highly premature (transcript, Appeal Book 4/2602 at line 1738).

44 Mr Russell also submitted that if the Tribunal were minded to consider a compulsory appointment, which the OC opposed, the Tribunal would not consider an appointment for all the functions of the OC but rather a limited appointment relating specifically to the orders in question (transcript, Appeal Book 4/2602 at line 1744).

The Tribunal's decision and aspects of the appellant's case which were not addressed

45 The Tribunal noted that the applicant (appellant) sought orders pursuant to s 237 of the SMA to have a managing agent appointed to exercise all of the functions of the OC and all the executive functions of the Strata committee, which it defined as the Principal Order: [8].

46 The Tribunal, briefly, summarised the appellant's case as being that the OC had failed to comply with the Consent Orders, in particular, that the rectification work required had been delayed; at best, partially done; and where done, not to a satisfactory standard. It referred to the case that the OC's failures to comply with the Consent Orders and pass resolutions aimed at financially protecting the applicant pointed to the need for the Principal Order. The Tribunal also referred to the applicant's case that the OC was incapable of complying with the Consent Orders and so those orders could not be implemented without the orders sought being made: [14]-[17].

47 The Tribunal, briefly, summarised the OC's case as being that an order under s 237 was not warranted because of "substantial" compliance with the Consent Orders as at the date of the hearing, albeit that this compliance extended beyond the time frame provided under the Consent Orders: [18]-[20].

48 The Tribunal stated that the applicant's case was founded upon the premise that the OC had breached the Consent Orders, which was a matter referred to in s 237 (3) (b) of the SMA and, accordingly, it was within the Tribunal's powers to consider whether the OC had failed to comply with the Consent Orders so as

to determine whether and *exactly how* to exercise its jurisdiction under s 237 of the SMA: [21]. [Our emphasis].

49 The Tribunal stated the issues for determination as being (at [21]):

(1) Should the Tribunal exercise its discretion and make the Principal Order?

(2) In the event that the Tribunal makes the Principal Order should the Tribunal make the "Related Orders" sought?

50 Whilst not expressly stated, we interpose to note that it appears from a reading of the reasons as a whole that the Tribunal recognised that there was an anterior issue to be considered before it came to the question whether it would exercise its discretion to make orders under s237, namely whether the condition for the exercise of the power set out in s237 (3) (b) had been established.

51 The Tribunal then turned to examine the Consent Orders in the order in which the appellant had addressed them in his in the ACR, namely, special levies (Orders 9 (11) and (12), repair to balconies (Order 9 (1), repairs to the floors (Order 4), cavity flashings (Order 5, make good works (Order 6) and roof membrane (Order 3): [24]-[68].

52 We will return to that section of the reasons, shortly.

53 Following this section about the Consent Orders, the Tribunal set out its conclusions with respect to the subject "Should the Tribunal exercise its discretion and make the Principal Order sought under s 237 of the Act". These were as follows:

> [69] There is no issue that the respondent is obliged under the Act (s106) to maintain and repair all common property structures to ensure that the applicant's lot is waterproof.
>
> [70] Clearly the Consent Orders set out what the respondent was required to do to meet and discharge that obligation and the respondent was and remains liable to comply with those orders.
>
> [71] Further, as is apparent from my comments and conclusions, when dealing with the Consent Orders above, the respondent has delayed in complying with the Consent Orders and hence has been in breach of those orders and in meeting its statutory obligations under the Act.
>
> [72] In some instances where the delay has been left unexplained, this constitutes a serious matter.

[73]-[81] [The Tribunal considered why there had been delay]

[82] What the applicant emphasises, however, is that the respondent's failure to comply with the Consent Orders and hence its failure to maintain and repair common property, should lead the Tribunal to make the Principal Order.

[83]-[84] [The Tribunal referred to the question whether the OC was discharging its day-to-day statutory obligations].

[85] However, the applicant does not raise these matters [failure by the OC to discharge its obligations to hold meetings, disseminate documents and information, entry into required contracts such as insurance or striking of levies, other than those in Order 9]. In seeking the Principal Order the applicant maintains that the respondents delayed actions in addressing its obligations to repair the matters the subject of the Consent Orders justify the making of the Principality Order….

[86] In considering this submission I return to my conclusions and comments, as noted above, in relation to the Consent Orders.

[87] In some instances, the applicant's evidence as to the state of the work the subject of the Consent Orders at the time he commenced these proceedings and the delay by the respondent up to that time, has been persuasive. Nonetheless, as matters now stand and as time moved on, the moment has now passed. Most matters have now been addressed and those that remain are not of a nature, whether considered singularly, or as part of a whole, to attract the operation of s 237 of the Act.

[88] For example, the evidence as to and the ramifications of, the failure to strike the remedial work levy and legal costs levy; the evidence as to the cause of any ongoing balcony problems; the seriousness of levelling the floor; the need, if any, to revisit the cavity flashings and the roof membrane; and the gravity of any matters that may remain in relation to the make good works Consent Order, did not come within the ambit of what is envisaged under s237 order.

[89] An order which will result in a new regime whereby a compulsorily appointed strata manager is placed in the shoes of the respondent, thus stripping the respondent of all its rights, duties and obligations. An order which the applicant seeks at the higher end of the restrictions allowable under s 237, namely, to appoint a strata managing agent to administer all the functions of the respondent and the Executive Committee.

[90] Certainly, there has been delay by the respondent and some instances of a broad brush approach in tackling some of the Consent Orders. This is not to be disregarded or taken lightly. Nonetheless, as matters currently stand, the applicant has failed to establish that an order within the ambit of what is envisaged under S237 of the Act and of the magnitude of such an order, is warranted on the evidence before the Tribunal.

[91] While the applicant submits that the respondent's failure to comply with the Consent Orders, which date back to 2019, is indicative of the ongoing possibility that this situation will persist in the absence of an agent appointed under s 237 of the Act to take control of the situation, the evidence of the current situation of compliance with the Consent Orders, does not support such a submission.

54 Based upon these conclusions concerning the Principal Order, the Tribunal said it was not necessary that it determine the second issue about making the "Related Orders": at [92].

55 Before returning to the section of the reasons concerning the Consent Orders, we make the following observations about the Tribunal's conclusions that we have just referred to:

(1) The Tribunal's consideration as to whether to exercise the power under s237 was founded upon its findings and comments concerning compliance with the Consent Orders. This was *not* a conclusion founded upon an approach that accepted or assumed non-compliance with the Consent Orders taking the appellant's case about non-compliance at its highest.

