Supreme Court

New South Wales

Case Name:	Keevers v Sarraf Property Group Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1017
Hearing Date(s):	8 March 2022
Date of Orders:	28 July 2022
Decision Date:	28 July 2022
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	(1) Leave to appeal pursuant to s 83(1) of the Civil and Administrative Tribunal Act 2013 (NSW) is refused. (2) The amended summons filed 26 October 2021 is dismissed. (3) The stay orders made on 8 July 2022 in this Court are dissolved. (4) The plaintiff is to pay the defendants' costs.
Catchwords:	ADMINISTRATIVE LAW – NCAT Appeal – Leave to appeal – Whether the Appeal Panel erred in joining parties – Whether there was an injustice going beyond what was reasonably arguable – Whether there is an issue of principle or a question of public importance – Appeal dismissed
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) ss 44, 80 Strata Schemes Development Act 2015 (NSW) Part 10 Strata Schemes Management Act 2015 (NSW) ss 86, 87, 237 to s 86 Strata Schemes Management Act

	Uniform Civil Procedure Rules 2005 (NSW) r 6.19
Cases Cited:	Adam P Brown Male Fashions v Phillip Morris (1981) 148 CLR 170 Administration of Papua New Guinea v Daera Guba (1972) 130 CLR 353 Australian Railways Union v Victorian Railways (1971) 125 CLR 319 Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164 Browne v Dunne (1893) 6 R 67 Commissioner of Police, New South Wales Police Force v Fine [2014] NSWCA 327 Corcoran v Far [2020] NSWCA 140 Coulter v R [1988] HCA 3; 164 CLR 350 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 1120 House of Spring Gardens Ltd v Waite [1991] 1 QB 241 House v The King [1936] HCA 40; 55 CLR 499 Huang v Attapallil & Ors [2017] NSWCA 181 Kuhl v Zurich Financial Services Australia [2011] HCA 11; (2011) 243 CLR 361 Lee v New South Wales Crime Commission (2012) 224 A Crim R 94; [2012] NSWCA 262 Macquane Developments Pty Ltd & Anor v Forrester & Anor [2005] NSWSC 674 Nana Ofori Atta II v Nana Abu Bonsra II [1958] AC 95 at 102 Nominal Defendant v Manning (2000) 50 NSWLR 139, [2000] NSWCA 80 Osborne v Smith (1960) 105 CLR 153 PPK Willoughby v Baird [2019] NSWCA 48 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 Rosenberg v Percival (2001) 205 CLR 434; [2001] HCA 18 Tan v Owners Corporation Strata Plan 22014 (No 2) [2015] NSWSC 1920
Category:	Principal judgment

Parties:	Francis Keevers (Plaintiff) Sarraf Property Group Pty Ltd (First Defendant) Konn Palonis (Second Defendant) Owners of Strata Plan 1813 (Third Defendant) Peta Bourke (Fourth Defendant) Joanna Fardell (Fifth Defendant)
Representation:	Counsel: S. Philips (Plaintiff) G. Sirtes SC (First, Second and Third Defendants) Solicitors: Terret Lawyers (Plaintiff) Madison Marcus (First, second and Third Defendants)
File Number(s):	2021/237102
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Appeal Panel
Citation:	NSWCATAP 130
Date of Decision:	12 May 2021; 22 July 2021; 30 July 2021;
Before:	P Durack SC, Senior Member D Robertson, Senior Member
File Number(s):	2020/00370815 (AP 20/23648)

Judgment

Background

The Appeal Panel

Events since the decision of the Appeal Panel

Grounds of appeal in this Court

Extension of time to appeal

JUDGMENT

1 **HER HONOUR:** This matter involves an appeal from a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal ("NCAT").

2 By Amended Summons filed on 26 October 2021, the plaintiff appeals (and, to the extent necessary, seeks leave to appeal) two decisions of the Appeal Panel of the NSW Civil and Administrative Tribunal (NCAT Appeal Panel) dated 12 May, 22 July 2021 and a 30 June 2020 decision in relation to costs.

3 The plaintiff is Mr Francis Keevers. The first defendant is Sarraf Property Group Pty Ltd ("Sarraf Property Group") which includes two Sarraf brothers, Mr Norman Sarraf and Mr John Sarraf. The second defendant is Mr Konn Palonis. Without meaning any disrespect, I will refer to Konn Palonis as "Palonis" for convenience. The third defendant is the Owners of Strata Plan 1813. The fourth defendant is Peta Bourke. The fifth defendant is Joanna Fardell. I will explain later in this judgment why the fourth and fifth defendants have played no role in this appeal. Mr Philips of Counsel appeared for the plaintiff. Mr Sirtes SC appeared for the first to third defendants. The parties relied upon a courtbook ("CB"). The parties made very lengthy submissions (about 80 pages)

so I have endeavored to condense them so to reproduce their submissions with some clarity.

4 The plaintiff relevantly seeks the following orders:

(1) Leave granted to the plaintiff to appeal from the decisions below, including the orders made on 30 June 2020,12 May 2021 and 22 July 2021.

(1A) To the extent necessary, the time for appealing from the orders made on 30 June 2020 be extended.

(2) Appeal allowed.

(3) Orders numbered 1 and 2 made below on 30 June 2020, Orders numbered 2, 3, 4, 5, 6 made below on 22 July 2021 and orders numbered 2 and 3 made below on 12 May 2021 be set aside and the appeal below be dismissed.

(4) Order 1 in proceedings SC 19/28238 and SC 19/28234 made on 25 May 2020 be restored.

(5) Orders 1, 2 and 3 made in proceedings SC 19/28238 and SC 19/28242 and SC 19/28244 made on 14 July 2020 be restored.

(6) First and second defendants to pay the plaintiff's costs of this appeal and of the appeal below.

Background

5 The strata building is a two storey, four unit block in Maroubra which was constructed in the 1920s. Strata Plan 1813 comprises four lots, with Lots 15 and 16 on the ground floor and Lots 17 and 18 on the first floor. Lots 15 and 18 each have a unit entitlement of 26% while Lots 16 and 17 each have 24%.

6 At the time of the NCAT proceedings, Keevers was (and has been since 1978) the owner of Lot XX in Strata Plan 1813, located in Maroubra (“the strata building”). Lot XX had and has a unit entitlement of 24% in the strata building. Marta Casabon is the spouse of Keevers.

7 The first and second defendants, Sarraf Property Group and Palonis, have since about January 2016 owned Lots 15 and 18 in the strata building, which together have a combined unit entitlement in the strata building of 52%.

8 The Third Defendant is the Owners Corporation of the strata building **(**“Owners Corporation”)

9 The Fourth and Fifth Defendants (“Bourke” and “Fardell”) are sisters, who between about May 2018 and June 2021 were the owners of Lot 16 in the strata building (having inherited that lot from their late father). Lot 16 has a unit entitlement of 24% in the Strata building. In June 2021, Bourke and Fardell sold Lot 16 to Sarraf Property Group and Palonis, resulting in Sarraf Property Group and Palonis acquiring a combined unit entitlement of 76% in the strata building. The sale of Lot 16 explains why the fourth and fifth defendants did not appear at the hearing as they no longer had any interest in their property.

10 During the Appeal Panel proceedings, Sarraf Property Group and Palonis were referred to as the majority lot owners, while Keevers and Bourke and Fardell were referred to as the minority lot owners. Now Keevers is the minority owner and Sarraf Property Group and Palonis are the majority lot owners.

11 On 10 April 2017, an extraordinary general meeting of the Owners Corporation on was held, where it was resolved that the Owners Corporation engage a building consultant to prepare a report in relation to any structural or remedial issues of the building.

12 On 9 June 2017, the Strata Manager received a Building Inspection Report prepared by Strata Defects Specialists, Michael Dakhoul, which provided an opinion in relation to defects within the strata building (“Dakhoul report”). The report concluded that the estimated cost of undertaking work to remedy the defects in the strata building was $1,006,425.00.

13 On or about 13 November 2017, the Owners Corporation circulated a Notice of Meeting for an Annual General Meeting. The notice included proposed resolutions to the following effect: building contractors be retained to undertake in the order of $800,000 in building works to the strata building; a Special Levy for a total amount of $1,000,000 be struck to assist with payment for the building works; the number of members of the Strata Committee for the ensuing year to be decided, and such members to be elected.

14 On 27 November 2017, the solicitor for Keevers informed the strata manager that he considered the Notice of Meeting to be defective in several respects, and that, as a result, if the proposed AGM were to proceed, then resolutions passed at it would be invalid.

15 On 28 November 2017, the AGM of the Owners Corporation occurred, with Keevers, Bourke and John Sarraf (as company nominee for Sarraf Property Group) were present. At this meeting the following matters were resolved by ordinary resolution, only 3 members were elected to the Strata Committee, excluding Keevers; approval of expenditure for building works, and special levies, of about $980,000 in total, amounting to about $250,000 for each of the 4 lots ("2017 Special Levies").

16 Both Keevers and Bourke and Fardell refused to pay the 2017 Special Levies on various grounds, including that they were invalidly struck. This led to the commencement of the debt recovery proceedings by the Owners Corporation against Keevers and Bourke and Fardell in the District Court.

17 Keevers, Bourke and Fardell obtained a building condition report which indicated that, contrary to the Dakhoul Report, the strata building was in a generally fair condition and required only about $77,650 in essential works in order to rectify the common areas and common property. In particular, this report described the roofing membrane as being in very good condition and reported as being only a few years old, and that the perimeter parapet wall had recently been capped.

Procedural background in various courts and in NCAT

18 There has been continuing, highly contested litigation in various Courts and NCAT, between the parties. I shall set out the litigation relevant to these proceedings.

19 On 23 February 2018, by summons, Keevers commenced proceedings against the Owners Corporation in the Equity Division of this Court ("SC Proceedings") and then filed Points of Claim on 14 April 2018. The Owners Corporation was the sole defendant to those proceedings, with Keevers (initially) the sole plaintiff. The initial relief sought in the Summons related to a by-law which had been passed by the Owners Corporation concerning garage spaces. This issue has no significance in this appeal.

20 On 30 May and 3 July 2018, the Owners Corporation commenced (separate) debt recovery proceedings against Keevers, and Bourke and Fardell, in the District Court of NSW ("DC Proceedings") seeking payment of the unpaid 2017

Special Levies. On 6 July and 6 August 2018, defences were filed in the District Court. On 3 August and 7 December 2018, consent orders were made transferring the DC Proceedings to the Supreme Court and ordering that they be heard and determined together with the SC Proceedings.

21 On 22 March 2019, Keevers served proposed Amended Points of Claim in the SC Proceedings that included adding Bourke and Fardell as plaintiffs.

22 On 1 April 2019, the SC and DC Proceedings were listed for hearing before Darke J.

23 On 3 June 2019, Amended Points of Claim were filed in the SC Proceedings in which Bourke and Fardell were added as plaintiffs. The relief sought in the Amended Points of Claim was expanded to include orders (pursuant to ss 87 237 *Strata Schemes Management Act 2015* (NSW)) reducing the 2017 Special Levies down to $25,000 for each lot owner and for the appointment of an independent strata manager to exercise all the functions of the Owners Corporation. The Owners Corporation remained as the sole defendant to those proceedings.

24 On 14 June 2019, Darke J made orders transferring both the SC Proceedings and DC Proceedings to NCAT for determination.

The NCAT proceedings

25 On 24 July 2019, case management orders were made in the proceedings by NCAT (Ex C in this Appeal). The relevant orders to this appeal are:

> "(7) if any lot owner in the strata scheme seeks to make submissions or provide documents in relation to the application for compulsory management they must seek to have themselves joined as a respondent to the proceedings and file and serve any submissions or documents by 4 October 2019; and
>
> (8) Note that interested parties are on notice that they will not be able to make submissions or give evidence at the hearing unless they have added themselves as a respondent to the proceedings."

26 Neither Sarraf Property Group nor Palonis availed themselves of this opportunity to be joined as a party to the proceedings. The directions included were that if they were not joined as parties they could not make submissions before the Tribunal Member. Hence they did not make submissions before the

Tribunal Member. I shall refer in more detail to what transpired before Deputy President Westgarth shortly.

27 On 6, 7 and 8 April, 14 May and 14 July 2020, the proceedings were heard before Senior Member Ellis SC ("the Senior Member") Neither Sarraf Property Group nor Palonis gave evidence or made submissions. The Senior Member delivered his substantive reasons and made orders on 25 May 2020 and delivered further reasons and made orders for costs on 14 July 2020 (Costs orders). The relevant orders made by Senior Member Ellis on 25 May 2020 are as follows:

(1) Rollings and Tyrell Pty Ltd are appointed as strata managing agent to exercise all the functions of the Owners Corporation pursuant to s 237 of the *Strata Schemes Management Act*

(2) The appointment is to continue for a period of two (2) years from the date of these orders.

(3) Orders pursuant to s 87 *Strata Schemes Management Act* reducing the 2017 Special Levies from $980,000 in total down to $80,000.

28 The relevant orders made on 14 July 2020 are as follows:

(1) that the Owners Corporation is to pay the costs of Keevers, Bourke and Fardell of (each of) the proceedings, and

(2) The Owners Corporation is not to recoup its costs from any levy or fund which includes monies contributed by those parties (costs orders).

Appeal to the Appeal Panel

29 On 26 May 2020, the Owners Corporation filed a Notice of Appeal to the Appeal Panel seeking to appeal all of the orders of Senior Member. An application seeking leave to appeal and a stay of the order for compulsory strata manager was later withdrawn. While the Tribunal Member had made an order appointing an independent Strata Manager, Rollings and Tyrell Pty Ltd for a period of 2 years (from 25 May 2020) at the time of the hearing of the appeal in this Court, the period of appointment of the independent strata manager had expired. The Owners Corporation was named as the appellant in the appeal, with Keevers, Bourke and Fardell named as the defendants.

