Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 2341 v P & M Sachs Pty Ltd
Medium Neutral Citation:	[2022] NSWCATAP 304
Hearing Date(s):	5 July 2022
Date of Orders:	19 September 2022
Decision Date:	19 September 2022
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member D Charles, Senior Member
Decision:	(1) Leave to appeal refused. (2) Appeal dismissed. (3) The respondent may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding three pages, concerning the question whether there are special circumstances warranting an order for costs in respect of the appeal. (4) The appellant may file and serve submissions not exceeding three pages in response to any such submissions within a further 14 days. (5) Any submissions filed in accordance with orders 3 and 4 should address the issue whether the question of costs can be determined on the basis of the written submissions and without a further hearing. (6) If the respondent does not file submissions in accordance with order 3 there will be no order in relation to the costs of the appeal.
Catchwords:	LAND LAW – Strata titles – Common Property – Maintenance and repair of common property – Claim by lot owner for compensation pursuant to s 106(5) Strata Schemes Management Act 2015 (NSW)

	APPEAL – Procedural fairness – Treasurer of owners corporation refused leave to represent the owners corporation until he produced evidence of authority – Whether refusal of leave could have affected the outcome of the proceedings
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Rules 2014 (NSW) Evidence Act 1995 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Allesch v Maunz (2000) 203 CLR 172 Collins v Urban [2014] NSWCATAP 17 Cominos v di Rico [2016] NSWCATAP 5 Italiano v Carbone [2005] NSWCA 177 Jackson v NK Tiling Pty Ltd [2017] NSWCATAP 106 Lubrano v Proprietors Strata Plan No 4038 (1993) 6 BPR 97,457 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Russo v Brack [2016] NSWCATAP 261 Stead v State Government Insurance Commission (1986) 161 CLR 141 Yao v Minister for Immigration and Border Protection (2014) 140 ALD 21; [2014] FCAFC 17
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 2341 (Appellant) P & M Sachs Pty Ltd (Respondent)
Representation:	Counsel: T Davie (Respondent) Solicitors: JS Mueller & Co (Respondent)
File Number(s):	2022/00126740
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	NA

Date of Decision:	04 April 2022
Before:	R Alkadamani, Senior Member
File Number(s):	SC 21/00107

REASONS FOR DECISION

Introduction

1 The appellant in these proceedings is the owners corporation of Strata Plan 2341. The respondent is the owner of Lot 8 in Strata Plan 2341. The respondent commenced proceedings against the appellant in the Consumer and Commercial Division of the Tribunal in December 2021 seeking an order pursuant to s 106(5) of the *Strata Schemes Management Act* 2015 (NSW) (SSMA) for the payment of damages in respect of losses claimed to have been suffered by reason of the appellant's alleged contravention of its obligation (arising pursuant to s 106(1) of the SSMA) to properly maintain and keep in a state of good and serviceable repair the common property vested in the appellant.

2 By a decision delivered on 4 April 2022 the Consumer and Commercial Division of the Tribunal made orders:

(1) Order the respondent [appellant] to repair and maintain the common property so as to prevent ingress of asbestos to lot 8 in strata plan 2341 in accordance with the recommendations of Stuart Lumsden contained in a joint expert report dated 3 February 2022 tendered as Ex 5 to the proceedings, at paragraph 9.1 pp 10 to 11, including provision of appropriate clearance certificates and further asbestos assessments and thereafter make good the property of the lot owner ("the work").

(2) Order that the work be carried out by an appropriately qualified and insured contractor or contractors.

(3) Order that the applicant [respondent to the appeal] grant access to the respondent to carry out the work.

(4) Order that the work be completed by 31 June 2022 [sic].

(5) Order that the respondent pay the applicant the sum of $80,360.00 within 28 days.

(6) Grant leave to the applicant and the respondent to renew the proceedings in accordance with s 8 of schedule 5 to the *Civil and Administrative Tribunal Act* 2013 if the work, which, for the avoidance of

doubt, includes the further asbestos assessments, is not completed by 31 June 2022 [sic].