(2) The Tribunal addressed the question whether an appointment of a strata manager to exercise *all* functions of the OC was warranted and not whether a more limited appointment referable to carrying out the Consent Orders was warranted. Nevertheless, the Tribunal's broad assessment of the matters that remained to be attended to might suggest that it would not have considered such a more limited appointment to be warranted.

(3) On appeal the appellant, strongly, criticised the Tribunal's conclusion that the matters of non-compliance it made specific reference to did not fall within the "ambit" of s 237: at [88]. It was submitted that the Tribunal had misunderstood the provision, asked itself the wrong question and, thereby, erred in law. It is unnecessary for us to come to a firm conclusion about this aspect of the appeal because we have decided that the appeal succeeds for another reason. Nevertheless, the language used by the Tribunal does suggest that it, incorrectly, took the view that the facts concerning non-compliance with the Consent Orders, as it found them to be, meant that it was not open to the Tribunal to make an order under s 237 (1).

(4) If not entirely clear, at least, the impression gained is that to the extent there were findings of non-compliance with the Consent Orders this was confined to non-compliance by delay, rather than failure to carry out the work at all.

(5) Earlier in this section of the reasons the Tribunal considered why there had been delay: at [73]-[84]. One of the matters it addressed was reliance by the OC on those it engaged to carry out the work and the difficulty the OC, as a collective body, had in trying to get those it engaged to take action: at [74]-[76]. It said that this was made clear by an email from Dr Burman to Mr Larsson in August 2019. This is a reference to the email chain we referred to earlier in the reasons which commenced with the email from Mr Bradford to Dr Burman. However, the Tribunal appears to have misunderstood that the content of the email it referred to in its reasons was the email from Mr Bradford to Dr

> Burman setting out his concern that none of the work the subject of the Consent Orders had been done without any suggestion that this was due to the difficulty the Tribunal referred to. Once this is appreciated, it is impossible to regard this email chain as supporting a conclusion of difficulties faced by the OC in taking action. Whilst, as the appellant contends, this is an error of fact, there is no need for us to take this any further in view of the separate reason we have accepted for upholding the appeal.

The Consent Orders

56 We return to the section of the reasons that addressed the Consent Orders. In doing so, for the purpose of addressing the argument that the Tribunal erred by failing to engage with significant aspects of the appellant's case, we express views about the merits of contentions by the appellant that were not addressed by the Tribunal because this is relevant to an assessment of the need for the Tribunal to respond to these contentions. Obviously, these are not final views as to the merits of these contentions.

57 The Tribunal, first examined the special levies to be raised with no contribution from the appellant (Orders 9 (11) and (12)).

Orders 9 (11) and (12)

58 As to the special levy for the works (Order 9 (11)), the Tribunal's briefly stated conclusions were:

> [30] As the respondent submits, neither of these Consent Orders have a timeframe.
>
> [31] Further, the respondent's explanation that it has waited for the full rectification cost involved to be substantiated, before proceeding to strike a special levy, while not strictly necessary, is to some extent plausible.

59 These reasons did not address the appellant's meritorious contentions which took issue with the relevance and appropriateness of Dr Burman's explanation back in March 2020 that "… The Owners Corporation says that the work consequent to the final orders in these proceedings has yet to be finalised and therefore, the full extent of the cost of these works is yet to be determined" by reference to the absence of a resolution to raise the levy at the general meetings in November 2020 or January 2021, being times that were subsequent to the OC's position that the works had been completed, or to the reasonable expectation that the special levy would be raised before the works were embarked upon.

60 As to the special levy for the costs of the proceedings the subject of the Consent Orders (Order 9 (12), in addition to the above point that no timeframe had been stated for raising this levy, the Tribunal concluded that the evidence as to the amount struck for a special levy was conflicting and that the applicant had failed to substantiate his case that the OC had failed to raise a sufficient levy "to the extent not already budgeted". In this regard, the Tribunal concluded that the best evidence as to the striking of a special levy was the levy raised for a sum of $39,551.00 at the general meeting on 4 March 2020.

61 These reasons did not address the appellant's detailed and meritorious contentions (referred to in paragraph 41(2) above) in support of a very substantial figure for legal costs that had not yet been raised by a special levy, including the lack of evidence in support of the claim that the levy of $39,551.35 was sufficient, from which it is difficult to see how, as the Tribunal found, the evidence was conflicting, rather than all one-way in favour of the appellant, and that the appellant had failed to substantiate his case.

62 Plainly, on their own, as well as in conjunction with the other matters concerning the Consent Orders, these aspects of the appellant's case concerning the special levies were significant matters in respect of the claim for the s 237 appointment.

63 As to the appellant's case concerning both special levies, the Tribunal concluded:

> [34] It must follow from the above that neither of these matters are overly persuasive in assisting the applicant to obtain the Principal Order under s 237 Act.

Order 9 (1)

64 Next, the Tribunal examined repair to the balconies Order 9 (1).

65 The Tribunal's consideration of this subject proceeded on the incorrect basis that it was uncontroversial that the OC had carried out *some* rectification work in respect of this order and that the OC disputed the need for "any more work": at [35] and [36]. As appears from our references to the parties' cases on this subject above, in fact, it was common ground that the OC had carried out *no* rectification work the subject of this order.

66 At the hearing of the appeal, Mr Russell, tentatively, suggested that the Tribunal may have been referring to the rectification work on the balconies that occurred before the proceedings the subject of the Consent Orders were commenced. However, it is clear enough that the statements by the Tribunal were directed at the rectification work the subject of the relevant order (Order 9 (1)) because, in this section of the reasons, the Tribunal was examining the issue of compliance with these orders-hence, the reference to the OC's alleged position that it disputed the need for *any more* work to be done under the order. Furthermore, the much earlier rectification work done before the Consent Orders was irrelevant to this assessment. Yet further, nowhere in the reasons did the Tribunal acknowledge the common ground that no work had been commenced in respect of this order.

67 In truth, the OC's position was that it did not need to carry out *any* work at all under this order because, so it said, Mr Straw's testing showed that no water ingress was coming from the balconies.

68 The Tribunal's conclusions then proceeded as follows ([36]-[41]):

(1) It referred to the OC's contention that any further work that may be required arose from the installation of doors which were not common property and, hence, not the OC's responsibility.