Interlocutory hearing and orders of Deputy President Westgarth ("Deputy Presidents decision") comprising of the Appeal Panel dated 30 June 2020

30 The orders made by the Deputy President assume importance in the current appeal to this Court.

31 On 30 June 2020, at the hearing of the stay application (before Deputy President Westgarth constituting the Appeal Panel), the following transpired:

(a) an oral application was made by Sarraf Property Group and Palonis to be joined as parties to the appeal;

(b) counsel for Keevers, Bourke and Fardell opposed the joinder of Sarraf Property Group and Palonis as parties to the appeal,

(c) Sarraf Property Group and Palonis were joined to the Appeal as additional plaintiffs; and

(d) the solicitors for the Owners Corporation were granted leave to represent Sarraf Property Group and Palonis in the Appeal.

The Transcript

32 I have extracted the relevant portions of the transcript of the hearing before Deputy President Westgarth on the topic of the joinder of parties.

33 At T7.12-T9-22 (CB 364-366), the following exchange took place between Mr Philips, appearing for Keevers, Mr Moir, appearing for Sarraf Property Group and the Deputy President:

> "Mr Philips: …But there may be a case for a joinder of the two parties identified by Mr Moir once those costs orders have been delivered, but, as things currently stand, in my submission, there's no basis for those two parties at this stage to be joined as parties to the appeal. Can I just respond…
>
> …
>
> The D. President: The costs orders won't be against the majority owners. They will be against the Owners Corporation, won't they?
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> Mr Philips: Yes. But depending on the way the form of the order that is sought.
>
> …
>
> Now, if that order is not made along those lines, then it's difficult to see how Sarraf Property Group and Mr Palonis would have any standing to be joined as appellants to the appeal.
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> The D. President: Except for this… That there's no real contradicter (SIC) in the appeal.
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> Mr Philips: I accept that.
>
> The D. President: I just can't see how you can avoid not adding these two majority owners if the real interests are to be discussed opening before the

appeal panel, that is to say that majority and the minority unit holders have different positions and that can only be properly ventilated by these two majority owners being added, I would have thought.

Mr Philips: … If you're minded- if you're against me, ...either today or at some future occasion to join these two parties as appellants, then I wouldn't wish to be heard any further about that. The further submission that I wish to make or observation that I wish to make was that the Sarraf Property Group and Mr Palonis did have an opportunity - when the proceedings below were transferred from the Supreme Court to the tribunal, there was an opportunity, I think to formally make this on the record, but it should be apparent on some directions that were made-I can't remember the name of the senior member, but it was-when it first came before the tribunal, an opportunity was given to those two parties to join the proceedings as there were countervailing claims.

… when that first came before the tribunal, there was an opportunity given to Mr Palonis and Sarraf Property Group as interested parties to join in the proceedings either as appellants - applicants or respondent in some way and they declined to avail themselves of that opportunity. That's merely one further submission I wish to draw attention- the tribunal's attention to on the question of whether it's appropriate that they should be joined as parties as appellants in the appeal, but that's all I wish to say in relation to that point.

Mr Moir: All I can say, Deputy President, was that most of the orders being sought by the two parties and there were three applications that were determined and there were orders sought on both side, but mostly then there was no reason to join the other owners the majority owners to the proceedings. But one of the orders was repayments with the collection of a special levy. There's no reason to join them on that order. Another order being sought by the minority owners was to confirm their right of exclusive use of a garage by-law. That was the dispute between them and the Owners Corporation. There was no reason to join the majority owners for that purpose either.

The main reason when the tribunal normally runs these two joined - or gives parties the opportunity to be joined to proceedings is whether the proposed change of unit entitlements because all owners can be directly affected their unit entitlements and their share of the vote and their share of the levies can go up or down if those orders are made. That, I believe, was the reason - but I could be wrong, but I believe that was the reason why the tribunal made that standard order for those people to be joined if they would like to and, ultimately that order was abandoned from Mr Philips at the hearing. So I don't think, given the orders that were made and the order that's being appealed, I don't think it was really appropriate for those parties to be joined in the previous proceedings or to seek to be joined in the previous proceedings.

The D. President: Well, with great respect to you both, I don't think the history of it is directly relevant. I think what is relevant is that there's an appeal brought by an Owners Corporation, the officers of which have been displaced by the appointment of a compulsory manager. In reality, those who wish to contest the orders that are under appeal is not the Owners Corporation nor the respondents to the appeal, but two other parties who are called the "majority owners" and I think that the interests of justice require that they be added as additional appellants and I propose, therefore, to add Sarraf Property Group and Palonis, whoever they are, to the appeal as additional appellants. And do I take it that, Mr Moir, you will be representing those two appellants?

Mr Moir: Yes. I will."

The Appeal Panel

34 On 28 October 2020, Keevers, Bourke and Fardell served their submissions on the appeal. In [5]-[11] of those submissions, they raised, as a threshold issue, the standing of Sarraf Property Group and Palonis to bring or be joined as plaintiffs in the appeal. They submitted that, by virtue of the provisions of s 80(1) of the *Civil and Administrative Tribunal Act 2013* (NSW)("*NCAT Act*"), as they were not parties to the proceedings below, Sarraf Property Group and Palonis did not have any standing to, and therefore could not, to bring the appeal to the Appeal Panel.

35 On 27 November 2020, Sarraf Property Group and Palonis served their written submissions in reply.

36 On 8 and 17 December 2020, the hearing of the appeal took place before the Appeal Panel comprised of Durack SC and D Robertson, Senior Members ("The Appeal Panel"). On 12 May 2021, the Appeal Panel delivered its substantive reasons, and delivered further reasons on costs. It made orders on 22 July 2021. The orders made by the Appeal Panel were in substance as follows:

(1) set aside the s 87 orders (reducing the 2017 Special Levies to $80,000 in total) save to the extent that each required payment of a levy referable to repair work required to the common stairs in the sum of $80,000;

(2) remit to a differently constituted Tribunal for redetermination (based on evidence already adduced and such further evidence as may be allowed) all claims made concerning the 2017 Special Levies, the appointment of a compulsory strata manager and the question of costs of the proceedings at first instance; and

(3) Sarraf Property Group's costs of the appeal to be paid by Keevers, Bourke and Fardell.

Events since the decision of the Appeal Panel

37 On 14 May 2021, Sarraf informed Keevers (by email) that the previous strata manager (CF Strata) had refused to take back management of the strata scheme and that the Sarraf Property Group would be nominating a different manager to replace the compulsory strata manager as soon as practicable.

38 On 20 May 2021, Sarraf informed Keevers (by email) that Sarraf Property Group and a company controlled by Palonis had entered into a contract to purchase Lot 16 from Bourke and Fardell.

39 On 28 May 2021, the solicitors for Sarraf Property Group and Palonis informed the solicitor for Keevers that as the plaintiffs now control at least 75% of the lots in the strata scheme, they had been instructed to commence the strata renewal process in Part 10 of *the Strata Schemes Development Act 2015* (NSW).

40 On 30 May 2021, the solicitors for the Sarraf Property Group informed the solicitor for Keevers (by email) that the strata manager appointed by the Tribunal (Ms Tyrrell) had ceased managing the scheme, had handed over the books and records to the plaintiffs and they had passed a motion appointing their preferred strata manager to run the scheme.

41 On 1 September 2021 a development application was lodged with Randwick Council (on the instructions of Sarraf) for the demolition of the strata building and the construction of nine apartments on the site in its place.

42 On 23 September 2021, an order was made by NCAT that the remitted proceedings be stayed pending finalisation of the appeal to this Court.

43 Currently, the strata block is vacant. The tenants have vacated the premises. The power has been turned off.

44 On 8 July 2022, I granted an urgent stay of the execution of District Court judgment in proceedings number 2022/123197:

> "Upon the undertaking proffered to the Court by counsel on behalf of the plaintiff not to dispose of or further encumber the property pending the determination of the appeal, with exception to the proposed $300,000.00 draw down under their mortgage facility with Credit Union of Australia Ltd, as deposed in the plaintiff's affidavit.
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> **THE COURT ORDERS THAT**:
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> (1) The enforcement of the judgment of the District Court of New South Wales in proceedings number 2022/00123197 given on 29 April 2022 ("the Proceedings") be stayed pending determination of the appeal and until 14 days after the publication of reasons in relation to the appeal to this Court or further order of this Court.
>
> (2) The operation and effect of the garnishee order made on 7 June 2022 in the Proceedings be stayed pending determination of the

appeal and until 14 days after the publication of reasons in relation to the appeal to this Court or further order of this Court.

(3) In the event that Mr Keevers fails by Friday 15 July 2022 to pay $132,716.37 by way of security for the judgment debt into his solicitor's trust account, the stay effected by orders 1 and 2 above are automatically discharged.

(4) The plaintiff's solicitor, Mr Terret shall confirm in writing upon receiving such funds into his trust account, as provided in order 3 above, with the defendants' solicitors.

(5) Costs reserved."

Grounds of appeal in this Court

45 The grounds of appeal as set out in the amended summons are numerous. They are follows:

(1A) The Appeal Panel erred, in law, in ordering that the First and Second Defendants be joined to the appeal as additional plaintiffs, in circumstances where:

(a) s 80(1) of the *NSW Civil and Administrative Tribunal Act 2013* provides that an appeal against an internally appealable decision may only be made to an Appeal Panel by a party to the proceedings in which the decision is made and the first and second defendants were not parties to the proceedings in which the decision the subject of the appeal below was made; and

(b) the appeal below sought relief by way of orders pursuant to s 86(1) of the *Strata Schemes Management Act 2015* and s 86(2) of that Act provides that such an order may only be made on the application of the Owners Corporation.

(1B) In the alternative to Ground 1A, the Appeal Panel erred, in law, by not limiting the joinder of the first and second defendants as additional plaintiffs to the appeal to those grounds of appeal relating to the appointment of a compulsory strata manager pursuant to s 237 of the *Strata Schemes Management Act 2015.*

(1) The Appeal Panel erred, in law, in finding that:

(a) it was open to the plaintiff to appeal the interlocutory decision of the Deputy President and that the only method of challenging that decision was to make such an appeal: [86] of the Appeal Panel's Reasons for Decision dated 25 May 2021,

(b) the plaintiff did not suggest that the Appeal Panel should revoke the interlocutory decision of the Deputy President [87]; and

(c) the plaintiff's submissions amounted to an impermissible collateral challenge to the decision of the Deputy President: [91].

(2) The Appeal Panel erred, in law, in finding that:

(a) the Tribunal at first instance made an error of law in the form of procedural unfairness by making findings (in [79] of its Reasons) described as "adverse" in circumstances where such findings were not advanced or sought by the plaintiff: Reasons 1 [139]-[140];

(b) it was not open (to the Tribunal) to conclude that a cost estimate was inflated because there was no probative evidence for such conclusion and the Tribunal erred in so doing (Reasons 1 [141]-[142]) in circumstances where there was probative evidence for such conclusion;

(c) material from an expert witness report was not capable of supporting a conclusion that the costs estimate was inflated (Reasons 1 [166]) in circumstances where such material was capable of supporting such conclusion;

(d) it was not open (to the Tribunal) to conclude that the building work the subject of the special levy went beyond what was required by s 106 of the *Strata Schemes Management Act* because there was no probative evidence to support such conclusion and such conclusion was an error of law (Reasons at [168]-[169]) in circumstances where there was probative evidence for such conclusion.

(3) The Appeal Panel erred, in law, in:

(a) upholding Ground 6 of the appeal below, and in so doing finding that the Tribunal's conclusions (about preferring the evidence of the plaintiff and Casabon to that of Norman Sarraf and that Norman Sarraf said at a meeting that the renovation work would never be carried out) were impugned and undermined by material errors of fact (Reasons 1 [215-216]) without identifying any such errors of fact; and

(b) upholding Ground 5 of the appeal below ([225]) and in so doing failing to give any, or sufficient, weight to the unchallenged findings made by the Tribunal (at [108] of its Reasons for Decision of 25 May 2020) which, individually and collectively, supported the conclusion that the special levy had been imposed for an improper purpose.

(4) The Appeal Panel erred, in law, in finding and ordering, in its second Reasons for Decision dated 30 July 2021 that:

(a) the First and Second Defendants achieved substantial success in the appeal (Reasons 2 at [31]) in circumstances where:

(i) none of the relief sought by them in the appeal (namely the making of all of the orders sought by the Owners Corporation before the Tribunal below) was granted;

(ii) contrary to the finding (Reasons 2 at [31(1)]) that they succeeded in having all of the orders made by the Tribunal at first instance which they challenged overturned), one of the principal orders of the Tribunal below which they challenged (namely the appointment of a compulsory strata manager) was not set aside following the appeal; and

(iii) where the substantive orders made following the appeal (namely the remittal of the proceedings to a freshly constituted Tribunal for re-determination) had not been sought; and

(b) the plaintiff should pay the First and Second Defendants' costs of the appeal below. (costs)

46 While there are numerous grounds of appeal, they fall into three broad categories. The first group consists of Appeal Grounds 1A, 1B and 1 in the amended summons. In these grounds, the plaintiff submitted that the Appeal Panel erred, in law, in ordering that Sarraf Property Group and Palonis be joined as plaintiffs ("Joinder of parties"). This is the main issue in this appeal. The second group of appeal grounds consists of Appeal Grounds 2(a), 2(b)-(d) and 3(a)-(b). These grounds allege errors made by the Appeal Panel as to findings of evidence and fact ("findings of fact and evidence"). The third group, Appeal Ground 4, refers to costs.

Extension of time to appeal

47 The first issue to be determined in these proceedings is whether and extension of time to appeal should be granted. It is my view that at the time Sarraf Property Group and Palonis were joined as parties, it may not have been clear to Keevers, Bourke and Fardell whether they should have appealed to the Court of Appeal in relation to the decision of Deputy President Westgarth (Comprising of the Appeal Panel) before the Appeal Panel heard the appeal. As was recently said by the Court of Appeal in *Chalak v G & G Michael Pty Ltd* [2022] NSWCA 116 at [9], the Court is cautious about granting leave to appeal from interlocutory judgments, especially those that are concerned with practice and procedure. As the plaintiff contends that had the appeal been upheld, there would have been no utility in incurring additional costs in appealing to the Court

of Appeal on an interlocutory matter. In these circumstances, I grant an extension of time to appeal to this Court.