(7) Order that the respondent pay the applicant's costs on a party-party basis as agreed or assessed.

3 The appellant appeals against orders 5 and 7.

4 In respect of order 5 the appellant seeks that the amount it is ordered to pay the respondent be reduced to $67,930.

5 The difference is said by the appellant to be 4½ months' loss of rent "for a report being withheld from the owners corporation by the [respondent]" and two months' rent "awarded incorrectly for alleged uninhabitability due to water ingress".

The scope and nature of internal appeals

6 By virtue of s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act), internal appeals from decisions of the Tribunal may be made as of right on a question of law, and otherwise with leave of the Appeal Panel.

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

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

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

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

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

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

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

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

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

8 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal

Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice 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).

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

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

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

11 In *Collins v Urban*, the Appeal Panel stated at [84(2)] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

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

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

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

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

Grounds of appeal

12 The grounds of appeal set out in the appellant's Notice of Appeal are as follows:

> The member applied Section 106 of the SSMA [*Strata Schemes Management Act* 2015 (NSW)] to applicant request for loss of rent from the 28th of March 2019 to the end of May 2019. This was applied on the proviso that the unit was uninhabitable due to water ingress. However, there was no evidence or report that the unit was uninhabitable due to water ingress. Furthermore, the Owners Corporation carried out repairs promptly to remediate the issue.

13 The appellant also sought leave to appeal on the bases that the decision was not fair and equitable, that the decision was against the weight of evidence, and that significant new evidence is now available that was not reasonably available at the time of the hearing.

14 In respect of the application for leave to appeal on the ground that the decision was not fair and equitable, the Notice of Appeal stated:

> i) The respondent [ie the appellant] was unable to rely on any evidence as the solicitors it had retained for approximately 18 months ceased to act for the respondent one week prior to the hearing. The legal firm of Chambers Russell lead the respondents it had filed evidence to NCAT for the hearing. However as seen in the Notice of Orders it states "the respondent did not adduce evidence". Without the respondent being able to adduce any evidence a fair and equitable hearing would be impossible.
>
> ii) At the beginning of the hearing until almost the end the representative for the respondent was not granted leave to address the member. The applicant's evidence was able to be presented uncontested. In the last 20 Minutes of the hearing, the respondent's representative was only able to present to the member one point, the hearing was then concluded prior to be given the opportunity to speak on other points which would have given evidential weight that would have changed the Members orders.
>
> iii) Given the above points, compensation was awarded to the applicant that it was not entitled to. It is doubtful these costs can be recovered by the respondent bringing proceedings under Section 111,120 and Section 132 of SSMA. The respondents only avenue to appeal.

15 In respect of the application for leave to appeal on the ground that the decision was against the weight of evidence, the Notice of Appeal stated:

> The respondents [appellant] were unable to produce any evidence because our solicitors failed to enter any. The decision of the tribunal was against the weight of the evidence however this weight was not filled.
>
> …
>
> There was no evidence or report suggesting from the 28th of March 2019 to May 2019 that the unit was uninhabitable due to water ingress. There is also

> evidence that the applicant hid a report from the respondent making the applicants claim for compensation larger.

16 In relation to the application for leave to appeal on the ground that there is significant new evidence, the Notice of Appeal stated:

> i) For reasons already expressed above the respondents were not able to have any evidence filled at the hearing. …
>
> ii) However, attached are three expert reports which state the asbestos issue and reason for the unit to be uninhabitable was due to the lot owner carrying out works to the common property. These works were never approved by the Owners Corporation. …
>
> iii) Attached is an email from the Applicant to the secretary of the committee where he admits not disclosing a report to the committee for four and half months. This report indicates that there was still an asbestos issue after the Owners Corporation had undertaken remediation and obtained a clearance certificate. Despite the applicant putting other occupants' health in danger, the applicant was compensated for this period. Attached is a Statutory Declaration that the report was eventually handed to a lot owner on the 2nd of July 2020, after being produced on the 18th of February 2020.