(2) The evidence concerning the flaw in the doors was based upon what appeared to be thorough and extensive hands-on testing by Mr Straw.

(3) There was no persuasive evidence to refute or replace the results of Mr Straw's examination and the matters raised by Mr Parker taking issue with the testing, such as its duration of it and limitations in the testing process, did not dislodge the weight of the examination undertaken by Mr Straw.

(4) The fact that Mr Straw acted in accordance with specific instructions from Dr Burman did not undermine the weight of his investigation and testing.

(5) Whilst the applicant's evidence that as at July 2020 water seepage from the balconies was causing wet carpet was not directly refuted, the expert evidence did not necessarily lead to a conclusive finding that the OC was responsible.

(6) The Tribunal then stated:

> [41] Even if this is not the case, the nature of what is in issue does not render the matter critical or persuasive in considering the Principal Order sought.

69 These reasons do not address the appellant's meritorious case that no rectification work at all had been carried out on the balconies in circumstances where, plainly, the order required some work, that there was unchallenged evidence that water ingress was coming from the balconies, that Mr Straw's testing had not been directed at excluding causes of water ingress that were additional to the doors, including deficiencies with waterproofing of the balcony identified by the Joint Experts' Report, which Mr Straw did not refute and, in fact, appeared to support, and that defects with the hobs as one of the causes of water ingress fell within the work required under Order 9 (1) because these were part of the balcony (the order required "repair the balconies"), which did not raise the question whether a part of the building was the OC's responsibility because it was common property.

Order 4

70 Next, The Tribunal examined repairs to the floors (Order 4).

71 The Tribunal's reasons on this subject were as follows ([42]-[49]):

(1) The Tribunal referred to the requirement in Order 4 for the OC to restore the floor levels where the respondent had removed the magnesite.

(2) The Tribunal referred to Mr Larsson's evidence that he had been instructed by Dr Burman to smooth rather than level the floors and that prior to commencing the work the floor was level. It said that as the evidence unfolded it appeared that an attempt was made to level only those parts of the floor where rectification work was carried out. (We note that the references here to "the work" and the "rectification work" must be a reference to the work carried out by the OC prior to the Consent Orders to repair the concrete slab).

(3) The Tribunal remarked that one had to seriously query whether under the Consent Orders the OC had to really level more than the area where it undertook rectification.

(4) The Tribunal also said that the further difficulty the applicant faced was that his photographs were not substantiated by any compelling evidence of the matters of which he complains and that, what is more, there was conflicting evidence, including photographic evidence from Mr Larsson.

(5) The Tribunal then referred to Mr Larsson's evidence which suggested there was cracking, as complained about by the applicant, but this appeared to be a matter that had arisen post the Consent Orders.

(6) The Tribunal then concluded:

> [49] Once again, the nature of what is in issue in the evidence in support, does not render the matter critical or persuasive in considering the Principal Order sought.

72 These reasons do not make findings on the meritorious case presented by the appellant, namely that the smoothing, but not levelling, work carried out by Mr Larsson was not what the order required "to restore the floor levels" and to do so "in areas where the Owners Corporation has removed the magnesite" (not only where they had rectified the concrete cancer), that this was a clear breach of the order that was occasioned by an instruction from Dr Burman which was at odds with the terms of the order, and that the photographic evidence was immaterial in light of Mr Larsson's clear evidence as to what he had been instructed to do. Furthermore, the delay had been occasioned by an initial instruction to only do levelling work in the living room.

Order 5

73 Next, the Tribunal examined cavity flashings and other matters the subject of Order 5.

74 The Tribunal's reasons on this subject were as follows ([50]-[55]):

(1) Some rectification work was carried out by Kerect Pty Ltd, albeit after the time required by the Consent Order. The OC also engaged Direct Building Pty Ltd and Permatec to attend this matter.

(2) The appellant submits that in the absence of any evidence from those who carried out, supervised or monitored the work, the OC's claim that the matter was concluded in September 2020 was baseless.

(3) The Tribunal's only conclusion on the subject was:

> [55] It is the case that the respondent delayed in attending to this matter. However, it is also the case that the applicant's allegations that the work that was eventually done has failed to address the problem, remain simply that, allegations without any substantiation. As such nothing of any import turns on this matter.

75 These reasons did not address the appellant's case, directed at the terms of Order 5, (not whether the appellant had established that the work that was done had "failed to address the problem ") that those parts of the work which needed to be done, as identified by Mr Blair's report, following his investigation, namely items 1.25 (b), (c), (d), (i) and (j) had never been carried out.

76 So far as items 1.25 (b), (i) and (j) are concerned, on the material we have seen, there was, at least, a substantial basis for a conclusion that the appellant

was correct in saying there was a failure to comply with the order in these respects. In the first place, the OC presented evidence from Dr Burman and Mr Larsson about the work that was done in relation to Order 5 but there was a distinct absence of any reference to the work the subject of these items. Oddly, Dr Burman's witness statement (his second, dated 28 August 2020, paragraph 23) asserted, without supporting material, that on or about 17 June 2020 the OC engaged Kerrect Group Pty Ltd "to undertake the remedial building works pursuant to Order 5 of the [Consent Orders]." However, it was uncontroversial that the only work Kerrect Group Pty Ltd did was the work identified in 1.25 (a) of the Blair report.

77 In addition, with respect to item 1.25 (b), the appellant presented an email it had obtained, sent on 6 January 2021, from Ms Armati, a member of the Strata Committee, to the contractor Kerrect Pty Ltd, which indicated that work item 1.25 (b) had never been done. The email referred to an instruction from Dr Burman, that this item was not needed. The email asked for a statement saying that the work item was unnecessary and the reason for that. No such statement was supplied.

78 Potentially, so it seems to us, a question arose as to whether items 1.25 (i) (concerning further investigation of moisture levels) and the conditional requirement in (j) fell within the terms of Order 5. Arguably, they did because 1.25 (i) fell within the requirement to carry out investigations, whilst 1.25 (j) fell within the requirement to do necessary repairs (as indicated by Mr Blair) if the further investigation found water ingress as Mr Blair referred to.