Leave to appeal

48 The next issue is whether leave to appeal should be granted, I can only make a determination on these topics after I have examined the grounds of Appeal and in particular in particular Grounds of appeal 1A, 1B and 1.

49 Section 83 of the *NCAT Act* relevantly reads:

> "**83 Appeals against appealable decisions**
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> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.
>
> …
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> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following—
>
> > (a) an order affirming, varying or setting aside the decision of the Tribunal,
> >
> > (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court."

50 There are many cases which deal with the principles governing leave to appeal. I will refer to *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 ("*Das*"), *Lee v New South Wales Crime Commission* (2012) 224 A Crim R 94; [2012] NSWCA 262 ("*Lee*") and *Coulter v R* [1988] HCA 3; 164 CLR 350 ("*Coulter*").

51 In *Das*, the Court of Appeal set out the principles to be considered in deciding whether leave to appeal should be granted. At [32], [33] and [35], Basten JA stated:

> "[32] The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:
>
> > 'It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Limited* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation,

> otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute.'
>
> [33] In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of *Carolan*, noting that Kirby P had recognised 'that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable': at [46].
>
> …
>
> [35] In *Coulter v The Queen* [1988] HCA 3; 164 CLR 350, dealing with a challenge to a refusal of the South Australian Full Court to grant leave to appeal in a criminal matter, the majority noted that a leave requirement was a preliminary procedure 'recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention': at 356 (Mason CJ, Wilson and Brennan JJ). That statement is clearly applicable to civil, as well as criminal, appellate jurisdiction."

52 Similarly, in *Lee*, Bathurst CJ outlined the principles relevant to the granting of leave at [12]:

> "[12] The principles upon which leave to appeal is granted are well established. Ordinarily it is only appropriate to grant leave concerning matters that involve issues of principle, questions of general public importance or where it is reasonably clear there has been an injustice in the sense of going beyond it being reasonably arguable that the primary judge was in error: *Carolan v AMF Bowling Pty Ltd* [1995] NSWCA 69; *Zelden v Sewell* [2011] NSWCA 56 at [22]; *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 at [46]; *GKD v Director of Department of Family & Community Service* [2012] NSWCA 219 at [10]; *Be Financial Pty Ltd v Das* [2012] NSWCA 164 at [32]-[34]."

53 The authorities referred to above are equally applicable in these proceedings. In determining whether or not I should grant leave to appeal, I shall consider whether the matters raised on appeal to this court involve issues of principle, questions of public importance, and whether it is reasonably clear that there has been an injustice in the sense of going beyond what is reasonably arguable that the Appeal Panel was in error.

The relevant statutory provisions

54 It is necessary to briefly refer to the most relevant statutory provisions of the *Strata Schemes Management Act*, the *NCAT Act* and Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") 6.19.

Strata Schemes Management Act

55 While some of the statutory provisions of the *Strata Schemes Management Act* are not directly relevant, they provide a background framework for the Tribunal Member's and the Appeal Panel's decisions.

56 The Owners Corporation is responsible for the management of the strata scheme: s 9.

57 Section 44(1) sets out the functions of treasurer of Owners Corporation. They include: to notify owners of any contributions levied in accordance with this Act; to receive, acknowledge, bank and account for any money paid to the Owners Corporation; to prepare any strata information certificate; and to keep the accounting records and prepare the financial statements.

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

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

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

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

62 Section 86 makes provision for recovery of unpaid contributions. It reads:

> **86 Recovery of unpaid contributions and interest**
>
> (1) The Tribunal may order the owner of a lot in the strata scheme, or other person, to pay a contribution that is payable by the owner or other person under this Act that is not paid at the end of 1 month after it becomes due and payable, together with any interest payable on that unpaid contribution and the reasonable expenses of the owners corporation incurred in recovering those amounts.
>
> (2) The Tribunal may make an order under subsection (1) only—
>
> (a) on the application of the owners corporation, and
>
> (b) if proceedings between the owners corporation and the owner of a lot in the strata scheme or other person are pending before the Tribunal.
>
> …

63 Section 87 makes provision for the Tribunal to vary a contribution. It reads:

> **87 Orders varying contributions or payment methods**
>
> (1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—
>
> (a) an order for payment of contributions of a different amount,
>
> (b) an order for payment of contributions in a different manner.
>
> (2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

64 The Owners Corporation is obliged to maintain and repair the common property. Section 106, reads:

> **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.

65 Section 237 reads:

> **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.

(4) **Qualifications of person appointed** A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must--

(a) hold a strata managing agent's licence issued under the *Property and Stock Agents Act 2002* , and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) **Terms and conditions of appointment** A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

…

(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,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

Civil and Administrative Tribunal Act

66 The relevant sections of the *NCAT Act* are as follows.

67 Section 29 is contained in Part 3 which provides for the jurisdiction of the Tribunal.

29 General jurisdiction

(1) The Tribunal has

"general jurisdiction" over a matter if--

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

Note: The general jurisdiction of the Tribunal includes (but is not limited to) functions conferred on the Tribunal by enabling legislation to review or otherwise re-examine decisions of persons or bodies other than in connection with the exercise of the Tribunal's administrative review jurisdiction.

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction--

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

(3) A "general decision" of the Tribunal is a decision of the Tribunal determining a matter over which it has general jurisdiction.

(4) A "general application" is an application made to the Tribunal for a general decision.

(5) Nothing in this section permits general jurisdiction to be conferred on the Tribunal by a statutory rule unless the conferral of jurisdiction by such means is expressly authorised by another Act.

68 Part 4 Div 1 of the Act provides for the practice and procedure of the Tribunal. Sections 32(3)(a) and 36 read:

32 Internal appeal jurisdiction of Tribunal

…

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal jurisdiction—

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

..

36 Guiding principle to be applied to practice and procedure

(1) The *guiding principle* for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The Tribunal must seek to give effect to the guiding principle when it—

(a) exercises any power given to it by this Act or the procedural rules, or

(b) interprets any provision of this Act or the procedural rules.

(3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal—

(a) a party to proceedings in the Tribunal,

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

(5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

69 Part 4, Division 3 makes provisions for participation in proceedings. Section 44 reads:

44 Parties and intervention

(1) The Tribunal may order that a person be joined as a party to proceedings if the Tribunal considers that the person should be joined as a party.

(2) The Tribunal may order that a person be removed as a party to proceedings if the Tribunal considers that the person has—

(a) been improperly or unnecessarily joined, or

(b) ceased to be a proper or necessary party.

…

(4) The following persons may intervene and be heard in proceedings to which they are not already parties—

(a) the Attorney General,

(b) a Minister who administers the legislation that confers or imposes functions the exercise (or purported exercise) of which are in issue in the proceedings,

(c) any other person who is authorised by this Act, enabling legislation or the procedural rules to intervene in the proceedings.

…

70 Sections 80, 81 and 82 read:

80 Making of internal appeals

(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note—

Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27(1).

(2) Any internal appeal may be made—

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may—

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

81 Determination of internal appeals

(1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following—

(a) the appeal to be allowed or dismissed,

(b) the decision under appeal to be confirmed, affirmed or varied,

(c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the

decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

82 Interpretation

(1) Each of the following kinds of decisions of the Tribunal is an ***appealable decision*** of the Tribunal for the purposes of this Division—

(a) any decision made by an Appeal Panel in an internal appeal,

(b) any decision made by the Tribunal in an external appeal,

…

Note—

An appealable decision includes any ancillary or interlocutory decisions of the Tribunal in such proceedings.

…

71 Finally, UCPR 6.19 reads:

6.19 Proceedings involving common questions of law or fact

(cf SCR Part 8, rule 2; DCR Part 7, rule 2; LCR Part 6, rule 2)

(1) Two or more persons may be joined as plaintiffs or defendants in any originating process if--

(a) separate proceedings by or against each of them would give rise to a common question of law or fact, and

(b) all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction or series of transactions,

or if the court gives leave for them to be joined.

(2) Leave under subrule (1) may be granted before or after the originating process is filed.

The Appeal Panel's decision – joinder of parties

72 The decision to which leave to appeal is sought is *The Owners – Strata Plan No 1813 v Keevers* [2021] NSWCATAP 130, a decision of the Appeal Panel dated 22 July 2021. The grounds of appeal [5]-[24] include many subparagraphs (CB 231-233).

73 On this topic of the joinder of parties namely, Sarraf Property Group and Palonis, the Appeal Panel summarised the respondents submissions as follows:

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

…

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

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

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

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

[81] However, as the SPG appellants pointed out, the appointment itself did not operate to terminate the OC's retainer of the solicitors who acted for it in the proceedings at first instance and who lodged the Notice of Appeal as representative of the OC. We were not provided with any evidence as to the terms of such retainer, including whether or not it authorised the lodging of an appeal.

…

[82] The respondents submitted as follows:

> (1) The SPG appellants had declined the opportunity to become parties to the proceedings at first instance. This opportunity had been provided by orders made on 24 July 2019. It was submitted that it should be inferred that the SPG appellants did not take up the opportunity to be joined as parties because they were content to rely on their control of the OC and did not want to expose themselves to the possibility of an adverse costs order by being joined to the proceedings. It was also submitted that in these circumstances the SPG appellants had elected or waived any right to pursue an appeal.
>
> (2) Since 25 May 2020 (the date of the Tribunal's orders) the powers and rights of the OC were reposed in the compulsory strata manager.
>
> (3) There was no evidence that the OC consented to or approved the lodging of the appeal in its name on 26 May 2020. That Notice of Appeal was lodged by the solicitors who had acted for the OC in the proceedings at first instance and were the solicitors acting for the SPG

appellants in relation to the appeal (Mr Moir from Madison Marcus Law Firm was named in the Notice of Appeal as the representative of the OC).

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

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

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

74 On this topic, the Appeal Panel concluded at [86]-[89] and [91]:

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

….

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

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

[89] As appears from the respondents' submissions to us, in arriving at this decision the Deputy President rejected the submission that the SPG appellants had no standing to be joined as appellants because they were not parties to the proceedings at first instance.

…

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

Appeal Grounds 1A, 1B and 1 – Joinder of parties

The plaintiff's submissions

75 As set out earlier, by appeal grounds 1A, 1B and 1 in the Amended Summons, Keevers contends that the Appeal Panel erred, in law, in ordering that Sarraf Property Group and Palonis be joined as plaintiffs (or in not limiting such joinder) in circumstances where the provisions of the *NCAT Act* and the *Strata Schemes Management Act* provide that only parties to the proceedings can bring an appeal and only the Owners Corporation can bring proceedings for unpaid strata levies, and in finding that Keevers could not challenge the decision to join Sarraf Property Group and Palonis as plaintiffs.

Appeal Ground 1

76 In [86], [87] and [91] of the Appeal Panel's reasons, the Appeal Panel made the following findings:

(a) as no appeal had been made from the orders of the Appeal Panel joining the Sarraf Property Group as parties to the appeal, it was open to Keevers to appeal that (interlocutory) decision and the only way to challenge that decision was to make such an appeal;

(b) Keevers did not contend that the Appeal Panel should revoke the interlocutory decision of the Deputy President; and

(c) Keevers' submissions amounted to an impermissible collateral challenge to the decision of the Deputy President.

77 For the reasons set out below, each of these findings was, with respect, wrong, and the Appeal Panel erred in law in so finding.

78 First, implicit in these findings is an assumption that it was open to Keevers to bring a freestanding appeal challenging the interlocutory decision of the Appeal Panel to join the Sarraf Property Group to the appeal. This assumption is incorrect because:

(a) s 32(3)(a) of the *NCAT Act* expressly provides that the internal appeal jurisdiction of the Tribunal (that is to the Appeal Panel) does not extend to any decision made by the Appeal Panel (which must include any interlocutory decision of the Appeal Panel). Consequently, Keevers could not have brought any appeal from the (interlocutory) decision of the Appeal Panel to the Appeal Panel itself;

(b) the only mechanism by which Keevers could have brought an appeal from the Appeal Panel's interlocutory decision re joinder would have been to appeal (to this Court) pursuant to ss 82 and 83 of the *NCAT Act*. Any such appeal would have been subject to leave being granted by the Court: (see *NCAT Act* s 83(1)). It is doubtful that leave to appeal from such an interlocutory decision would have been granted at the time, especially given that appellate courts exercise caution in reviewing decisions pertaining to practice and procedure: eg *Adam P Brown Male Fashions v Phillip Morris* (1981) 148 CLR 170 at 177;

(c) in any event, it would be unusual for the Court to grant leave and uphold an appeal from an interlocutory decision with respect to the joinder of a party (being a matter of discretion and practice and procedure), especially an application for leave made during the course of proceedings, given that any such application would be approached with restraint by the Court: see *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21].

79 Second, Keevers did, as a matter of substance, contend that the Appeal Panel should, in effect, revoke the interlocutory decision of the Appeal Panel (comprising the Deputy President). In submitting that the Appeal Panel should find that the Sarraf Property Group had no standing to bring the appeal and advancing the s 80 contention, Keevers was, in substance and effect, contending that the Deputy President had erred in joining them as plaintiffs and inviting the Appeal Panel to revoke that decision.

80 *Third,* in circumstances where there is no practical way for a party to appeal from an interlocutory decision of the Appeal Panel (at least until the whole appeal has been determined and an appeal can be made to the Court), the challenge to the substance of the Deputy President's decision (by advancing the s 80 contention) was not an impermissible collateral challenge to that decision. To the contrary, it was a reasonable and practical way of drawing to the attention of the Appeal Panel the reality that the Sarraf Property Group lacked standing and that by incident of s 80 the whole appeal was misconceived, and the Appeal Panel lacked jurisdiction to hear and determine it.

Ground 1A - the Appeal Panel erred in joining Sarraf Property Group and Palonis as plaintiffs

81 There is no specific provision in the *NCAT Act* that provides for an appeal to be brought by a party which was not a party to the proceedings in which the

decision was made. Even a party which actively participated, made submissions to and was an intervenor in the proceedings, cannot be characterised as a party in the Tribunal proceedings below for the purposes of NCAT internal appeal rights under s 80 of the *NCAT Act: 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 [74] per Armstrong P and Senior Member Britton ("*Rice Marketing Board*").