17 The reason given by the appellant why the evidence had not been available at the time of the hearing was:

> Our Acting Solicitors Chambers and Russell ceased acting for us one week prior to the hearing. At that time, we were led to believe that the Solicitors had filled the evidence as the respondents did question the inadequacy and the format of some documents that had been filed to NCAT. At the hearing the representative for the respondents found that no evidence had been filed for the respondents.

The hearing at first instance

18 At the hearing at first instance the respondent was represented by Mr T Davie of counsel. Mr David Shirley, the treasurer of the owners corporation, sought to appear to represent the owners corporation.

19 Mr Davie queried Mr Shirley's authority to do so and the transcript of the hearing discloses that it was not until well into the hearing that Mr Shirley was able to produce evidence that he had been authorised by resolution of the strata committee to represent the owners corporation at the hearing and Mr Shirley was granted leave to represent the owners corporation.

20 The respondent tendered evidence at the hearing, including a statement from Mr J Sachs, a director of the respondent, and a joint report prepared by experts retained by each party.

21 The owners corporation had not filed any evidence in advance of the hearing. It is apparent that the owners corporation had, a week before the hearing, parted company with solicitors it had retained to act on its behalf. Mr Shirley did not suggest to the Appeal Panel that the failure to file evidence was a consequence of any failure on the part of the owners corporation's former solicitors (although that assertion does appear by inference in the Notice of Appeal). Rather, as appears from a letter to the appellant from its solicitors, filed by the appellant as part of a bundle titled "Appellants Reply Documents", the owners corporation made a deliberate decision not to file evidence, in the expectation that the proceedings would settle.

Background

22 The background to the proceedings was set out in the decision under appeal as follows:

> 6. The applicant [ie the respondent to the appeal] is the owner of lot 8 in strata plan 2341. Lot 8 is one of a number of commercial premises in the building. From about 1990 until March 2019 the applicant leased lot 8 to Exec Estates Pty Ltd (Exec Estates), a commercial tenant. This tenancy was uninterrupted. Mr Sachs is a director of both the applicant and Exec Estates. However, there is no evidence that the rent paid by Exec Estates to the applicant during the tenancy was inflated or uncommercial.
>
> 7. In early 2019 lot 8 experienced water penetration issues. On about 28 March 2019 Exec. Estates vacated lot 8 due to the water penetration issues. The applicant informed the respondent [ie the appellant owners corporation] of this.
>
> 8. In May 2019, Mr Sachs became aware of the presence of asbestos in the common property area above the ceiling to lot 8, which could enter lot 8. This caused lot 8 to be unsafe. From May 2019 there was communication between the applicant and the respondent concerning the presence of this asbestos.
>
> 9. On 7 August 2019 Pickford & Rhyder Pty Ltd, NATA accredited consultants, measured and assessed the asbestos presence in the "top floor ceiling lining" which was identified as being manufactured from an "asbestos (Amosie) friable insulation-type material". The report recommended, amongst other things, that the lot not be "re-occupied until further remediation...is undertaken".
>
> 10. Thereafter the respondent undertook some remediation of the common area above the ceiling.
>
> 11. On 31 October 2019 a clearance certificate was issued relating to the work undertaken. However, the scope of work to which that certificate related was limited to nominated areas of the building. The significance of that limitation is that not all of the asbestos was attended to and the presence of asbestos was subsequently found in the wall cavities.

> 12. For the purposes of these proceedings a joint expert report was prepared by Mr Lumsden, the expert retained by the applicant, and Mr Braid, the expert retained by the respondent and tendered by the applicant (exhibit 5). The joint report shows that the current state of the building in relation to asbestos is that there is asbestos present, likely in the wall cavities of the common property. The asbestos is capable of entering into lot 8, including through air vents. The experts agree that access to the lot should be restricted completely and that rectification work needs to be undertaken. There is only a narrow difference in the recommendations as to how the rectification work should be undertaken.
>
> 13. The applicant's claim in these proceedings is for loss suffered by way of lost rent from the period 18 March 2019 until the present.