79 The documentary evidence regarding carrying out the work in items 1.25 (c) and (d), both external works, gave rise to, at least, an arguable position that these works, as well, had not been carried out. The OC's position was that this work had been carried out by Permatec as part of the waterproofing work on the roof, but its evidentiary material about this was of a low quality. Dr Burman did not refer to this when he addressed the subject of compliance with Order 5 in his witness statement of 28 August 2020 and the written quote from Permatec to Dr Burman, dated 10 July 2020, made no reference to this work and said that no allowance had been made for capping (even though Mr Blair

had identified these items in his report in May 2020). On the other hand, the OC presented an email from the Administration Manager of Permatec, sent to Ms Armati on 7 January 2021, stating that she had discussed the position with her director and that even though they were not instructed to do these items ".. In due course of our works we had cover both 1.25 (C) (sic) and 1.25 (d). Please be assured that these items had been address (sic) and will not causes (sic) any problem."

Order 6

80 Next, the Tribunal examined make good works the subject of Order 6.

81 The Tribunal's reasons on this subject were as follows ([56])- [58]):

(1) The applicant takes issue with the workmanship-for example, the alleged failure to reinstate the original paint colour and finishes; unsatisfactory painting of the northern balcony; cracks and stains to the living room ceiling; gaps in the skirting boards and failure to affix carpet smooth edge strips.

(2) The applicant's allegations of non-compliance with this order remain largely allegations and rest on his personal and subjective opinions. While some of his photographs do go some way in supporting his case the nature of what is in issue does not render the matter critical or persuasive in considering the Principal Order sought.

82 These reasons did not address one aspect of the applicant's case – a matter that was not concerned with the quality of make good workmanship but that it had never been done. As to this, it was, apparently, uncontroversial that no painting had been applied to the re-rendered internal walls, which was work done pursuant to Order 5. The OC's closing submissions did not, specifically, address this item. Even though the Blair report, at item 1.25 (h), indicated the painting was for the appellant to carry out, in our opinion, there was merit in the appellant's position that the work fell within the terms of Order 6.

83 At the hearing of the appeal, Mr Knoll indicated that the outstanding issues under Order 6 were fairly minor.

Order 3

84 Finally, the Tribunal examined the roof membrane work the subject of Order 3. As we have already said, it is unnecessary for us to examine this aspect of the dispute on appeal.

Section 106 of the SMA

85 There was one other aspect of rectification work that was not addressed in the Tribunal's reasons. This was a separate allegation from the allegations of failure to comply with the Consent Orders, namely that the condition in s 237 (3) (b) of the SMA had been met by the OC's breach of its duty in s106 of the SMA by failing to repair cracking in the floor in the appellant's lot indicative of residual concrete cancer. This was a matter the appellant said had first been identified in Mr Blair's May 2020 report.

86 The appellant's submission (at ACR [161]-[163] was founded, partly, upon a section of Mr Blair's May 2020 report and, partly, upon some evidence from Mr Dr Marinko.

87 In his May 2020 report Mr Blair set out a number of matters he observed when he removed the appellant's furnishings in respect of the internal walls. One of these was:

> [1.13 (e)] The floor levelling at one location adjacent the eastern wall was delaminating from the substrate with cracking visible in the surface and a pronounced hollow sound when tapped.

88 The appellant contended that there was evidence from Mr Parker and Mr Alden from the earlier proceedings that such a hollow sound when tapped was indicative of concrete cancer.

89 The evidence from Dr Marinko (witness statement, dated 28 August 2020) was that when preparation work was being done in respect of Order 5 he observed "there was cracking in the magnesite in the far eastern corner of the living room" and later he observed that contractors from Direct Building had taken core drilling samples from the floor. He annexed photographs in respect of this issue.

90 There was no response to these submissions in the RCS and no suggestion the OC had repaired the relevant section of the floor.

91 The Tribunal, briefly, adverted to an issue about cracking in the floors in the context of its examination of consent order 4 (see paragraph 71 (5) above). However, this did not consider the question whether the OC had breached s

106, nor does it seem that there was any evidence as to when the cracking arose.

92 It would seem unlikely to be controversial that this cracking problem with the floor was a problem with the common property.

Proposed resolutions concerning the management of the Strata Committee

93 After dealing with the Consent Orders, the Tribunal (at [65]-[68]) turned to 2 resolutions considered by the Strata Committee on 24 July 2020 concerning sharing information between committee members and approval from the Strata Committee before taking any action that will incur costs to the OC. This concerned allegations by the appellant that this action and Dr Burman's opposition to it supported contentions that the operation of the OC was dysfunctional.

94 The Tribunal found that, whilst Dr Burman played an active part in matters concerning the Consent Orders and that, regrettably, this had resulted in some personal hostility between the appellant and Dr Burman, given that these resolutions were "no longer an issue their weight in considering the Principal Order sought is not compelling".

Alleged failure by the Tribunal to respond to a substantial argument based upon evidence presented-further consideration and conclusions

95 The OC's written submissions relating to this principal ground of appeal can be fairly summarised as follows:

(1) Whilst the appellant's case in the Tribunal was directed at the factors in (a), (b) and (c) of section 237, the section did not mandate that the Tribunal consider those matters when determining an application for the appointment of a strata manager under that section. Those matters were not "relevant" considerations in the sense of being mandatory matters that the Tribunal would be in error not to consider.

(2) The question as to the extent to which it would be an error for the Tribunal to fail to engage adequately with consideration of a not-irrelevant, but not mandatory, consideration when determining whether to exercise its discretion under s 237 was not the subject of any authority.

(3) The Tribunal's obligation to engage with these matters went no further than to afford procedural fairness and provide adequate reasons. That is something that clearly occurred in this case-there were several days of hearing in many pages of submission, evidence, and cross-

examination devoted to the appellant's case and the consideration of the issue occupied the bulk of the Tribunal's reasons.

(4) The essential component of the Tribunal's task in addressing the appellant's case, and in articulating its reasons, was to grapple with whether the appellant had established matters of sufficient gravity to warrant the making of what was a "draconian" remedy, as so described by the Appeal Panel in *Bischoff & Ors v Rita Sahade & Anor* [2015] NSWCATAP 135 at [147].

(5) A fair reading of the Tribunal's reasons made it clear that it did precisely that. The core of the Tribunal's reasons were at [87] to [90] in which the Tribunal concluded, in essence, that most matters in the Consent Orders had now been addressed and that those that remained were not of a nature, whether considered singularly, or as part of a whole, to attract the operation of s 237.