82 This is consistent with the more general principle that an appeal cannot be brought by an entity which was not a party to the proceedings in which the impugned decision was made. This in turn is supported by the following principles: it is parties, and parties alone, which have standing to conduct and appear in proceedings: see *Australian Railways Union v Victorian Railways* (1971) 125 CLR 319 at 331 per Dixon J. Any person who had an interest in and could make themselves a party to proceedings, but knowing what was passing, was content to stand by and see the battle fought by somebody else in the same interest, should be bound by the result, and not be allowed to re-open the case (or, it follows, appeal from the result): *Administration of Papua New Guinea v Daera Guba* (1972) 130 CLR 353 at 456 per Gibbs J; *Osborne v Smith* (1960) 105 CLR 153 at 155 per Kitto J; *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95 at 102; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 252-253.

83 There are sensible practical reasons for this. They are that if it were otherwise, it would be possible for an entity which may have a practical interest in the outcome of proceedings (such as a lot owner in a strata scheme) to decline an opportunity to participate as a party to proceedings (and thereby avoid any potential exposure to an adverse costs order) but still be able to appeal from a decision in those proceedings (to which it was not a party).

84 As Sarraf Property Group and Palonis were not parties to the proceedings before the Tribunal, given the terms of s 80(1), absent being joined as parties to the proceedings, they had no standing to bring or continue any appeal from the decision of the Tribunal and, it follows, the Appeal Panel had no jurisdiction

to entertain or determine any appeal brought by such entities (not being parties to the proceedings in which the decision was made).

85 Sarraf Property Group and Palonis sought to circumvent this impediment to any appeal by them by making a joinder application. The Appeal Panel erred in granting this application, and in joining Sarraf Property Group and Palonis as plaintiffs in the appeal, for these reasons:

(a) if Sarraf Property Group and Palonis had wished to resist the application by Keevers (and Bourke and Fardell) for a compulsory strata manager to be appointed pursuant to s 237 of the *Strata Schemes Management Act* (or otherwise oppose the granting of the other relief sought in the proceedings), they should have availed themselves of the express opportunity to do so which was afforded to them earlier in the Tribunal and have themselves joined as defendants to the proceedings. Sarraf Property Group and Palonis did not do so, and thereby elected not to be joined to the proceedings before the Tribunal and should be bound by that election, and its consequences, which included having no right or ability to appeal from the decision of the Tribunal;

(b) if Sarraf Property Group and Palonis had been joined as defendants in the proceedings in the Tribunal and participated as such in the first instance hearing, they would have had a statutory right, as parties to the proceedings, to seek to appeal from the decision of the Tribunal. Having elected not to be so joined, they should not have (retrospectively) been granted the ability to appeal from a decision in proceedings in which they elected not to participate;

(c) the corollary of the Appeal Panel's decision to join Sarraf Property Group and Palonis as plaintiffs is that it enables individual lot owners in a strata scheme which is the subject of an application for the appointment of a compulsory strata manager not to join themselves as defendants to such an application but nevertheless preserve the ability to appeal from a decision they consider to be unfavourable. In practical terms, the Appeal Panel's decision permits a person potentially affected by proceedings to elect not to participate in those proceedings but nevertheless to enjoy an ability to appeal from a decision in those proceedings;

(d) by adding Sarraf Property Group and Palonis as plaintiffs without any limitation, the Appeal Panel in effect conveyed on them a wider ability to appeal than they would have enjoyed if they had (already) been joined to the proceedings before the Tribunal. This is because in the Notice of Appeal as lodged on 26 May 2020, the Owners Corporation sought that, in lieu of the orders

made by the Tribunal Member, orders be made as sought in the District Court Proceedings (namely orders pursuant to s 86 of the *Strata Schemes Management Act* for the payment of the unpaid 2017 Special Levies) but s 86(2) of the *Strata Schemes Management Act* provides that such an order can only be made on the application of the Owners Corporation. Such orders were also sought by Sarraf Property Group and Palonis in the Amended Notice of Appeal filed on about 27 August 2020. If the Appeal Panel had, in determining the appeal, made the orders pursuant to s 86 *Strata Schemes Management Act* sought by Sarraf Property Group and Palonis, then it would have acted in excess of its jurisdiction, given that s 86(2) expressly provides that such an order can only be made on the application of the Owners Corporation. In other words, the Appeal Panel erred in adding Sarraf Property Group and Palonis as plaintiffs for all purposes and without limiting such joinder for the (limited) purpose of challenging the order appointing the compulsory strata manager because it left open the possibility that in granting the relief sought on appeal it would exceed its jurisdiction (and thereby fall into further error); and

(e) if there was to be any joinder of additional parties to the proceedings below (not just to the appeal), that should only have occurred (by order pursuant to s 44 of the *NCAT Act*) following a proper hearing, of which proper notice was given and at which considered submissions were made. Further, any such order for joinder should have been subject to conditions that it was limited to the issue of the application for the appointment of a compulsory strata manager and that the newly joined parties be exposed to the same potential risks as the other parties to the proceedings, (particularly with respect to the costs of those proceedings), and not be represented by the same solicitor that had acted for the Owners Corporation throughout the proceedings. That Sarraf Property Group and Palonis were joined, not as parties to the proceedings below but only as plaintiffs, without a hearing for which proper notice was given, and without any such limitations, only highlights the errors made by the Appeal Panel in so ordering.

86 Put another way, the Appeal Panel's decision to allow Sarraf Property Group and Palonis to be joined as plaintiffs put them in a more advantageous position than they would have been if they had been joined to the proceedings below. As a result of the Appeal Panel's decision, Sarraf Property Group and Palonis enjoyed the benefits of being able to appeal from the decision of the Tribunal without facing any of the burdens imposed on the parties to the proceedings before the Tribunal (such as exposure to an order for costs). In short, the Appeal Panel's decision to join the Sarraf Property Group as plaintiffs led to

substantive unfairness because it enabled entities who elected not to participate in proceedings to nevertheless appeal from a decision made in those proceedings.

87 The Appeal Panel compounded its initial error (in joining Sarraf Property Group and Palonis as plaintiffs) by proceeding to hear an appeal brought by two entities who were not a party to the proceedings in which the decision had been made. The Appeal Panel, even after (wrongly) ordering that Sarraf Property Group and Palonis be joined as plaintiffs, did not have any jurisdiction to hear (and determine) the appeal, because the Owners Corporation did not seek to prosecute the appeal and Sarraf Property Group and Palonis were not, and had not been made, parties to the proceedings in which the subject decision had been made, and therefore by incident of s 80(1) could not bring the appeal.

The section 80 contention

88 Section 80(1) of the *NCAT Act* only allows an appeal to be brought by a party to the proceedings in which the decision was made. The joinder of a party as an plaintiff in the appeal (but not as a party to the proceedings below) does not overcome this fundamental bar. The only way that Sarraf Property Group and Palonis could have (properly and legitimately) overcome the clear words of s 80(1) and ensured they would have an ability to appeal from the decision of the Tribunal, was by seeking to be joined as a party to the proceedings below before the Tribunal (not to the appeal). This they did not do, either when they were expressly given the opportunity to do so in 2019, or subsequently.

89 This section 80 contention was, in substance, advanced by Keevers before the Appeal Panel when he submitted (having referred to s 80(1)) that the appeal (as advanced by Sarraf Property Group and Palonis but not the OC) should be dismissed at the threshold on the basis that it was not properly brought by a person with standing to do: see Appeal Panel Reasons 1 [83]. The Appeal Panel failed to (properly) address this submission because it (wrongly) found that the contrary position had already been determined by the Appeal Panel (comprising the Deputy President) on 30 June 2020: see Appeal Panel Reasons 1 [87]. This finding was wrong because on 30 June 2020 the Deputy

President had not determined that, for the purposes of s 80(1), Sarraf Property Group or Palonis had standing to bring the appeal, or if he had (implicitly) done so, he was in error, because neither of those entities was, or had been made, a party to the proceedings in the Tribunal, and therefore had no standing to bring the appeal.

90 At [87], the Appeal Panel (wrongly) found that the short answer to the s 80 contention was that the contrary position had already been determined by the decision made by the Deputy President on 30 June 2020. For the reasons set out above, this was no answer to the s 80 contention and the Appeal Panel was wrong to so find. Not only did this finding involve circular logic but it was wrong in point of fact. The Deputy President had simply made an order acceding to the (ad hoc) application that Sarraf Property Group and Palonis be joined as additional plaintiffs. In so doing, he did not provide any reasoning or make any findings, including any finding that the Sarraf Property Group had standing to bring the appeal. Contrary to the conclusion (and finding) of the Appeal Panel, the Deputy President did not order that the Sarraf Property Group be joined as parties to the proceedings (and thereby overcome the s 80 contention).

Hypothetical derivative proceedings

91 Sarraf Property Group and Palonis sought to outflank the s 80 contention by submitting (in reply) that it amounted to a triumph of form over substance and, in effect, that any procedural defect could be cured by them being joined to the proceedings below and bringing derivative proceedings on behalf of the Owners Corporation: see [4]-[7] of Sarraf Property Group Reply Submissions. For the reasons which follow, these submissions should have been rejected by the Appeal Panel (and it erred in not doing so).

92 First, it cannot be said that the clear terms of s 80(1) amount to a triumph of form over substance. As has been set out above, there are sensible and compelling reasons why a person who was not a party to the proceedings in which a decision was made, cannot have standing to bring an appeal from that decision, not least that if it were otherwise a person who was not a party to proceedings could nevertheless appeal from a decision made in those

proceedings. This was, in effect, conceded by Sarraf Property Group and Palonis who submitted that the Tribunal could overcome any deficiency in form by making a further order pursuant to s 44 joining them to the proceedings below (which the Appeal Panel erroneously failed to do): see [4] of Sarraf Property Group Reply Submissions.

93 *Second,* while it may have been possible, at least in theory, for Sarraf Property Group and Palonis to have made an application to bring derivative proceedings on behalf of the Owners Corporation, that is not what actually occurred in this case. The theoretical possibility that such proceedings could have been brought was entirely hypothetical and as such provided no answer to the factual reality that Sarraf Property Group and Palonis had not sought to bring such proceedings and were not parties to the proceedings below (and therefore had no standing to bring the appeal by virtue of s 80).

94 Third, any application to bring derivative proceedings on behalf of the Owners Corporation (in order to prosecute the appeal) would have been opposed by Keevers and the Appeal Panel would have been wrong to entertain or grant any such application. Sarraf Property Group and Palonis relied upon *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 1120 ("*Glenquarry Park Investments"*) at [8]-[9] and *Tan v Owners Corporation Strata Plan 22014 (No 2)* [2015] NSWSC 1920 *("Tan")* as authority for the proposition that where there has been a compulsory appointment, meaning there is no avenue for a lot owner to cause the Owners Corporation to pursue an appeal, a lot owner is *entitled* to bring derivative proceedings in the name of the Owners Corporation: see [6] of Sarraf Property Group Reply Submissions. However, those authorities do not go that far. Rather, they merely establish that, in an appropriate case, the Court *can,* pursuant to its inherent equitable or statutory jurisdiction (which the Tribunal and Appeal Panel do not enjoy) grant leave to parties who are connected with corporations to bring proceedings for the benefit or in the name of the corporation.

95 In *Tan,* Robb J stressed (at [114]) that, in deciding whether to grant leave to individual lot owners to bring derivative proceedings in the name of the Owners Corporation, the fundamental question would be whether the applicants for

leave wished to appeal in the name of the Owners Corporation to achieve a result that would be of a genuine benefit for the Owners Corporation, and for all of the lot owners, or whether, instead, the application was to secure a benefit for the applicants, but that for technical reasons requires the applicants to wield the name of the Owners Corporation to secure the benefit for themselves.

96 Here, there was no application for leave to bring derivative proceedings (or an appeal) in the name of the Owners Corporation or for the benefit of the Owners Corporation as a whole. Instead, there was an ad hoc application for Sarraf Property group and Palonis to be added as plaintiffs, not joined as parties to the proceedings below, for the benefit of the Sarraf Property Group, not the Owners Corporation as a whole, or for all of the lot owners. The reference to, and reliance on, principles relating to the bringing of derivative proceedings on behalf of the Owners Corporation was entirely hypothetical and of no relevance (or assistance) because no application was in fact made at any time to bring such proceedings.

97 Further, in addition to seeking to challenge the appointment of a compulsory strata manager, Sarraf Property Group and Palonis sought, as plaintiffs in their own right, to challenge the decision of the Tribunal to (substantially) reduce the 2017 Special Levies and in its place to make orders (pursuant to s 86 of the *Strata Schemes Management Act*) requiring Keevers (and Bourke and Fardell) to pay their share of these (disputed) special levies. In so doing, Sarraf Property Group and Palonis were not seeking to secure a benefit for the Owners Corporation as a whole and for all of the lot owners, but rather were seeking to secure a benefit for themselves as majority lot owners, and were acting contrary to the interests of Keevers (and Bourke and Fardell) as minority lot owners, and, on Keevers' case (and the findings made by the Tribunal) in furtherance of an improper purpose. This is consistent with the (unchallenged) finding of the Appeal Panel that it was the Owners Corporation, under the control of Sarraf Property Group and Palonis. which had pursued claims to be paid contributions to the special levy, and that the heart of the proceedings was a dispute between the majority lot owners (Sarraf Property Group and Palonis) and the minority lot owners (Keevers, Bourke and Fardell): see AP Reasons 1 [77].

98 As such, and in these circumstances, in accordance with the principles summarised in *Tan* (and the authorities referred to in that decision), had any application to bring derivative proceedings in the name of the Owners Corporation actually been made, it would likely have been refused.