The decision under appeal

23 The Tribunal concluded:

> 18. The Tribunal is satisfied that there is a continuing presence of asbestos in the wall cavities of the common property, which does or may enter lot 8, creating a safety hazard in lot 8. The Tribunal is also satisfied that the continuing presence of asbestos in the common property constitutes a breach of the owners corporation's obligations under section 106(1).
>
> 19. The Tribunal has jurisdiction pursuant to section 232 of the SSMA to make "an order to settle" a complaint or dispute. In *Vickery v The Owners Strata Plan No 80412* [2020] NSWCA 284 the Court of Appeal held that the jurisdiction conferred on the Tribunal by section 232 permitted the Tribunal to make a monetary order in respect of the loss suffered by a lot owner due to the owners corporation's breach of section 106(1) of the SSMA.
>
> 20. Lot 8 is commercial premises. In those circumstances, it is foreseeable that its main source of income is likely to be rent from a tenant and if the lot cannot be occupied by a tenant the lot owner cannot earn that rental income. There is clear evidence in these proceedings in the rental ledger for lot 8 that rental income was generated on a consistent basis prior to March 2019.
>
> 21. The Tribunal is satisfied that the applicant was not able to earn rental income from lot 8 from 28 March 2019 to date and that this was "reasonably foreseeable loss suffered" by the applicant. The Tribunal is also satisfied that the cause of that loss was the respondent's breach of section 106(1) of the SSMA. The initially identified cause of the loss was initially water penetration into lot 8. However, from May 2019 the cause of the loss has been the presence of asbestos in the common property which can or does enter lot 8. That asbestos presence continues to the present.

24 The Tribunal awarded the respondent compensation assessed on the basis of the rent paid by the tenant which had vacated in March 2019, that is $2,260 per month from the end of March 2019 to 31 March 2022, that is 36 months.

25 The Tribunal ordered the owners corporation to pay costs on the basis that the amount in dispute exceeded $30,000, and therefore rule 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) applied, special circumstances were

not necessary before an award of costs could be made, and costs should therefore follow the event.

The appeal

26 The only question of law explicitly raised in the grounds of appeal is that the finding, that the premises were not able to be occupied in March, April and May 2019 due to water ingress, was made without evidence. Whether a finding is made without evidence is a question of law: *Prendergast* at [13(7)].

27 However, as Mr Davie, who also appeared for the respondent on the appeal, submitted, before an appeal may be upheld on this ground it is necessary that there be no evidence at all, even a scintilla of evidence in support of a finding is sufficient.

28 Mr Davie pointed to evidence outlined in his submissions as follows:

> 9 The statement of John Sachs dated 27 April 2021 was before the Tribunal.
>
> 10 At paragraph 9 he says this:
>
> > The Lease ended in March 2019 after Lot 8 was damaged by water ingress and asbestos, and Exec estates was forced to vacate the premises.
>
> 11 The evidence at paragraph 9 is corroborated by contemporary documents.
>
> 12 Exhibited to his statement was a paginated bundle of documents. Pages 110 to 121 consist of email correspondence. An email from Mr Sachs dated 28 March 2019 to strata manager and members of the Owners Corporation [at 110] says this, materially:
>
> > Please refer to our emails sent to you 10/01/2019, 18/02/19 & 21/0219 [which deal with water ingress into the lot] to which we haven't had any satisfactory response.
> >
> > A plumber did inspect on 28/02/2019.
> >
> > As a result of the work health & safety issues caused, we have had to quarantine areas of the unit & evacuate the unit until it is made safe.
>
> 13 An email from Mr Sachs dated 24 June 2019 to strata manager and members of the Owners Corporation [at 116] says this, materially:
>
> > Water and friable material is still entering out property. As previously advised we have quarantined areas of the unit, access is only through us.
> >
> > The problem was advised to all 10 January 2019, five & a half months ago. We are in the position that we can’t occupy, rent or sell.