(6) The Tribunal devoted roughly half of its reasons to addressing the case concerning the Consent Orders, which the appellant now claims it failed to adequately engage with.

(7) More importantly, it was particularly telling that the Tribunal's reasons at [87]-[90] went beyond merely addressing the Tribunal's consideration of the atomised components of the appellant's case, and instead can be read in a sense of seeking to address the appellant's case at its highest- non-compliance with the Consent Orders and delay was found to be "persuasive", there was said to be a "failure" to strike levies, the Tribunal acknowledged the possible existence of "any" ongoing balcony problems, acknowledged the need for levelling of the floor, noted the possible need to revisit the cavity flashings and roof membrane, and acknowledged that matters may remain in relation to make good works.

(8) It was clear the point the Tribunal was making was that the appellant's case did not disclose circumstances of sufficient gravity to warrant the making of the order sought. The Tribunal was not required to go further than this. It was enough for the Tribunal to determine that, even if the controversy surrounding the Consent Orders was made out, it did not rise to the threshold required to allow the Tribunal to exercise its discretion under s 237.

(9) In those circumstances, it could be further concluded that even if the Tribunal had fallen into error in the specific ways the appellant alleges, the Tribunal would not have decided the matter differently. It was clear that, even if the Tribunal had accepted the factual allegations of the appellant in their entirety, the Tribunal would not have been satisfied that it should exercise its discretion to make the orders sought.

96 The OC also submitted that the Tribunal's orders could be supported by reasons additional to those given by the Tribunal, namely:

(1) An order to appoint a compulsory manager would serve no meaningful purpose, noting particularly that the intention of such an order is not punitive in nature. Such an appointment would not alleviate the issues

that underlie the controversy between the parties as to the interpretation of the Consent Orders.

(2) As to the associated orders sought by the appellant requiring a compulsory strata manager to take certain action, to the extent the Tribunal had power to make such orders, it would be a denial of procedural fairness in circumstances where they do not have an opportunity to be heard on the matter. Accordingly, the Tribunal was correct not to make any such order.

97 In oral submissions, Mr Russell, made submissions that included:

(1) Speaking at a high level of generality, the Tribunal was entitled to approach its decision in the way it did and none of the alleged errors were material in the view of the way the Tribunal addressed the matter.

(2) What were relevant considerations for the Tribunal to take into account was determined by the statute and not by the facts of the case: see *Rodger* at [84]-[87].

(3) Section 237 did not compel the taking of a two-stage process under which the factors in s 237 (3) were mandatory considerations in respect of the exercise of the discretion.

(4) Essentially, the course the Tribunal took was to say that even if there was a failure (s) to comply with the Consent Orders there were discretionary considerations as to why such an appointment would not be made.

(5) Furthermore, the Tribunal did grapple with the case about the Consent Orders and dysfunction of the OC and, essentially, said that even taken at its highest, these matters were not sufficient to make the draconian order sought.

(6) As *Dranichnikov's* case makes clear there is only error in failing to address an issue where that issue achieves a certain level of materiality. Also, the authorities recognise that it is unnecessary for the Tribunal to refer to all the evidence and that one should not too readily draw the inference that something has been overlooked.

98 A number of these submissions are directed at a contention that the error by the Tribunal was the failure to take account of relevant considerations. However, the principal ground of appeal we have been focusing upon is not such a contention-a distinction referred to in *Rodger* at [85]-[87].

99 We have already expressed our view that the Tribunal did not approach the matter on the basis that, taking the appellant's case at its highest, it was not, nevertheless, prepared to make the order sought (see paragraph 55(1) above). However, even if we are wrong about this, as appears from what we next mention, the Tribunal's failure to address the matters we have identified above

meant that it misunderstood what the appellant's case was at its highest. As Mr Russell agreed at the hearing of the appeal, this would lead to a decision affected by an error of law.

100 As to the materiality of the matters not addressed in the reasons (referred to above), in our opinion, possibly, individually (leaving aside the outstanding make good matter), but, at least, in combination, the matters, if established, considerably strengthened the case for the appointment of a strata manager under s 237 of the SMA, particularly, an appointment that was directed at the function of completing compliance with the Consent Orders.

101 These matters not addressed, if established, showed that the OC was, significantly, in default in carrying out the Consent Orders and, was so, in circumstances where there appeared to be little or no prospect that the outstanding steps would be voluntarily carried out by the OC. In this regard, it is important to bear in mind that these were orders of the Tribunal and it is of very high importance that they be complied with.

102 If established, these matters rendered it difficult, if not impossible, for the Tribunal to conclude, as it did, that "most" matters in the Consent Orders had now been addressed and that those that remained were "not of a nature, whether considered singularly, or as part of a whole, to attract the operation of s237 of the Act": at [87]

103 As to the OC's submissions that the appointment sought would serve no meaningful purpose (paragraph 96 (1)), these matters not addressed by the Tribunal, if established, would supply such purpose, particularly if the appointment was of the limited nature we have referred to, namely to ensure that orders of the Tribunal requiring an owners corporation to provide important remedies to a party were carried out. Any dispute about the meaning of the orders should necessarily be resolved in deciding whether, and if so, the extent to which there has been a failure to comply with the Consent Orders.

Outcome of the appeal against dismissal of the appellant's claim

104 It follows from our reasons given so far that the dismissal of the appellant's claim must be set aside. Accordingly, it is unnecessary for us to address the other grounds of appeal.

105 In the Notice of Appeal and at the hearing of the appeal, the appellant pressed for the Appeal Panel to redetermine the proceedings and order that a compulsory strata manager be appointed. Such a step was opposed by the OC, which contended that the volume of material and extensive reliance on the cross-examination of witnesses in the matter made it inappropriate for such a course to be followed.

106 On the first day of the hearing of the appeal there was some debate about this question with Mr Knoll, who appeared for the appellant. Mr Knoll argued that it would be convenient and efficient for the Appeal Panel to itself carry out the redetermination, particularly, given that it will have had to examine the issues, including evidence, in considerable detail in deciding the appeal.

107 This debate included reference by the Appeal Panel to the scope of the factual findings that the appellant would seek, the scope of the functions that the appellant would seek to require of a compulsory strata manager, whether the appellant would press the application for orders directing the strata manager to take particular action, and the potential relevance of evidence concerning events that may or may not have occurred since the last day of hearing in the Tribunal at first instance. This resulted in the provision by the appellant of some additional material overnight, including some proposed amended orders it would seek in any redetermination of the substantive proceedings, a document setting out of the factual findings sought (although not including any reference to the evidentiary material relied upon) and a short additional affidavit from Dr Marinko concerning water ingress in recent times.