99 *Fourth,* even if an application to bring derivative proceedings had been brought (and granted), it could only have been in relation to the issue of the appointment of the compulsory strata manager, not the whole of the appeal. This is because the express purpose and intention of the joinder of Sarraf Property Group and Palonis as plaintiffs was to enable there to be an appeal from the decision to appoint a compulsory strata manager (given that the compulsory strata manager so appointed was not likely to appeal from that decision): see [3] of plaintiffs Submissions in Reply and AP Reasons 1 [90]. In other words, any (theoretical) joinder order of Sarraf Property Group and Palonis to the proceedings below pursuant to s 44 of the *NCAT Act* would have been for the limited purpose of allowing an appeal with respect to the appointment of a compulsory strata manager, not for a wider purpose or to enable them to appeal with respect to all issues.

Ground 1B – any joinder should have been for a limited purpose

100 Keevers submitted, in the alternative to the above submissions with respect to Ground 1A, that, if it be found that the Appeal Panel did not err in joining Sarraf Property Group and Palonis as additional plaintiffs and permitting them to advance the appeal (in the absence of the OC), then it erred by not limiting the joinder to those grounds of appeal relating to the appointment of a compulsory strata manager.

101 The Appeal Panel was correct to observe that the obvious rationale for the decision to join Sarraf Property Group and Palonis as plaintiffs was that the compulsory strata manager may decide not to pursue, or actively participate in, the appeal in circumstances where one of the orders challenged was the strata manager's appointment: Appeal Panel Reasons 1 [79] and [89]. In other words, the lacuna which the joinder of the Sarraf Property Group sought to address was the possibility that the compulsory strata manager would have no interest

in advancing an appeal which sought to challenge its appointment (as was submitted by the Sarraf Property Group: see Reply Submissions [3]).

102 The corollary of these observations and submissions is that any joinder of the Sarraf Property Group should have been limited to addressing the anticipated lacuna in the appeal (namely a reluctance on the part of the compulsory strata manager to challenge its own appointment), but should not have been granted in unlimited and unconditional terms.

103 Had the joinder of the Sarraf Property Group been limited to advancing an appeal only in relation to the Tribunal's decision to appoint the compulsory strata manager, then the compulsory strata manager (which was represented in the appeal by different solicitors to Sarraf Property Group and Palonis) could have made forensic decisions (for the benefit of the Owners Corporation as a whole) in relation to the conduct of the balance of the appeal without having to take into account, or be guided by, the competing and conflicting interests of the majority and minority lot owners.

104 However, the Appeal Panel did not so limit the joinder of the Sarraf Property Group, but rather permitted them to be joined as plaintiffs with unlimited ability to advance an all grounds appeal for their own benefit (not for the benefit of the Owners Corporation as a whole), and without being required to provide any indemnity to the Owners Corporation with respect to the costs of the appeal. This was inconsistent with the principles referred to above (for example as summarised in *Tan)* to the effect that any derivative proceedings can only be brought for the benefit of the Owners Corproation as a whole.

105 For the reasons set out above, the Appeal Panel erred, as a matter of principle and in law, in not limiting the joinder of the Sarraf Property Group in the manner submitted above.

The defendant's submissions

Ground 1 – lack of action to the Joinder Orders

106 The Appeal Panel did not err in finding that Keevers had not appealed the Joinder Orders nor asked the Appeal Panel to revoke the Joinder Orders (Substantive Decision at [86]-[87]):

(a) First, Keevers' submission that there was no way to appeal the Joinder Orders (AS at [84]) is wrong It was open for Keevers to seek leave to appeal the Joinder Orders This is precisely what he is now attempting to do, albeit significantly out of time and in circumstances of prejudice to the Sarraf Property Group parties Where a party alleges an error in an interlocutory decision justifying it being overturned, then an application for leave to appeal is at the time the appropriate course of action.

(b) Secondly, Keevers' speculation that leave to appeal the Joinder Orders would have been refused because it was a discretionary decision on practice and procedure suffers three problems.

(i) it is not, according to Keevers, an exercise of discretion. It is a question of power Keevers says none existed for the Appeal Panel.

(ii) if it was a discretionary decision, it was one that concerned the regularity of the impending appeal If leave was not granted by this Court it would leave the parties in the position that remains today that the appeal proceeds, the Appeal Panel expends significant resources determining the matter only for all the time, cost and allocation of public resources to be vanquished.

(iii) it is confounding that Keevers says he could not seek leave in mid-2020 but he can nevertheless seek leave now That submission is unexplained and baseless.

(c) Thirdly, Keevers did not ask the Appeal Panel to revoke Deputy President Westgarth's decision (AS at [83]) He made no application to revoke the Joinder Orders nor did he point to some material change of circumstances (Substantive Decision at [87]), as is generally required in order to revoke an interlocutory order *Nominal Defendant v Manning* (2000) 50 NSWLR 139, [2000] NSWCA 80 at [10] -[11] (Mason P), [72] (Heydon JA), [118] and [121] (Foster AJA).

107 These findings were open, are not infected with any legal error and no appeal right is engaged.

108 In addition to its recitation of the procedural background (see [9] above), there are four Appeal Panel findings relevant to these appeal grounds:

(1) It was the Owners Corporation under the control of the Sarraf Property Group parties, which pursued its claims at first instance to be paid contributions to the special levy and defended the claims for the appointment of a strata manager and for the variation of the special levy At the heart of the dispute was a dispute between the Sarraf Property Group parties, as majority lot owners, and the minority lot owners, including Keevers (Substantive Decision at [77]).

(2) The appointment of a compulsory strata manager under s 237 of the SSM Act did not terminate the Owners Corporation's retainer of its solicitors who acted for it in the proceedings and who lodged the Notice of Appeal as representative of the Owners Corporation (Appeal Panel at [81])

(3) Neither before Deputy President Westgarth nor the Appeal Panel did the plaintiff submit that the Owners Corporation's appeal was invalid and that as a consequence Deputy President Westgarth had no power to make an order for the joinder of any party (Appeal Panel at [84]).

(4) Unless the compulsory strata manager chose to prosecute the appeal, or some means were put in place by which the majority lot owners could prosecute the appeal, no effective appeal right would exist in respect of the Tribunal's orders Plainly, the compulsory manager had a personal interest that was in conflict with prosecuting an appeal which challenged its appointment (Appeal Panel at [79]).

Ground 1A - joinder of Sarraf Property Group and Palonis as plaintiffs

109 Having regard to the above four findings and the procedural history concerning that joinder (see [10] above), Deputy President Westgarth did not make any error of law in making the Joinder Orders because

(a) *First,* as the Owners Corporation had an appeal on foot Deputy President Westgarth had power pursuant to s 44 (1) of the *NCAT Act* to join the Sarraf Property Group parties to the proceedings if he considered that they should be joined as a party. As stated above, Keevers did not submit either before Deputy President Westgarth on 30 June 2020, nor before the Appeal Panel, that the Appeal was invalid.

(b) *Secondly,* the Joinder Orders enabled the substance of the dispute between the Sarraf Property Group parties, as majority owners and the minority owners to be determined, in circumstances where the compulsory manager was unlikely to challenge its own appointment, nor the reasons which led to that appointment. By adding the Sarraf Property Group parties, Deputy President Westgarth was acting consistently with s 38(4) of the *NCAT Act*, which required the Tribunal to act "with as little formality as the circumstances of the case permit and according to equity good conscience and the substantial merits of the case without regard to technicalities or legal forms"

110 The effect of the Joinder Order pursuant to s 44 of the *NCAT Act* joining the majority owners as plaintiffs was consistent with the approach taken by Robb J in *Tan* and the approach taken by Sackar J in *Glenquarry Park Investments:*

(a) In both cases, their Honours were dealing with an appeal pursuant to s 83 of the *NCAT Act*, which allows an appeal with leave *"to a party to an internal appeal*"; and

(b) in both cases, the majority owners were joined as parties to the appeal in addition to the Owners Corporation as the Owners Corporation was subject to a compulsory appointment, notwithstanding that the majority owners had not been parties before the Appeal Panel.

111 *Further,* where at all times the Owners Corporation was a party to the appeal as plaintiff, Keevers does not demonstrate why the Deputy President's discretionary order as to practice and procedure pursuant to s 44 of the *NCAT Act* was an error of law, let alone one justifying leave to appeal and an extension of time in which to bring that application:

(a) the matters recited by Keevers in his submissions (AS at [59(a)-(c)]) are all factors relevant to Deputy President Westgarth's exercise of his discretion to join the Sarraf Property Group parties, but they do not establish an error of law;

(b) the suggestion that any joinder of the Sarraf Property Group parties should have been limited to the issue of the appointment of a compulsory manager (AS at [59(d)]) was not a submission put to Deputy President Westgarth. He cannot be criticised for failing to make such a limited order;

(c) even if an application for a limitation of the Joinder Order had been made it would not have been appropriate to make such an order As stated by the Appeal Panel, the disposition of the appeal turned upon the Appeal Panel's assessment of the Tribunal's fact-finding in respect of the inter-related conclusions that the work the subject of the special levy went beyond that required by s 106 of the SSM Act and about improper purpose (at [98]). Those errors were determinative in the conclusion that the Tribunal erred in ordering a compulsory appointment (at [104], [250]-[257]). It was neither appropriate nor practical to the limit the Joinder Order in the way suggested by Keevers.

Ground 1B – joinder for limited purpose

112 The short answer to this ground and Keevers submissions is that it was never submitted to Deputy President Westgarth or to the Appeal Panel at the substantive hearing that the Sarraf Property Group parties joinder should be for a limited purpose

113 In those circumstances, they can hardly be criticised for not considering the matters now raised by Keevers on appeal in the exercise of the discretion pursuant to s 44 of the *NCAT Act* In the absence of having raised the matters before the Appeal Panel, Keevers cannot establish error, let alone satisfy the high burden lying on an applicant seeking leave to appeal from a discretionary

judgment on a question of practice or procedure: see *PPK Willoughby v Baird* [2019] NSWCA 48 at [5] and the cases cited.

114 In any event, even had the matters been raised, they would not have justified a limited joinder. As earlier stated, it would not have been appropriate to make such an order given the appeal in relation to the appointment of a compulsory manager turned upon an examination of the Tribunal's fact-finding in respect of its inter-related conclusions that the work the subject of the special levy went beyond that required by s 106 of the *Strata Management Act* and about the levy being struck for an improper purpose (Substantive Decision at [98]) In coming to its conclusion that the Tribunal erred in ordering a compulsory appointment, the Appeal Panel was required to investigate those matters (Substantive Decision at [104], [250]-[257]) It was neither appropriate nor practical to limit the Joinder Order in the way suggested by Keevers

Consideration of Rice Marketing Board and Fine v Commissioner of Police

115 Both parties referred to *Rice Marketing Board* at the hearing. They were given leave to make short supplementary submissions as they considered it the guiding decision after I reserved my decision. I now have those submissions. The plaintiff relied upon *Rice Marketing Board* in support of its argument that the Deputy President had no power to join Sarraf Property Group and Palonis as parties to the appeal. The defendant relied upon *Rice Marketing Board* to support its argument that the Deputy President had power under s 44 of the *NCAT Act* to join Sarraf Property Group and Palonis to the Appeal.

116 Before I consider *Rice Marketing Board,* I will refer to the decision of *Commissioner of Police, New South Wales Police Force v Fine* [2014] NSWCA 327 ("*Fine*"). *Fine* was referred to in *Rice Marketing* by the Appeal Tribunal in its decision at [104]-[105]. In my view, *Fine* is more instructive and relevant to this appeal. The short facts are as follows. Mr Fine sought a review of an order in the Civil and Administrative Tribunal (the Tribunal). The Liqour and Gaming Authority ("the Authority"), which was joined as the only defendant and filed a submitting appearance. An application by the Commissioner of Police ("the Commissioner") to be joined as a party was dismissed by the Tribunal. The Commissioner appealed to the Appeal Panel of the Tribunal, which dismissed

his appeal. The Commissioner appealed to the Court of Appeal, which allowed the appeal and ordered, in lieu of the order of the Appeal Panel, that the Commissioner be joined as a party to Mr Fine's review application pursuant to s 44 of the *NCAT Act*.

117 In *Fine,* the Court of Appeal (per Bathurst CJ, Beazley P and Ward JA) granted leave to appeal pursuant to s 83(1) of the *NCAT Act* on the basis that the matter raised an important question of law relating to practice and procedure of the Tribunal.

118 At [28]-[29] and [34], the Court considered s 44 of the *NCAT Act*. It stated:

> [28] The Appeal Panel recognised, at [35], that the *Civil and Administrative Tribunal Act*, s 44 conferred a wide discretion on the Tribunal in determining who ought to be joined to proceedings as a party. It considered that the discretion was similar to, but wider than, the discretion conferred under the Uniform Civil Procedure Rules 2005 (UCPR), r 6.19. The Appeal Panel also noted that, unlike the *Administrative Appeals Tribunal Act* 1975 (Cth), s 30(1A), the power to join a party was not constrained by the requirement that the party seeking to be joined demonstrate that that party's "*interests are affected*".
>
> [29] By reference to the "*broad discretion*" conferred by UCPR, r 6.19, the Appeal Panel, at [36], articulated the "*basic principle*" governing the exercise of the discretion under s 44 in the following terms:
>
> > "... a court (or tribunal) should take the course most conducive to the just resolution of the dispute, having regard to the desirability of minimizing the costs and delay of litigation ..."
>
> [34] The Appeal Panel concluded, at [43], that the Tribunal was required to exercise its powers and to interpret the Act and the Rules to give effect to the "*guiding principle*" to facilitate the just, quick and cheap resolution of the real issues in proceedings. It considered that having two respondents in the proceedings, that is, the Commissioner as well as the Authority, might increase the costs of proceedings. The Appeal Panel concluded the Commissioner had not established that his joinder was "*necessary or appropriate in order to do justice in the proceedings*". There was, therefore, no error in the decision of the Tribunal Member in refusing the Commissioner's application for joinder.

119 At [35]-[41] the Court made its determination regarding s 44 of the *NCAT Act*:

> “[35] The Commissioner must establish error of law in the Appeal Panel's determination. The Commissioner in his argument identified as the relevant error the failure of the Appeal Panel to recognise that upon a merits review, the Tribunal stood in the shoes of the decision-maker: see ADR Act, ss 63(1) and (2). If this proposition is made out, the relevant error will be an error in the construction and application of the relevant legislation. For the reasons which follow, the Court is satisfied that the Commissioner has established this error of law. The Court has also concluded that the Appeal Panel erred in failing to have regard to the interest of the Police Force in the outcome of a

determination relating to an application for a banning order. Expressed in this way, the error is probably best understood as being the obverse of the first error. Finally, the Court is of the view that the Appeal Panel placed constraints upon the exercise of the discretion which are not warranted by the language of the section.