> 14 An exchange of emails between members of the owners corporation on 8 May 2019 refers to water leaking have introduced asbestos into the relevant apartment and a consequent duty to seal off the area.
>
> 15 An email from Mr Sachs dated 28 June 2019 to strata manager and members of the Owners Corporation [at 121] says this, materially:
>
> > As previously advised we have two breeches in the ceilings of # 31, these breaches have allowed water & friable material into the unit making it unsafe to occupy ...
> >
> > Water and friable material still entering our property.
> >
> > As previously advised we have quarantined areas of the unit, access in only through us.
> >
> > The problem was advised to all 10 January 2019, over five & a half months ago. We are in the position that we can't occupy, rent or sell.

29 Mr Shirley, who also appeared for the owners corporation at the hearing of the appeal, submitted that Mr Sachs had no qualification to give that evidence. However, the proposition that the water ingress had rendered the lot unfit for occupation was not a matter that necessarily required specialist expertise to establish. It could not be said that Mr Sachs' evidence was mere speculation.

30 The statement of Mr Sachs, and the documentation referred to, were before the Tribunal, and that was some evidence that the premises were unfit for occupation due to the water ingress. That is sufficient to dispose of this ground of appeal.

Procedural fairness

31 At the hearing of the appeal, the Appeal Panel raised with Mr Davie the question whether the owners corporation had been accorded procedural fairness in the circumstances where Mr Shirley had been unable to represent the owners corporation for a substantial part of the hearing and the owners corporation had not filed the evidence upon which it wished to rely.

32 Mr Davie pointed out that Mr Shirley had not asked for an adjournment. However, in some circumstances, procedural fairness may require that the Tribunal invite an unrepresented party to seek an adjournment: *Italiano v Carbone* [2005] NSWCA 177 at [174]-[184]; *Jackson v NK Tiling Pty Ltd* [2017] NSWCATAP 106 at [27].

33 Mr Davie further submitted that the Notice of Appeal had not raised this as a ground of appeal. However, we note the statement of the Appeal Panel in *Cominos v di Rico* [2016] NSWCATAP 5 at [12]-[13]:

> 12 The Appeal Panel must give effect to the guiding principle when exercising functions under the CAT Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). …
>
> 13 It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. …

34 The grounds propounded by the owners corporation for submitting that that the decision was not fair and equitable included:

> i) The respondent was unable to rely on any evidence as the solicitors it had retained for approximately 18 months ceased to act for the respondent one week prior to the hearing. The legal firm of Chambers Russell lead the respondents it had filed evidence to NCAT for the hearing. However as seen in the Notice of Orders it states "the respondent did not adduce evidence". Without the respondent being able to adduce any evidence a fair and equitable hearing would be impossible.
>
> ii) At the beginning of the hearing until almost the end the representative for the respondent was not granted leave to address the member. The applicant's evidence was able to be presented uncontested. In the last 20 Minutes of the hearing, the respondent's representative was only able to present to the member one point, the hearing was then concluded prior to be given the opportunity to speak on other points which would have given evidential weight that would have changed the Members orders.

35 In our view this sufficiently raises a ground of denial of procedural fairness.

36 Had we been persuaded that there were grounds to conclude that the owners corporation had been denied procedural fairness, we would likely have given Mr Davie an opportunity to file further submissions to meet that case.

37 However, we are not persuaded that there are such grounds.

38 The owners corporation had made a deliberate decision not to file evidence. The requirement that a party be given an opportunity to be heard does not require that a party which fails to take that opportunity should be permitted a second chance if it subsequently regrets that failure: *Allesch v Maunz* (2000) 203 CLR 172 at 185 – 186, [38] – [40];*Yao v Minister for Immigration and*

Border Protection (2014) 140 ALD 21; [2014] FCAFC 17 at [61]; *Russo v Brack* [2016] NSWCATAP 261 at [44] – [45].

39 There was no denial of procedural fairness in the hearing proceeding without evidence from the owners corporation in circumstances where the absence of such evidence was the result of the owners corporation's own deliberate decision.