108 Clearly, the OC must be given a reasonable opportunity to respond to the additional material that the appellant seeks to rely upon. It would also be of considerable assistance to a redetermination for the appellant to supply a document with references to the evidentiary material relied upon in support of each of the factual findings, to which, of course, the OC must have an opportunity to respond.

109 Bearing in mind the scale of the factual dispute that remains between the parties, the sizeable body of evidentiary material involved in the resolution of that dispute, and that a further substantial hearing will be necessary, we have

decided that a redetermination by the Appeal Panel is not a convenient or efficient way to proceed.

110 Accordingly, we will order that the proceedings be redetermined by a differently constituted Tribunal. We will make provision for the parties to serve additional evidence but only concerning events that have occurred since the last day of hearing in the Tribunal on 31 May 2021.

The Costs Appeal and the costs of the Appeal

111 By a separate decision delivered on 10 February 2022 (the Costs Decision), the Tribunal ordered the appellant to pay the OC's costs of the proceedings.

112 The appellant appeals from that decision.

113 The Tribunal did so on the basis that rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) was applicable in the proceedings, so that the requirement laid down in section 60 of the NCAT Act that the Tribunal may only make an order for costs if there are special circumstances, was not applicable. The Tribunal therefore applied the "usual rule" that costs follow the event and, as the appellant was the unsuccessful party, ordered the appellant to pay the respondent's costs.

114 As the appeal is to be upheld, the Tribunal's decision concerning the costs of the proceedings at first instance must be set aside, as is common ground between the parties. It is thus not necessary to resolve the question raised by the costs appeal in order to determine the appeal.

115 However, the appellant sought an order for the costs of the appeal in the event the appeal was successful. We turn to that question.

116 Rule 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) provides:

> **38A Costs in internal appeals**
>
> (1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of—
>
> (a) enabling legislation, or
>
> (b) the Division Schedule for the Division of the Tribunal concerned, or
>
> (c) the procedural rules.

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

117 Section 60 of the NCAT Act provides:

60 Costs

(1) Each party to proceedings in the Tribunal is to pay the party's own costs.

(2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

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

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

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

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

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

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

(5) In this section—

costs includes—

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

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

118 Rule 38 of the Civil and Administrative Tribunal Rules provides:

38 Costs in Consumer and Commercial Division of the Tribunal

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

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

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

119 The question whether rule 38 was applicable in the first instance proceedings is therefore relevant to the determination of the question whether rule 38A is applicable to the appeal. The appellant sought in the appeal the same orders, or orders to similar effect, as he had ultimately sought at first instance. Accordingly, if rule 38 was applicable to the first instance proceedings, then rule 38A would be applicable in relation to the costs of the appeal.

120 Although the appellant explicitly disavowed reliance upon rule 38A, as he maintained that rule 38 was not applicable in the first instance proceedings, that is, that there was not an amount exceeding $30,000 claimed or in dispute in the first instance proceedings, we consider it appropriate, in determining whether to make an order relation to the costs of the appeal, to consider whether rule 38 was applicable in the first instance proceedings so that rule 38A is applicable in the appeal proceedings.

121 For the reasons which follow, we find that rules 38 and 38A are not applicable in these proceedings. Contrary to the view taken by the Tribunal in the Costs Decision, in our view there was not, in the proceedings at first instance, an amount claimed or in dispute exceeding $30,000.

122 We note that the Tribunal at first instance expressed its reasons for finding that rule 38 was applicable as follows:

> "In the substantive application the applicant sought an order for the appointment of a compulsory managing agent and an order that the appointed agent be ordered to raise special levies in a sum in excess of $163,000 (later reduced) for the carrying out of rectification work to ensure that the alleged ongoing repairs in dispute, which were at the heart of the substantive application, could be implemented.
>
> Clearly the cost of the repairs the subject of the substantive application (as initially claimed and as later prosecuted), is in excess of the threshold stipulated under rule 38 of the NCAT legislation.
>
> What the applicant submits, however, is that he did not seek payment of any money sum. What he in fact sought was the appointment of a compulsory managing agent. The applicant also raises the apportionment of the monetary sum of the levy he sought vis-a-viz his unit entitlement obligations.

> The applicant relies principally on the case of *Owners Corporation - Strata Plan No 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256.
>
> While I have considered the matters raised by the applicant on this point, I am not persuaded by his submission.
>
> Clearly, the applicant was not seeking payment of a monetary order. Clearly, the applicant was seeking the appointment of a managing agent to exercise all the functions of the respondent and the executive. Just as clearly, however, the applicant was seeking the striking of a special levy to fund the implementation of a work order, the cost of which was in excess of the Rule 38 threshold.
>
> While the appointment of the managing agent was the first order sought, it was a means to an end. The end being the other orders also sought, namely that the appointed agent be ordered to strike a special levy to fund the implementation of the building work and repairs the applicant sought to be carried out. The implementation of these repairs, which the applicant persisted needed to be carried out, was at the heart of the substantive proceedings and the crux of the dispute between the parties. The applicant's motivation in seeking the compulsory agent order was to put in place a mechanism to implement the repairs he sought.
>
> I therefore find that the costs application falls within Rule 38 of the NCAT legislation."

123 The meaning of the terms "amount claimed" and "amount in dispute" were considered by the Appeal Panel in *Allen v Tricare (Hastings) Ltd* [2017] NSWCATAP 25 at [43]-[69]. Relevantly, at [43] the Appeal Panel held:

> In the case of an internal appeal, the "amount claimed … in the proceedings" can be determined by considering what orders the appellant seeks on the appeal. If those orders sought include an order that the respondent pay a sum of more than $30,000, expressly or impliedly, then the Tribunal should conclude that the amount claimed in those proceedings was more than $30,000. If the substantive orders sought do not involve any express or implied claim to any amount, it is difficult to see how there is any "amount claimed" for the purposes of r 38(2)(b).

124 At [48] the Appeal Panel held:

> The inclusion of the words "or in dispute" after "the amount claimed" in r 38 indicates that amounts may be in dispute in proceedings even if they are not the subject of a specific claim for an order for payment.