[36] The Appeal Panel was determining an appeal from an interlocutory decision of the Tribunal at first instance. Save for the requirement of leave the nature of the appeal was not identified. However, the Tribunal did not appear to proceed by way of a new hearing: the *Civil and Administrative Tribunal Act*, s 80(2). Presumably, therefore, the Appeal Panel approached the appeal on the basis that it was necessary for the Commissioner to establish error in the Tribunal's decisions.

[37] The Tribunal decision, as the Appeal Panel correctly identified, was a discretionary determination as to whether the Commissioner should be joined as a party. In determining whether the Tribunal erred in refusing the Commissioner's application, the Appeal Panel examined the principles that governed the exercise of discretion conferred by s 44. As the Appeal Panel recognised, the starting point was the text of the governing statute.

[38] The power of joinder conferred by the *Civil and Administrative Tribunal Act*, s 44 is stated in general terms. It is a power to join a party "*if the Tribunal considers the person should be joined as a party*": s 44(1). The Tribunal also has the power to remove a party. The power of removal may be exercised if the person is "*improperly or unnecessarily joined, or ... ceased to be a proper or necessary party*": s 44(2). The Commissioner submitted that the power of joinder conferred by s 44(1) was to be read in conformity with the power of removal so that a party who was a "*proper or necessary party*" ought to be joined in the proceedings. That submission may be accepted. However, the question remains as to the meaning or, perhaps more correctly, the parameters of the expressions "*proper*" and "*necessary*", noting that the expressions are used in s 44(2) disjunctively and that a "*proper*" party may not be a "*necessary*" party.

[39] A party whose interests are affected by a decision, including by reference to a statutory interest, may be a necessary party to proceedings. For that reason, the decision-maker is usually joined as the decision made may be affected by the application. The intent and effect of the joinder is to ensure that the decision-maker is bound by the determination of the Tribunal. The Appeal Panel appeared to accept that this was so: see at [37], referred to at [30] above. Further, the Rules provide for the joinder of the decision-maker: r 27(b). For that reason alone, the Authority was properly joined as a party in this case and because of the provisions of the rules is a necessary party to the proceedings. However, the fact that a party such as a decision-maker is a necessary party to proceedings does not of itself require that party to take an active role in the proceedings. This is discussed below in relation to the *Hardiman* principle.

[40] The question whether a party is a "*proper*" party to an application raises different considerations. A party with an interest in the proceedings, that is, a party whose interests were affected by the decision, would usually be a proper party. By contrast, a mere inter-meddler would neither be a necessary nor proper party. A Minister may have an interest in being a party. Reasons why this may be so would include where a particular decision affects the operation of a Minister's department or if there is a matter of public interest relevant to the decision to be made of which the Tribunal ought to be informed. This is

recognised by s 44(4)(b) which enables a Minister or the Attorney General to intervene.

[41] A party who is an applicant in the process before a decision-maker would also be a proper party. In the ordinary course, a successful applicant would have a relevant interest in the review proceedings and would, therefore, be a proper party to an appeal…"

Rice Marketing Board

120 The short facts are as follows. The Rice Marketing Board decision involved a number of parties. The relevant party, for this appeal, is SunRice Marketing Board for the State of New South Wales ("Sunrice"). which was an ASX-listed company which held the sole and exclusive export licence to sell NSW grown rice outside Australia.

121 Forbidden Foods (a ricegrower in Victoria) applied under the Government Information (Public Access) Act 2009 (NSW) (ie. the 'Freedom of Information' Act) for access to documents held by the Rice Growing Board ("the Board") relating to the Board's decision to grant SunRice the exclusive export licence to sell NSW rice outside of Australia. The Board gave access to some documents but refused access to the majority. Forbidden Foods then applied to NCAT to review the decision. NCAT gave Forbidden Foods access to more documents than the Board had earlier granted which led the Board to bring an appeal to the Appeal Panel against that decision.

122 There were two issues that the Appeal Panel was required to deal with in relation to SunRice:

(1) whether SunRice was entitled to commence its own appeal against the Tribunal's decision;

(2) whether SunRice could be joined to the appeal brought by the Board and Forbidden Foods under s 44 of the *NCAT Act*.

123 SunRice was an 'intervenor' in those initial proceedings before the Tribunal, pursuant to s 44(5)(b) of the *NCAT Act*.

124 In *Rice Marketing,* the Appeal Panel stated at [23],[32]-[33]:

"[23] Further, on 5 June 2020, we granted SunRice's application to be joined as a party, under s 44(1)(a) of the *NCAT Act*, to the Board's appeal in proceedings AP 20/7117, and we made an order to that effect. Towards the end of the second day of the appeal hearing on 30 June 2020, SunRice applied to be joined as a party to Forbidden Food's proposed appeal. We did not make an order at that time. We have decided to grant SunRice's

application to be joined as a party under s 44(1)(a) to that proposed appeal (AP20/22787).

[31] Whether the purported appeal commenced by SunRice is competent depends on whether SunRice was a party in the Tribunal proceedings below and thus a person who has standing to bring an internal appeal against the Decision under s 80 of the *NCAT Act*.

Submissions

[33] SunRice's submissions: SunRice argued it was a "party" to the proceedings in the Tribunal below and as such may appeal the Tribunal's decision in its own right under s 80 of the *NCAT Act* (and is a proper respondent to the Board's appeal). If that argument were not accepted, SunRice argued that it was an intervenor in the proceedings below and an intervenor has the same privileges as a party, including the right to appeal the Decision in its own right. If those arguments failed, then SunRice requested joinder as a party to the Board's appeal under s 44(1)(a) of the *NCAT Act*, and later, also sought joinder to Forbidden Foods' proposed appeal." [original emphasis]

125 The Appeal Panel continued at [63]-[65], [68] and [74]:

"[63] We agree that the participation by SunRice in the first instance proceedings was substantial (leading evidence, cross-examining, taking part in confidential stages of the hearing, making oral and written submissions). Through this participation SunRice had the opportunity contemplated by the statutory scheme to make clear to the Tribunal its objections to disclosure of material. However, SunRice did so exercising a specific entitlement under s 104(3) of the *GIPA Act* to appear and be heard in the administrative review proceedings. The statutory scheme in question, including the specification of parties found in rr 27-29 of the NCAT Rules, differs in material respects from the legislative provisions under consideration in *Tran*.

[64] The statutory entitlement in s 104(3) of the *GIPA Act* is confirmed by cl 9(4)(c) of Sch 3 to the *NCAT Act* in relation to *GIPA Act* administrative review proceedings in the Tribunal. Clause 9 of Sch 3, headed "special practice and procedure", deals specifically with the rights of representation and appearance in administrative review proceedings of "any person who could be aggrieved" (typically third-party objectors), and of the Information Commissioner and Privacy Commissioner, for the purposes of the *GIPA Act*. Proceedings "for the exercise of a Division function" for the purposes of the *GIPA Act* involve functions of the Tribunal allocated to the Administrative and Equal Opportunity Division (AEOD), relevantly functions in relation to the *GIPA Act* (see Sch 3, cl 1(1) definition of "Division function").

[65] We agree with comments in earlier decisions of the Tribunal and the NCAT Appeal Panel that where a person is only exercising its right to "appear and be heard" under s 104(3), it does not have the right to appeal the Tribunal's administrative review decision: see *CBL*, *Scenic*. In its submissions, the Board urged the Appeal Panel not to follow that approach, submitting that it would be "an unusual outcome if the effect of s 104, being a provision directed to protecting the rights of third parties whose interests might be affected by a determination of the Tribunal, were to constrain the ability of third parties to protect their interests by precluding them from appealing such a determination". We do not agree. The rights conferred on third-party objectors in the statutory scheme under consideration are not unlimited. In any event,

third-party objectors are not precluded from seeking party status through joinder under s 44(1)(a) of the *NCAT Act*.

…

[68] SunRice also argued, as an alternative submission, that it was an intervenor in the first instance proceedings, that courts treat intervenors as having the same privileges and burdens of parties at general law, that there is nothing in the legislative scheme under consideration that changes this general position, and that SunRice should therefore be treated as a party for the purposes of s 80(1) of the *NCAT Act*."

…

[74] We do not consider that SunRice can properly be characterised as a party in the Tribunal proceedings below for the purposes of NCAT internal appeal rights under s 80."

126 At [99]-[1118] the Appeal Panel further explained:

[99] SunRice applied to be joined as a party to the appeals of the Board and of Forbidden Foods under s 44(1)(a) of the *NCAT Act* and r 29(d) of the NCAT Rules, in the event that SunRice was not successful in its primary argument that it had an entitlement to bring an appeal in its own right. The Board supported SunRice being joined to the appeal. Forbidden Foods opposed SunRice's joinder application.

[100] On 5 June 2020 we granted SunRice's application to be joined as a party to the Board's appeal. On 30 June 2020 near the end of the appeal hearing, SunRice applied to be made a party to Forbidden Food's proposed appeal under s 44(1)(a). We are satisfied that it is appropriate to join SunRice as a party to Forbidden Food's proposed appeal.

Submissions

[101] SunRice submitted that it is both a "proper" and "necessary" party because it is aggrieved by the Decision and because it has rights and interests that are affected by that decision.

[102] The Board supported SunRice's application to be joined as a party to its appeal on the same basis, and argued that SunRice's position is analogous to that of Sydney Airports Corporation in *Marrickville Council*, a case in which the Tribunal permitted the joinder of that Corporation, a third-party objector, as a party to first instance proceedings.

[103] Forbidden Foods opposed SunRice's joinder application, arguing that SunRice is not a "proper and necessary" party as described in *Fine*. The Court of Appeal in *Fine* considered whether the Commissioner of Police, being the applicant in the process before the decision-maker (the Liquor and Gaming Authority) and therefore a statutory applicant, was a proper party to the Tribunal proceedings below: at [41]-[44]. The Court of Appeal noted at [52]-[56] the reference made by the Appeal Panel to the principle that:

> "… in ordinary inter partes litigation, where the issue in dispute could be effectively and completely adjudicated upon in the absence of the party sought to be joined and where no order was sought against that party, joinder was unnecessary and would generally not be allowed."

The Court of Appeal concluded that "[t]here was no error in the Appeal Panel's consideration of these authorities". Forbidden Foods argued that the present circumstances do not involve the joinder of a statutory applicant in a like position to the Commissioner of Police in *Fine*, and the current proceedings are in the nature of inter partes litigation. Noting that the purpose of the proceedings is for the Board to release documents which it holds, and no orders are sought against SunRice, Forbidden Foods submitted that the issues in dispute can be effectively and completely adjudicated in SunRice's absence.

Consideration

[104] Section 44(1) gives the Appeal Panel power to order that a person should be joined as a party to proceedings if the Appeal Panel considers that the person should be joined a party. Section 44(2) provides for the removal of parties if "the person has been improperly or unnecessarily joined or ceased to be a proper or necessary party". Given those provisions and the relevant authorities, a person should be joined as a party if the Appeal Panel considers that joinder is "proper" or "necessary": *Fine*; *DNY v Public Guardian* [2018] NSWCATAD 254 at [11]; *DHJ v Secretary, Department of Family and Community Services* [2018] NSWCATAD 46; *Marrickville Council*; *CBL*; *Auld v Independent Liquor and Gaming Authority* [2017] NSWCATAD 160 (*Auld*); *Wilson v Chan & Naylor Parramatta Pty Ltd as trustee for Chan & Naylor Parramatta Trust* [2016] NSWCATAP 236 at [25]; *Scenic NSW* at [7].

[105] When deciding whether to exercise the discretion to join a person as a "party", "the nature and extent of the review being undertaken, the position or interest of the party to be joined and the circumstances of the case" are all relevant factors: *Fine* at [57]. Whether prejudice would be caused by joinder, such as delay to proceedings, is relevant. Further, as previously stated by the Tribunal, "[w]hen exercising its powers under the [*NCAT Act*], including the power under s 44(1), the Tribunal is to seek to give effect to the guiding principle…to facilitate the just, quick and cheap resolution of the real issues in the proceedings": *Auld* at [14].

[106] Our attention has been drawn in these proceedings to three decisions where the Tribunal (including Appeal Panel) has determined joinder applications under s 44 of the *NCAT Act* by persons consulted under s 54 of the *GIPA Act*: *CBL*, *Marrickville Council* and *Scenic NSW*. Each of these instances was in the context where the joinder applicant was found to have a statutory right to appear and be heard under s 104(3) of the *GIPA Act*.

[107] In *CBL* the Tribunal declined to join a third-party objector to first instance administrative review proceedings because the person had a right to appear and be heard under s 104(3) and because it had failed to make detailed submissions about why it should have the additional status of party. In *Marrickville Council*, the Tribunal joined a third-party objector as party in first instance proceedings relying on the relevant factors set out by the Court of Appeal in *Fine* at [38] and [57], despite that person having an entitlement under s 104(3) to appear and be heard. In *Scenic NSW*, the Appeal Panel declined to join third-party objectors to an appeal from a GIPA first instance decision on the basis it was neither "proper" nor "necessary" for them to be joined as parties in circumstances where the Appeal Panel determined they had the right to appear and be heard in the appeal under s 104(3).

[108] We do not disagree with the Tribunal's statement in *CBL* at [26] to the effect that s 44 "is to be read in the light of any rights and obligations of third parties under the enabling legislation", relevantly the *GIPA Act*. That case concerned first instance proceedings where the legislation is clear in permitting a party to appear and be heard in those proceedings if that party could be aggrieved by the administrative review decision. However, given our preferred view that s 104(3) does not provide the same participation rights to a third-party objector in an appeal that it does in first instance proceedings, any joinder application from a third-party objector should be considered in this light. We acknowledge that a refusal of the s 44 joinder application would deprive that objector of a right to participate in the appeal. Any decision to join a third-party objector as a party to an appeal will depend on the facts of the particular case.