40 We would not wish to be understood as condoning the hearing proceeding without the active participation of Mr Shirley while he sought evidence that he was authorised to represent the owners corporation. We consider that, in circumstances where there is no dispute concerning the membership of the strata committee or the election of the officers of the owners corporation, and particularly where the owners corporation has been previously represented by solicitors, it would usually be appropriate to grant a member of the strata committee, and *a fortiori* one of the officers of the owners corporation, leave to represent the owners corporation. We refer to the Consumer and Commercial Division Procedural Guideline concerning Representation, which provides, in paragraph 10(a), that:

> "The Tribunal will usually grant leave to a person to represent a party in the following circumstances:
>
> a) if the party is an owners corporation under the Strata Schemes Management Act 2015 (NSW) and the proposed representative is a member of the Strata Committee or the strata managing agent".

41 We accept that the position would be different where there was a dispute concerning the membership of the strata committee or where a respondent to proceedings, brought purportedly on behalf of an owners corporation, explicitly challenged the authority of the person purporting to represent the owners corporation in those proceedings. However, neither of those circumstances was applicable in this case. There was no dispute concerning the membership of the appellant's strata committee and the proceedings were brought against the owners corporation, not by the owners corporation. We note, further, that Mr Davie did not explicitly challenge Mr Shirley's authority to represent the owners corporation, rather he merely queried it. In our view that did not justify the Tribunal's insistence upon Mr Shirley producing a resolution of the owners

corporation (or the strata committee – it is not clear which was required) authorising him to represent the owners corporation.

42 Nevertheless, we note that the hearing was initially adjourned to permit Mr Shirley to obtain evidence that he was authorised to represent the owners corporation and that the resolution first produced by Mr Shirley did not in fact authorise him to do so. It was only after Mr Shirley had produced those documents that the hearing proceeded without Mr Shirley being given leave to represent the owners corporation. Mr Shirley was nevertheless permitted to appear as a friend of the Tribunal.

43 Furthermore, Mr Shirley had a full opportunity in the course of the appeal to raise any issues which he considered he had not had the opportunity to raise at first instance.

44 The only issues raised by Mr Shirley were those the subject of the owners corporation's other grounds of appeal or application for leave to appeal. In circumstances where the owners corporation had filed no evidence, we are satisfied that the owners corporation did not lose any chance of a different outcome by reason of Mr Shirley not being given leave to represent the owners corporation until late in the course of the hearing: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

45 We note that the leave grounds, which we have extracted above, include the assertion that:

> "In the last 20 Minutes of the hearing, the respondent's representative was only able to present to the member one point, the hearing was then concluded prior to be given the opportunity to speak on other points which would have given evidential weight that would have changed the Members orders."

46 That statement discloses a misunderstanding of the potential effect of the submissions which Mr Shirley might have made. The owners corporation had not filed evidence. Nothing Mr Shirley might have said should have been given "evidential weight". All that Mr Shirley could properly have done would have been to make submissions, which could not have constituted evidence.

47 Accordingly, we do not consider that any challenge to the decision on the ground of denial of procedural fairness can succeed.

Leave to appeal

Decision not fair and equitable

48 The appellant's grounds for seeking leave to appeal on the ground that the decision was not fair and equitable were the same grounds as we have considered in relation to the question whether the appellant was denied procedural fairness. For the reasons we have set out in that context we refuse leave to appeal on the ground that the decision was not fair and equitable.

Weight of evidence

49 We have set out above (at [15]) the basis stated in the Notice of Appeal upon which the appellant submitted that the decision was against the weight of the evidence.

50 The first half of the stated ground, that "there was no evidence or report suggesting from the 28th of March 2019 to May 2019 that the unit was uninhabitable due to water ingress", merely repeats the no evidence ground of appeal we have already addressed above.

51 The evidence that the respondent's lot was "uninhabitable" (ie not capable of being safely occupied) might have been thin, but it was evidence and there was no evidence to the contrary.

52 The second half of the stated ground, "There is also evidence that the applicant hid a report from the respondent making the applicants claim for compensation larger", refers to the fact that the respondent received a report from an expert asbestos consultant on 17 February 2020, which indicated that there was friable asbestos entering the respondent's lot from common property, and, according to the appellant, did not provide it to the owners corporation until early July 2020.