125 At [50] to [56] the Appeal Panel referred to the provisions of s 101(2)(r)(i) of the *Supreme Court Act 1970* (NSW) which restricts the right of appeal to the Court of Appeal to "an appeal… that involves a matter at issue amounting to or of the value of $100,000 or more".

126 The Appeal Panel noted that the assistance in relation to the interpretation of r 38 to be derived from cases considering s 101(2)(r)(i) of the *Supreme Court Act* must be limited because:

> 1. The wording of these provisions is different from that of r 38; and
>
> 2. The provisions serve a different purpose.

127 The Appeal Panel referred to the principles applicable to s 102(2)(r)(i) of the *Supreme Court Act* as noted in *Jabulani v Walkabout II Pty Ltd* [2016] NSWCA 267 at [80].

128 At [57] the Appeal Panel concluded:

> 57. Adapting these principles to the circumstances of the present appeals and having regard to the specific wording of r 38, it appears to us that in applying r 38(2)(b):
>
> > 1. The determinative factor is the amount in dispute in each appeal, not the amount in dispute in the proceedings at first instance;
> >
> > 2. The phrase "in dispute" is to be construed as meaning truly in dispute or at issue or, inversely, not unrealistically in dispute;
> >
> > 3. Whether "the amount … in dispute" in each appeal is more than $30,000 depends on whether there is a realistic prospect that in each appeal the wealth of the appealing party would be changed by more than $30,000 or, put another way, whether the right claimed by the appealing party, but denied by the decision at first instance, prejudices that party to an amount in excess of $30,000;
> >
> > 4. The fact that the value of the property the subject of any appeal exceeds $30,000 does not, of itself, mean that "the amount … in dispute" in that appeal is greater than $30,000.

129 In *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 the Appeal Panel referred to cases dealing with monetary limitations upon rights of appeal to the High Court and the Court of Appeal and noted "that the expression found in r 38(2)(b) is substantially different". The Appeal Panel stated, at [83] – [96]:

> 83 The language of the Judiciary Act, District Court Act and Supreme Court Act, which the courts were required to consider in the decisions to which we have referred above, concerned proceedings "that involves a matter in issue" or "involves (directly or indirectly) any claim, demand or question" (emphasis added) to or of a specified value or more than the prescribed amount.
>
> 84 The expressions are of wide import. The expressions do not speak of "the amount claimed" or "the amount in dispute".
>
> 85 The words "involves a matter at issue" and "involves (directly or indirectly) any claim, demand or question" are not limited to proceedings in which an

order for an amount of money is claimed or to proceedings where an order might be made relieving a party from an obligation to pay. Nor are those words limited to proceedings where a specific amount must be found due and payable in order to establish an entitlement to the relief sought. However, the words are wide enough to include such claims. As the authorities make clear, the provisions are seeking to confine the circumstances in which a decision may be challenged as of right by applying a monetary filter. In the case where no specific amount is claimed or in dispute, the value of the property or other rights must be greater than the prescribed amount.

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

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

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

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

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

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

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

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

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

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

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

130 The effect of the decision in *Malachite* was summarised by the Appeal Panel in that decision at [3] – [5] as follows:

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

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

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

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

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

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

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

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

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

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

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

131 In *Lee v The Owners – Strata Plan No. 56120* [2021] NSWCATCD 8, the Tribunal held, at [52]:

> As this application only seeks an order that could result in the payment of more than $30,000 and does not depend upon a finding that such an amount is owed, this case falls within [paragraph [5] of the decision in *Malachite*] with the result that costs fall to be determined by s 60 rather than rule 38(2)(b).

132 That passage was referred to with approval by the Appeal Panel in *The Owners – Strata Plan No 76700 v Trentelman (No 2)* [2021] NSWCATAP 268 at [13].

133 Although the appellant took issue with the Tribunal's finding that the applicant was seeking "the striking of a special levy" to fund the implementation of a work order, it is the case that the appellant was, in effect, seeking orders directing the striking of a special levy in excess of $30,000 (by a direction that the appointed strata manager cause the OC to comply with Orders 9 (11) and (12) by raising the special levies, including in the case of Order 9 (12) such levy being no less than $163,141). However, applying what was said in *Malachite*, in our view, in proceedings seeking such an order, even with respect to a special levy exceeding $30,000, there is no "amount claimed or in dispute" for the purposes of rule 38.

134 In this respect these proceedings may be distinguished from the proceedings the subject of the Appeal Panel decision in *The Owners - Strata Plan No 1813*

v Keevers (No 2) [2021] NSWCATAP 229 where it was common ground between the parties that rule 38 was applicable to proceedings in which two lot owners challenged, as excessive pursuant to section 87 of the *Strata Schemes Management Act*, a special levy raised by the owners corporation in general meeting, where the individual contributions required of the applicant lot owners exceeded $200,000. The lot owners' liability to pay the special levy in that amount was directly in issue in the proceedings.

135 It follows that, had it been necessary to determine the costs appeal, we would have upheld the appeal and remitted the question (raised by the OC should the appeal against dismissal of the claim be unsuccessful but the costs appeal be allowed) whether there were special circumstances warranting an order in respect of the costs of the first instance proceedings to the Consumer and Commercial Division of the Tribunal. However, as noted above, it is not necessary to determine the costs appeal, as the setting aside of the costs order is a necessary consequence of our decision to set aside the dismissal of the appellant's application.

136 As rules 38 and 38A are not applicable, in order that the Appeal Panel may make an order in respect of the costs of the appeal, we must determine that there are special circumstances warranting such an order.

137 It was common ground that "special circumstances" are circumstances that are out of the ordinary, they do not need to be extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11], citing Santow JA in *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81 at [60].

138 The appellant submitted that there are special circumstances warranting an order for costs in relation to the appeal. The appellant primarily relied, as we understand his submissions, on the proposition that the errors in the decision at first instance were so egregious that the OC should not have resisted the decision being set aside (s 60 (3) (c) of the NCAT Act), at least, from the time it received the appellant's written submissions on appeal. The appellant further submitted that the nature and complexity (s 60 (3) (d) of the NCAT Act) of the appeal proceedings itself constituted special circumstances and that, even if the respondent's opposition to the appeal was not unreasonable, the relative

strength of the parties' respective cases was sufficient to constitute special circumstances.