[109] Forbidden Foods submitted that where the *GIPA Act* at s 104(3), properly construed, excludes a person from having a right to appear and be heard in appeal proceedings, then an application for joinder should not be granted to allow that person to participate in the appeal proceedings under s 44 of the *NCAT Act*. However, there is nothing in the legislation to indicate that, notwithstanding our view on the proper construction of s 104(3), the discretion under s 44(1)(a) to join a "proper" or "necessary" party in the particular circumstances of a case is constrained in the manner suggested.

[110] In the present circumstances, we are satisfied that SunRice is aggrieved by the decision under review. SunRice has commercial, financial and business interests affected by the Board's appeal and Forbidden Foods' proposed appeal. SunRice has consistently maintained its objection to release of certain information on the basis that disclosure will affect such interests. It wishes to be heard on questions of law that are relevant to the determination of the appeals, as well as on appeal grounds that require leave.

[111] We understand Forbidden Foods' submission to be that the issues in dispute in the appeals can be adjudicated in SunRice's absence. That submission is not without force. We nonetheless consider that, due to the nature of the information said to be commercial-in-confidence, SunRice is in the best position to identify how its business interests could be prejudiced by disclosure of relevant information. SunRice played an active role in the first instance proceedings, through its right to appear and be heard under s 104(3), and made a number of submissions on legal and factual points in relation to the balancing exercise required to be undertaken by the Tribunal in relation to the Table to s 14 of the *GIPA Act*. The Board's appeal grounds raise complex legal and factual points about alleged errors in the balancing exercise undertaken by the Tribunal at first instance. The same can be said about the appeal ground in Forbidden Foods' proposed appeal. We consider that SunRice's participation as a joined party can assist the Appeal Panel in adjudication of the real issues in dispute.

[112] SunRice's position is somewhat analogous to that of Sydney Airports Corporation in *Marrickville Council*. There, the applicant for joinder was found to be a "proper or necessary party" bearing in mind that it may well need to take the lead role in the substantive proceedings (at [34]). While we are presently concerned with appeal and not first instance proceedings, we nonetheless think that similar factors are at play in the Board's appeal. Errors are alleged to have occurred in the way, for instance, the Tribunal concluded there was a general presumption against disclosure in respect of certain material, but in respect of very similar material located in different documents,

there was found to be a general presumption in favour of disclosure (the alleged "inconsistency" grounds). Whether any such error occurred depends, at least partly, on the identification of such material and the reasons why disclosure may prejudice SunRice's legitimate business, commercial, professional or financial interests.

[113] Significantly, in terms of prejudice to Forbidden Foods, we do not think that providing SunRice with the opportunity to participate in the Board's appeal (and Forbidden Foods' proposed appeal) will cause undue delay or additional cost to the resolution of the appeal proceedings.

[114] In any internal appeal, as in an administrative review of a decision under the *GIPA Act* by the Tribunal, the guiding principle is that the *NCAT Act* and the procedural rules should be applied so as to facilitate the just, quick and cheap resolution of the real issues in the proceedings. We think that joinder of SunRice, and SunRice's consequent participation as a party, will facilitate the resolution of the real issues in the appeal proceedings, and that joinder in the particular circumstances of these proceedings is consistent with, and in furtherance of, the guiding principle in s 36 of the *NCAT Act*.

[115] We are satisfied that SunRice is "a proper or necessary party" and as such it is appropriate that SunRice be joined as a party to the Board's appeal. We are also satisfied that it is appropriate to join SunRice to Forbidden Food's proposed appeal.

[116] To the extent it is necessary to comment on whether SunRice is a "proper" or "necessary" party, we note that the Court of Appeal in *Fine* stated that a party whose interests are affected by a decision, including by reference to a statutory interest, may be a necessary party to proceedings. "For that reason, the decision-maker is usually joined as the decision made may be affected by the application. The intent and effect of the joinder is to ensure that the decision-maker is bound by the determination of the Tribunal" (at [39]). At [40], the Court continued:

> "The question whether a party is a "proper" party to an application raises different considerations. A party with an interest in the proceedings, that is, a party whose interests were affected by the decision, would usually be a proper party. By contrast, a mere inter-meddler would neither by a necessary or proper party."

[117] The role of third-party objectors in Tribunal (including Appeal Panel) proceedings under the statutory regime in the *NCAT Act* and *GIPA Act* is not "on all fours" with the role of applicant for joinder in *Fine*. Much of the discussion in *Fine* related to what that Court referred to as a statutory applicant, in that case the Police Commissioner who made an application to the Liquor and Gaming Authority. That said, SunRice would seem to fall within the description of a "proper" party for the purposes of s 44 of the *NCAT Act* as described by the Court of Appeal in *Fine* at [40]. SunRice is a person whose interests are affected by the Tribunal's decision and has a material interest in the result of the appeal proceedings; SunRice is not a "mere inter-meddler".

[118] We also think that, in the particular circumstances before us, SunRice can be characterised as a "necessary party" to the appeals of the Board and of Forbidden Foods as a person whose interests are affected by the Decision: see *Fine* at [39]. The orders of the Tribunal (and of the Appeal Panel) do not (and will not) bind SunRice and there is no requirement for SunRice to be joined as a party to the appeal proceedings for that reason. While not

> applicable to NCAT, r 6.24 of the *Uniform Civil Procedure Rules 2005* (NSW) is worth noting given the similarity of language in r 6.24 and s 44 of the *NCAT Act* (particularly at s 44(2)). Under the heading "Court may join party if joinder proper or necessary", r 6.24 provides that the Court may join a party if the court considers that a person ought to have been joined as a party "or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings". Accepting that the wording of that rule provides some guidance in the present context, we are of the view that the joinder of SunRice is necessary to the determination of all matters in dispute in the Board's appeal and Forbidden Foods' appeal. This is particularly so, given the guiding principle in s 36(1) of the *NCAT Act*.

The defendant's submissions on Rice Marketing

127 The plaintiff relies upon *Rice Marketing Board* in support of its argument that Deputy President Westgarth had no power under s 44 of the *NCAT Act* to join the Sarraf Property Group and Palonis as parties to the appeal in the Appeal Panel.

128 The Rice Marketing Board decision does the opposite; it confirms that Deputy President Westgarth had the power to join the Sarraf Property Group and Palonis to the appeal validly brought by another party and exercised that power properly. It should be noted that Keevers does not attack the exercise of the power but only the existence of the power.

129 Much of the relevant parts of the judgment of the Appeal Panel discuss the involvement, by SunRice, in the proceedings before the Tribunal. SunRice was an 'intervenor' in those proceedings. That gave it rights similar to being a party but, critically, SunRice was not a party in the Tribunal proceedings.

130 There is much analysis in the Appeal Panel's decision of the GIPA legislation. None of that is relevant because there was no question that SunRice was not a party in the Tribunal proceedings even though it tried to argue that, in essence, it was a party. The Appeal Panel rejected that submission. And because the Appeal Panel found that SunRice was not a party, it dismissed the appeal that had been brought by SunRice.

131 SunRice, no doubt as a backup plan, sought an order that it be joined to the Board's and Forbidden Foods' Appeal Panel appeal. It should be noted, at this juncture, that SunRice was in exactly the same position as the Sarraf Property Group parties before Deputy President Westgarth: they were not parties in the Tribunal proceedings.

132 Despite that, the Appeal Panel considered that SunRice could be joined (ie. There was power under s 44 of the CAT Act to do so) and should be joined to the appeal brought by the Board and Forbidden Foods.

133 At [23] the Appeal Panel pronounced its decision to grant SunRice's application to be joined under s 44(1)(a) to the proposed appeal.

134 As to whether SunRice could commence its own appeal the Appeal Panel observed, at [132], that this depended on "whether SunRice was a party in the Tribunal proceedings below...". In concluding that SunRice was not a party, it followed that its appeal was incompetent.

135 While SunRice could not commence its own appeal- in the same way that the Sarraf Property Group parties could not commence their own appeal- s 44 allowed them to be joined to an existing appeal. At [115], the Appeal Panel concluded:

> "[115] We are satisfied that SunRice is "a proper or necessary party" and as such it is appropriate that SunRice be joined as a party to the Board's appeal. We are also satisfied that it is appropriate to join SunRice to Forbidden Food's proposed appeal."

136 These proceedings were and are on all fours with the circumstances in the Rice Marketing Board case:

(i) In both cases a valid appeal was on foot. It should be remembered that the Appeal Panel in these proceedings accepted that a valid appeal was on foot when Deputy President Westgarth made the joinder order. In other words, the Sarraf Property Group did not commence the appeal, they were joined as parties to an extant valid appeal. That was the same situation that existed in the Rice Marketing Board matter. (SunRice sought to be joined as a party to an existing valid appeal)

(ii) The Appeal Panel in these proceedings found that the appointment of a compulsory strata manager under s 237 of the *Strata Schemes Management Act* did not terminate the Owners Corporation's retainer of its solicitors who acted for it in the proceedings and who lodged the Notice of Appeal as representatives of the Owners Corporation (see [S1] of the substantive decision).

(iii) Neither before Deputy President Westgarth nor the Appeal Panel did the plaintiff submit that the Owner's Corporation's appeal was invalid such that Deputy

President Westgarth had no power to make an order for the joinder of any party (see substantive decision at [8a]).

137 Once it is accepted that Deputy President Westgarth had the power to join the Sarraf Property Group parties, in the same exercise of power made by the Appeal Panel in the Rice Marketing Board case, that is the start and end of the matter. How that power was exercised has never been the subject of this appeal.

138 The Rice Marketing Board decision, which was handed down three or so months after Deputy President Westgarth's decision, demonstrates that Deputy President Westgarth acted within power.

The plaintiff's supplementary submissions on Rice Marketing

139 The defendants' supplementary submissions ignores the fact that in *Rice Marketing* the non-party which unsuccessfully sought to bring an appeal was only joined to the appeal as a party, not as an plaintiff. Consequently, *Rice Marketing Board* does not assist the defendants, nor does it establish that Deputy President Westgarth had the power to join Sarraf Property as plaintiffs to the appeal.

140 The plaintiff does not rely on *Rice Marketing Board* to argue that the Deputy President had no power under s 44 of the *NCAT Act* to join Sarraf Property as parties to the appeal. The plaintiff relies on the decision as authority for the proposition that s 80 of the *NCAT Act* provides that a non-party to proceedings cannot bring an appeal and that therefore the Deputy President wrongly exercised the joinder power under s 44 by joining Sarraf Property as plaintiffs (not just as parties) to the appeal.

141 In other words, the plaintiff relies on *Rice Marketing Board* to argue that the Deputy President had no power under s 44 of the *NCAT Act* to join Sarraf Property Group and Palonis as plaintiffs (rather than merely as parties) to the appeal. This is consistent with the primary challenge made to the Joinder Orders (Appeal Ground 1A) which was that the Appeal Panel erred, in law, in ordering that Sarraf Property and Palonis be joined to the appeal as additional plaintiffs.

142 In *Rice Marketing Board* a non-party to the proceedings below, Sunrice, sought to bring an appeal in its own right. As is acknowledged, in *Rice Marketing Board* the Appeal Panel dismissed the appeal which Sunrice sought to bring on the basis that, as it was not a party to the proceedings below, it had no appeal rights and could not properly bring any appeal: see [32] and [74]. This is the same outcome which the plaintiff submits should have occurred in the present case, namely that the Deputy President should have declined to join Sarraf Property as plaintiffs because, as non-parties to the proceedings, they had no right of appeal (pursuant to s 80) and any appeal by them would be incompetent.

143 It is noteworthy that the first to third defendants (still) do not dispute the plaintiff's fundamental submission, being the section 80 contention, namely that as non-parties to the proceedings below, they had no right or standing to bring any appeal (in their own right). *Rice Marketing Board* (especially the finding at [74]) is authority for that proposition (and principle). The corollary of this principle is that the Deputy President erred in exercising the joinder power because he joined plaintiffs parties who had no right to appeal.

144 The defendant's submissions (that SunRice was in exactly the same position as the Sarraf Property Group parties and that the present proceedings are on all fours with the circumstances in *Rice Marketing Board)* should be rejected for the following reasons.

145 First, in *Rice Marketing Board*, in addition to seeking to run its own appeal, SunRice sought to be joined as a party (but not as an plaintiff) to two separate appeals which had been brought by plaintiffs who were parties to the proceedings below (namely the Board and Forbidden Foods): see [99]. These two appeals had already been fully pursued and argued, and there was no question of the Board or Forbidden Foods not pursuing their appeals, or that SunRice would participate in the appeals as an plaintiff, or would seek to exercise any right of appeal pursuant to s 80. This is quite different to the position of Sarraf Property Group and Palonis who were joined as plaintiffs (not just as parties) in order to be the primary (if not only) moving parties in the appeal and thereby exercise (non-existent) rights of appeal pursuant to s 80.

146 Second, in *Rice Marketing Board*, SunRice (unlike Sarraf Property Group and Palonis) had been an active participant, and had led evidence, cross examined, and made oral and written submissions, in the proceedings below: see [63]. To the contrary, in the present case, Sarraf Property elected not to be joined to or participate in the proceedings below.

147 Third, in *Rice Marketing Board*, the joinder of SunRice (as a party not as an plaintiff) was supported by one of the plaintiffs (the Board): see [102] rather than being opposed by the defendants to the appeal (as was the situation in the present case).

148 *Fourth*, in *Rice Marketing Board* the Appeal Panel (unlike the Deputy President) undertook a thorough consideration (aided by considered written submissions) as to whether or not SunRice was a proper or necessary party in the appeal, and concluded that it was, as a party whose interests were affected by the Tribunal's decision and has a material interest in the result of the appeal proceedings: see [104]-[118]. With respect, no such analysis or findings were made in the present case.

149 Fifth, the outcome in *Rice Marketing Board* was quite different to that in the present case in that Sunrice was not joined as an plaintiff in the appeal, but instead was only joined as a party.