53 The appellant submitted that the respondent should not be entitled to compensation for loss of rent during the period when the respondent withheld a report which disclosed the need to undertake repairs and did not inform the appellant of the need to undertake repairs.

54 Mr Davie submitted in response that:

(1) There was no evidence before the Tribunal that the report was withheld by the respondent or when it came to the attention of the appellant.

(2) Even assuming the report was not provided to the owners corporation until July 2020, there was no basis to conclude that the owners corporation would have acted any earlier to resolve the asbestos issue which rendered the lot unfit for occupation. As Mr Davie pointed out, the owners corporation had not rectified the issue by the time of the hearing in April 2022. There is no reason to conclude that the owners corporation would have done so any earlier, if it had received the report in February 2020 rather than July 2020.

(3) Even if the owners corporation had been able to show that it would have acted earlier if the report had been disclosed earlier, the owners corporation's obligation under section 106 of SSMA was a strict obligation. Mr Davie submitted that there was no obligation on the respondent to mitigate its loss (citing *Lubrano v Proprietors Strata Plan No 4038* (1993) 6 BPR 97,457 at 13,310 – 13,311, per Young J).

55 We do not accept Mr Davie's first proposition, there was slight evidence before the Tribunal that the owners corporation only received a copy of the February asbestos report on in July 2020. That evidence consists of a sentence (numbered 1.7) in a letter from the owners corporation's former solicitors to the respondent dated 23 November 2021, which stated that the solicitors were instructed that the report was not provided to the owners corporation until 3 July 2020. That evidence can fairly be described as second (or even third) hand hearsay, but the rules of evidence do not apply in the Tribunal, and the statement by the appellant's solicitors is material which "if accepted could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue" (cf section 55 *Evidence Act* 1995 (NSW)).

56 Nevertheless, we accept Mr Davie's second proposition. There is no foundation in the evidence upon which the Tribunal might have drawn the conclusion that the earlier provision of the report would have led to the owners corporation taking any action any earlier which might have resulted in the respondent's lot being fit for occupation before the date of the hearing. Indeed, in paragraph 1.9 in the 23 November 2021 letter (ie following closely after the statement concerning the 17 February 2020 report), the owners corporation's solicitor stated that the owners corporation had engaged an asbestos expert to conduct further inspections in Lot 8 in May 2020. There is no reason to conclude that the provision of the 17 February 2020 report was necessary to prompt the

owners corporation to action, or that it was sufficient to do so. It is therefore not necessary to address Mr Davie's third proposition.

Significant new evidence

57 In seeking leave to appeal on the basis that significant new evidence is now available, the appellant identified evidence in four categories:

(1) A full submission in response to evidence filed by the respondent, in other words, the evidence the owners corporation would have filed if it had been able to (or more precisely had not chosen not to) do so. Clearly, all of this evidence was available before the hearing.

(2) "Expert reports" from a builder, an electrician and "BBN consulting", apparently an asbestos consultant, which the appellant submitted establish "that the asbestos issue and the reason for the unit to be uninhabitable was due to the lot owner carrying out works to the common property". We note that the "reports" were dated respectively 15 February 2022, 14 May 2021 and 7 September 2021, that is, before the hearing at first instance.

(3) An email from John Sachs, a director of the respondent, dated 3 July 2020, responding to an email from Stephen Davies, the secretary of the owners corporation, which referred to the 17 February 2020 report having been provided the previous evening, and suggested that:

> "Having given the report a cursory read last night I can only conclude that having this report in your possession since 17 February 2020 and not having forwarded the report to the OC for review and action is unconscionable behaviour in the extreme."

Mr Sachs' email did not seek to contradict the proposition that the report had not been provided to the owners corporation until 2 July 2020. Rather he stated:

> "This is a private report commissioned by me concerning Lot 31 because I was concerned about the owners corporation's own report. It was not addressed to the owners corporation."