139 We will address in turn the matters relied upon by the appellant as constituting special circumstances.

Unreasonable opposition/ Relative strengths of the arguments on appeal

140 Although we have determined that the appeal should be allowed, and that the decision should be set aside, we have not determined that the decision of the Tribunal to dismiss the application for the appointment of a compulsory strata manager was necessarily wrong. We are also of the view that it cannot be said that the OC's resistance to the decision being set aside was misconceived or without a tenable basis.

141 We accept that the relative strengths of the parties' cases (s 60 (3) (c)) may be relevant to the determination of special circumstances, even if it cannot be said that one party's case was untenable in the sense of being "so weak as to be unarguable".

142 Whilst, for present purposes, we would characterise the appellant's principal ground of appeal as having considerable force we do not regard the OC's response to that ground of appeal as being so weak as to justify, by this factor alone, a conclusion that special circumstances existed sufficient to warrant an order that the OC pay the costs of the appeal.

143 With respect to these matters, we make the following observations:

(1) In *DYH v Public Guardian (No 3)* [2022] NSWCATAP 34, at [18], the Appeal Panel expressed the view, with which we agree, that the concern with access to justice evinced in s 60 (1) indicated that the Tribunal should not award costs too readily on the basis that one party's claim was stronger than the other party's claim.

(2) It must be recognised that the decision of the Tribunal was a discretionary decision and that the burden of establishing that it involved material appealable error was substantial.

(3) This was all the more so with grounds of appeal based upon contentions of legal unreasonableness and those for which leave to appeal was required, including that the decision was against the weight of the evidence.

(4) It was apparent from the hearing of the appeal that the brevity and generality of a number of the Tribunal's reasons raised some difficulties for both parties in the assessment of the reasons.

Complexity

144 The appellant relied, in support of the submission that the complexity of the proceedings constituted special circumstances, on the decision of the Appeal Panel in *The Owners – Strata Plan No 58068 v Cooper (Costs)* [2020] NSWCATAP 198, where the Appeal Panel held that an appeal, against orders setting aside as harsh, unconscionable or oppressive a by-law prohibiting any animal other than an assistance animal, involved special circumstances. The Appeal Panel held, at [70] – [72]:

> 70 There was no dispute that the issues in appeal were complex.
>
> 71 The appeal was determined in circumstances where the Tribunal constituted by this Appeal Panel and Senior Member Wilson was reserved in the appeals now reported as *The Owners – Strata Plan No 55773 v Roden; Spiers v The Owners – Strata 77953* [2020] NSWCATAP 95 (Roden Appeal). At that time there had been no decisions of the Appeal Panel concerning the operation of s 139(1) of the SSMA in the context of by-laws prohibiting the keeping of animals or by-laws regulating the number of animals that can be kept. Also, as far as we are aware, there have been no decisions of any court regarding challenges to by-laws prohibiting the keeping of animals under s 139(1) of the SSMA.
>
> 72 Consequently, having regard to the fact of complexity, the fact the Appeal Panel had not previously determined like cases, and having regard to the issues raised, we are also satisfied that special circumstances exist to enliven the power of the Appeal Panel to make the order for costs in the appeal under s 60(2) of the NCAT Act.

145 Some indication as to the nature of the complexity involved in *Cooper* may be gleaned from the Appeal Panel's statement, at [16], of the appellant's submissions concerning complexity:

> 16 As to complexity, the Owners Corporation says that the proceedings at first instance and on appeal involve both a complex question of statutory interpretation, the impact of certain transitional provisions in the SSMA and their application to the particular facts of the case. … In respect of the appeal proceedings, the Owners Corporation says that the present appeal, and the appeal in *Roden v The Owners-Strata Plan No 55773* [2019] NSWCATCD 61 (Roden), were the first occasions on which the Appeal Panel had considered the proper interpretation of s 139(1) of the SSMA, following its introduction when the SSMA commenced in 2016.

146 Other instances where Appeal Panels have found the complexity of proceedings constituted special circumstances warranting an award of costs include:

- *The Owners – Strata Plan No 55773 v Roden (Costs)* [2020] NSWCATAP 197
- *The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)* [2020] NSWCATAP 273
- *The Owners – SP No 90189 v Liu (No 2)* [2022] NSWCATAP 74

147 *Roden* involved much the same issues as *Cooper*.

148 In *B & G Trading*, the Appeal Panel concluded that:

> "The issues on the appeal were complex and were out of the ordinary because of the absence of any earlier Appeal Panel or court decision on those issues."

149 In *Liu* the Appeal Panel found special circumstances arising from the complexity of the proceedings because:

> "the legal issues raised were not simple or straight forward. They included the proper test for the application of s 150 of the SSMA which has been described by the Court of Appeal as 'fraught with difficulty'";
>
> "the appeals also involved other difficult legal issues such as the use of extrinsic material in the interpretation of statutes (including s 34 of the *Interpretation Act 1987* (NSW)) and severance"; and
>
> "the appeals raised, for the first time as far as we are aware, the application of new legislative provisions being amendments to the SSMA by the *Fair Trading Amendment (Short-Term Rental Accommodation) Act* 2018 (NSW) which affects the short term rental market in NSW and so potentially have wide reaching effects".

150 The Appeal Panel held:

> "In our view, it would not have been practical for either party to have conducted the appeals without legal representation. In the circumstances, we were able to deal with the appeal most efficiently because both parties were legally represented."

151 We do not consider that the present appeal involves a comparable level of complexity. The appeal involved the application of generally accepted principles concerning appealable error, principally, in relation to factual conclusions, in a factual setting which, although examined in detail in oral and written submissions by Mr Knoll, who appeared for the appellant, were not unduly complicated. Although the Appeal Panel was considerably assisted by the submissions, both written and oral, of the legal representatives of the parties, we do not consider that the appeals could not have been conducted without legal representation.

152 Accordingly, there will be no order in relation to the costs of the appeal.

Orders

153 To the above reasons, we make the following orders:

(1) The appeal is allowed.

(2) The orders made by the Tribunal on 25 November 2021 and 10 February 2022 are set aside.

(3) The proceedings are remitted to a differently constituted Tribunal for redetermination.

(4) The redetermination of the proceedings is to be made upon the evidence already presented to the Tribunal at first instance and such further evidence as the parties may wish to present concerning events and circumstances that have occurred since 31 May 2021 (the last day of the hearing before the Tribunal), only.

(5) No order as to the costs of the appeal.

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

Registrar

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