While this would, if permitted to be relied upon, constitute evidence that the report was not provided to the owners corporation until 2 July 2020, it was also evidence that was available to the owners corporation before the hearing at first instance

(4) A statutory declaration from a witness, whose connection to the owners corporation is not disclosed, declaring that Mr Peter Sachs, also a director of the respondent, had handed her a copy of "the JBS & G report" on 2 July 2020. Even ignoring the clear deficiencies in this evidence which, without further explanation, says nothing of possible relevance to the proceedings, there is no reason to conclude that this

> document, or a document to similar effect, could not have been obtained by the appellant before the hearing in April 2022.

58 Thus, none of the four categories of evidence, referred to by the appellant in support of its application for leave to appeal on the basis that there is significant new evidence, can be described as "significant new evidence that was not reasonably available at the time the proceedings under appeal were being dealt with".

59 As we have noted, all of the evidence was available at the time of the hearing, and was not presented at the hearing because the owners corporation had, deliberately, and in circumstances where it had legal representation, not filed any such evidence.

60 Accordingly, we cannot grant leave to appeal on this basis.

Appeal against costs order

61 As the appeal against the substantive orders has failed, the appeal against the costs order cannot succeed. The only basis for that appeal was the proposition that, if the appeal against the substantive order was upheld, the substantive orders which would then have been made would have provided the respondent with no more than the owners corporation had offered in November 2021. For reasons canvassed in oral submissions, which it is not necessary to repeat, that premise was not correct. The offer was not equal to, or better for the respondent than, the outcome the owners corporation sought by the substantive appeal. In any event, as the substantive appeal has failed, the costs appeal could not succeed even if the premise was correct

Conclusion

62 For the foregoing reasons leave to appeal will be refused and the appeal will be dismissed

63 We note that in the Notice of Appeal the appellant also sought an order:

> "iii The respondent [ie appellant] is granted leave to initiate proceedings to make a claim under section 111, 120 and section 132 of SSMA to substantiate the applicant [respondent to the appeal] carried out works that has caused damage to the common property."

64 Sections 111, 120 and 132 of the SSMA relate to unauthorised work by lot owners affecting common property and the right of the owners corporation to

carry out work which a lot owner is required to carry out but has failed to carry out.

65 It is not apparent why the owners corporation should require leave to commence proceedings in relation to those matters. It is certainly not appropriate for the Appeal Panel to make such an order.

66 To the extent that the decision of the Tribunal raises an issue estoppel inhibiting the owners corporation from making any such claim (about which we express no opinion), the position in that regard will not be affected by our decision in this matter, as the appeal is to be dismissed.

Costs

67 Mr Davie indicated in the course of submissions that, if successful, his client sought an order for the costs of the appeal.

68 The Appeal Panel noted that it was not apparent that the amount in issue on the appeal exceeded $30,000, as the orders sought by the appellant only involve the reduction of the amount of the judgment against the owners corporation from $80,360 to $67,930, with the result that rule 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) was not applicable and special circumstances were necessary before the Appeal Panel could make an order in relation to the costs of the appeal.

69 Mr Davie submitted that there were special circumstances, and sought an opportunity to make submissions concerning that issue after the determination of the appeal. Mr Davie indicated that he did not consider that he was able to propound his submissions concerning special circumstances with full force before the appeal has been determined. The Appeal Panel indicated at the hearing that, if the appeal was dismissed, we would give Mr Davie the opportunity to file brief submissions concerning whether there are special circumstances, and we will make orders to that effect.

ORDERS

70 Our orders are:

(1) Leave to appeal refused.

(2) Appeal dismissed.

(3) The respondent may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding three pages, concerning the question whether there are special circumstances warranting an order for costs in respect of the appeal.

(4) The appellant may file and serve submissions not exceeding three pages in response to any such submissions within a further 14 days.

(5) Any submissions filed in accordance with orders 3 and 4 should address the issue whether the question of costs can be determined on the basis of the written submissions and without a further hearing.

(6) If the respondent does not file submissions in accordance with order 3 there will be no order in relation 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 Civil and Administrative Tribunal of New South Wales.
Registrar