150 Contrary to the assertion, Keevers does challenge both the *existence* and the *exercise* of the power to join a non-party to the proceedings below to an appeal. This is obvious from those aspects of the plaintiff's written submissions which challenge the discretionary aspects of the joinder. From the inclusion of Ground 1B in the Amended Summons and PWS [74]-[79], given that by that ground of appeal and those submissions the plaintiff contended that, if the Appeal Panel did have the contested joinder power, then it erred in the *exercise* of that power (by failing to limit the scope of the joinder to only certain grounds of appeal).

151 For the reasons set out above, the way in which the joinder power was exercised by the Deputy President was quite different to the way in which it was exercised in *Rice Marketing Board*. In the present case, Sarraf Property Group and Palonis were impermissibly joined as plaintiffs (in circumstances

where the terms of s 80 meant they had no appeal rights and therefore could not be plaintiffs) while in *Rice Marketing Board* SunRice was (properly) joined merely as a party, not as an plaintiff.

152 In these circumstances, the decision in *Rice Marketing Board* does not demonstrate that Deputy President Westgarth acted within power or otherwise assist Sarraf Property Group and Palonis. To the contrary, it indicates that, by joining Sarraf Property as plaintiffs (as opposed to merely as parties), he acted outside or erred in the exercise of the joinder power, and thereby fell into legal error.

153 Contrary to the oral submissions put on behalf of Sarraf Property at the end of the hearing of this appeal, there would be substantial practical utility in granting leave and upholding this appeal (and in particular Ground 1A) because allowing the appeal would mean that the original orders of the Tribunal would be restored (other than the compulsory strata manager order) and appropriate orders would be made with respect to the (incompetent) appeal to the Appeal Panel. It is by no means certain, or even likely, that Sarraf Property would apply for, and/or be given, leave to be joined to the proceedings below in order to then bring a (competent) appeal from the Tribunal's orders. Any such application would be opposed and it is difficult to see on what basis it could or would be granted in circumstances where the reasons for any joinder (namely to challenge the order for compulsory strata manager) no longer exist.

Resolution

154 Starting with *Fine,* the Appeal Panel recognised, at [35], that s 44 of the *NCAT Act* conferred a wide discretion on the Tribunal in determining who ought to be joined to proceedings as a party. It considered that the discretion was similar to, but wider than, the discretion conferred under UCPR r 6.19. By reference to the "broad discretion" conferred by UCPR r 6.19, the Appeal Panel at [36] articulated the "basic principle" governing the exercise of the discretion under s 44 in the following terms:

> "... a court (or tribunal) should take the course most conducive to the just resolution of the dispute, having regard to the desirability of minimizing the costs and delay of litigation ..."

155 The Court of Appeal in *Fine* stated that the power of joinder conferred by s 44 of the *NCAT Act* is stated in general terms. It is a power to join a party "if the Tribunal considers the person should be joined as a party": s 44(1). The Tribunal also has the power to remove a party. The power of removal may be exercised if the person is "improperly or unnecessarily joined, or ... ceased to be a proper or necessary party": s 44(2). The power of joinder conferred by s 44(1) was to be read in conformity with the power of removal so that a party who was a "proper or necessary party" ought to be joined in the proceedings. However, the question remains as to the meaning or, perhaps more correctly, the parameters of the expressions "proper" and "necessary", noting that the expressions are used in s 44(2) disjunctively and that a "proper" party may not be a "necessary" party (at [38]).

156 A party whose interests are affected by a decision, including by reference to a statutory interest, may be a necessary party to proceedings. For that reason, the decision-maker is usually joined as the decision made may be affected by the application. The intent and effect of the joinder is to ensure that the decision-maker is bound by the determination of the Tribunal (at [39]).

157 The question whether a party is a "proper" party to an application raises different considerations. A party with an interest in the proceedings, that is, a party whose interests were affected by the decision, would usually be a proper party." (at [40]).

158 Turning to the current proceedings, the appeal to this Court is in reality an appeal against the decision of Deputy President Westgarth sitting as the Appeal Panel of 30 June 2021 when he ordered that Sarraf Property Group and Palonis be joined as parties to the proceedings. As reproduced in excerpts from the transcript earlier, at the hearing before Deputy President Westgarth, Mr Philips, appearing for Keevers, Bourke and Fardell, accepted that there was no contradictor in the appeal, if Sarraf Property Group and Palonis were not joined as parties. The Deputy President also stated that if the real interests are to be dealt with before the Appeal Panel, the different positions of the majority and minority owners can only be property ventilated by these two majority owners being added as parties.

159 The Deputy President, in his ex tempore reasons, decided that what was relevant was that an appeal had been brought by an Owners Corporation, the officers of which had now been displaced by the appointment of a compulsory manager. In reality, those who wished to contest the orders under appeal were not the Owners Corporation nor the defendants to the appeal, but two other parties who are called the "majority owners." Deputy President Westgarth's view was that the interests of justice require that they be added as additional plaintiffs. He added Sarraf Property Group and Palonis, as additional plaintiffs to the Appeal.

160 Likewise, the Appeal Panel at [79] of its decision, stated that because of the effect of the appointment of the compulsory strata manager (provided for in the *Strata Scheme Management Act*) unless the compulsory strata manager chose to prosecute the appeal, or some means were put in place by which the majority lot owners could prosecute the appeal, no effective appeal right would exist in respect of the Tribunal's orders. The compulsory strata manager had a personal interest that was in conflict with prosecuting an appeal which challenged its appointment. The Appeal Panel observed that no appeal from Deputy President Westgarth orders had been brought [APD [86]]. At [87], the Appeal Panel's short answer to the defendants' objection to the appeal on the basis that the Sarraf Property Group and Palonis plaintiffs have no standing is that the contrary position had already been determined by the decision made by the Deputy President on 30 June 2020. That decision was not appealed, and the defendants to that appeal were not suggesting that the Appeal Panel should revoke the interlocutory decision of the Deputy President by reason of a change of circumstances or other reason.

161 It is my view that s 80 of the *NCAT Act that* deals with the making of appeals should not be read to exclude the exercise the specific powers set out in s 44(2) of the *NCAT Act,* one of which is to join parties. Section 82(1)-(2) of the *Strata Schemes Management Act* provides for the Owners Corporation to make an application to the Tribunal for recovery of unpaid contribution interest. The Owners Corporation made the application to the Tribunal. These submissions failed. The plaintiff also raised hypothetical derivative

proceedings. The following exchange occurred by Senior Tribunal Member Durak with Counsel for Keevers, Bourke and Farrell: (CB417)

> "MR DURACK: Mr Philips, let me just ask you this. It might be a question of the construction of section 80, but if these lot owners seek to bring the appeal as a derivative proceeding that is really effectively on behalf of the Owners Corporation, albeit in their own names, couldn't "by a party" be construed as applying to a situation where it's brought on behalf of a party in those circumstances?
>
> MR PHILIPS: Yes. If I could perhaps go back to my retrospective scope scenario which is what should have happened in this case, is that if SPG and Palonis not having availed themselves of the opportunity to be joined as parties to the proceedings below wished to bring an appeal by way of a derivative suit for and on behalf of the Owners Corporation, having been informed that the SMA did not wish to bring any appeal, then they could have and should have sought to bring a derivative suit and that, if it had done, would overcome the practical problem that's identified by my learned friends in their submissions.
>
> But taken to its logical extent, the position I contend for would mean there wouldn't be able to be an appeal from any decision made to appoint a strata manager pursuant to section 237. So, in my submission, what could have and should have happened is that Mr - that SPG and Palonis could have applied - sought to apply for leave to bring, effectively, a derivative appeal."

162 This argument to me seems academic as *Fine* establishes that a party can be joined by in accordance with s 44 of the *NCAT Act.*

163 So far as appeal ground 1B is concerned, s 44(2) of the *NCAT Act* gives a wide discretionary power to join parties. There is no reason that power for joinder of parties be limited, in circumstances where no such submissions of this nature were made before Deputy President Westgarth.

164 In the event that I am wrong, these appeal grounds do not raise a matter of principle because in 2014 the Court of Appeal in *Fine* has already addressed the proper application of s 44(2) of the *NCAT Act*. There is no question of public importance. Nor is it reasonably clear that there has been an injustice in the sense of going beyond what is reasonable arguable.

165 Appeal Grounds 1, 1A and 1B fail.

Appeal Grounds (2)(a) – procedural fairness

166 This appeal ground is that the Appeal Panel erred, in law, in finding that the Tribunal at first instance made an error of law in the form of procedural unfairness by making findings (in [79] of its Reasons) described as "adverse" in

circumstances where such findings were not advanced or sought by the plaintiff: see Reasons 1 [139]-[140].

167 At [78]-[79], the Tribunal Member stated

> "[78] The Tribunal does not consider the 09 June 2017 report of Mr Dakhoul to provide a reliable basis for the special levy for the following reasons;
>
> (1) Norman Sarraf conceded that Mr Dakhoul was *"one of my best friends in the worid'.*
>
> (2) SPG uses Dakhoul for most of their work, according to John Sarraf.
>
> (3) SPG has used Mr Dakhoul to provide defect reports since the 1990s.
>
> (4) The strata managing agent, Mr Haldezos, conceded in cross-examination that aspects of Mr Dakhoul's report went beyond the section 106 obligation.
>
> (5) A number of Mr Dakhoul's cost estimates appear high, notably $85,800 for rising damp (despite evidence that there is a damp course in place), $84,700 for work on the roof (which includes replacing a membrane that the evidence establishes was replaced at a cost of $35,780 in 2015) and $23,100 for dealing with parapet walls.
>
> (6) After arriving at a total amount of $552,495 for building work, Mr Dakhoul then adds 20% for preliminaries, 15% for builder's profit and overheads, 20% for contingencies and 10% for GST with the effect that the sub-total of $552,495 becomes a total of $1,006,425.
>
> (7) To that amount he adds a proposal dated 07 November 2017 for his project management at a total cost of $94,710 which would be payable to him if the work proceeds.
>
> (8) A number of the items included in Mr Dakhoul's report do not appear to be urgent such as would require immediate payment in order to undertake that work.
>
> (9) There was evidence from Mr Magro, who was cross-examined, that the schedule of defects is outdated as some of the major components have been rectified and the cost estimates appear exorbitant."
>
> [79] Because of the effect of the appointment of the compulsory strata manager, as provided for in the SSMA, unless the compulsory strata manager chose to prosecute the appeal, or some means were put in place by which the majority lot owners could prosecute the appeal, no effective appeal right would exist in respect of the Tribunal's orders. Plainly, the compulsory strata manager had a personal interest that was in conflict with prosecuting an appeal which challenged to its appointment."

168 At [80]-[82] the Tribunal Member gave reasons as to why he did not accept the expert evidence of Mr O'Donnell and Mr Burner.

The Appeal Panel's decision

169 At [132],[134]-[138] and [139]-[140], the Appeal Panel stated:

> [132] Prior to the hearing, in accordance with an order made by the Tribunal, the respondents required Mr Dakhoul to attend the hearing for cross-examination: see letter from the respondents' solicitor to the OC's solicitor dated 7 February 2020. Presumably, that occurred because the respondents expected the 2017 Dakhoul report to be part of the evidentiary material to be relied upon by the OC. At the commencement of the hearing, Mr Newton, Junior Counsel for the OC, identified the 2017 Dakhoul report as evidence to be relied upon by the OC (albeit not as an expert report prepared for the purpose of the proceedings) and informed the Tribunal that Mr Dakhoul was available for cross-examination (transcript, line 30 on page 1272 to line 6 on page 1273: see also at lines 6 to 10 on page 1289). Mr Dakhoul was not cross-examined at the hearing in the Tribunal.
>
> …
>
> [134] These reasons [The Tribunal's] are seriously adverse to both Mr Dakhoul and Norman Sarraf.
>
> [135] They are suggestive of untruthfulness and unprofessionalism by Mr Dakhoul, not as a witness, but in his 2017 report. The conclusions are also suggestive of impropriety by Mr Norman Sarraf in seeking to take advantage of his friendship to obtain an untruthful report.
>
> [136] If the conclusions had been confined to what was set out in [78] of the reasons there would have been a conclusion that the 2017 Dakhoul report was not a reliable basis for the special levy for reasons that remained consistent with Mr Dakhoul holding an honest opinion as to need for and costing of the rectification work.
>
> [137] The conclusions in [79] stand in contrast to the opening and closing written submissions from the respondents to the Tribunal at first instance that:
>
> > 12 In this regard, the Lot Owners repeat the matters set out in paragraph 33 of their Opening Submissions in relation to the Dakhoul Report, and in particular that the express purpose of the Dakhoul Report was to comprehensively identify all defects in the building (regardless of materiality) but not to distinguish between any repairs necessary to properly maintain and keep in good and serviceable repair the common property and those which may be less critical or more cosmetic in nature.
>
> [138] The respondents submitted to the Tribunal at first instance that Mr Dakhoul had no level of objectivity or professional independence given that he was a close friend of Norman Sarraf and that in preparing his report he had sought to identify each and every possible defect in the building rather than identifying only those repairs which were necessary to keep the common property in a safe and serviceable condition. However, no submission was made by the respondents to the Tribunal at first instance to the effect that Mr Dakhoul had acted dishonestly, improperly or unprofessionally in the preparation of his report.
>
> [139] In our opinion, it was unfair to Mr Dakhoul, Norm Sarraf and to the SPG appellants for the Tribunal to say what it did in [79] of the reasons in circumstances where such adverse findings were not put to Mr Norm Sarraf in

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

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

The plaintiff's submissions

Appeal Ground 2(a) – procedural fairness

170 In [79] of its primary reasons, the Tribunal Member found that the Dakhoul Report was consistent with an objective to arrive at a high amount in a report prepared for a friend who uses him for most of their work and is more interested in redevelopment than refurbishment.

171 In [139]-[140] of its primary reasons, the Appeal Panel found that the Tribunal below had made an error of law because its findings in [79] of its reasons were "procedurally unfair". The basis for this finding was that procedural unfairness had been demonstrated to Dakhoul, Norman Sarraf and the Sarraf Property Group in circumstances where such "adverse" findings were not put to Norman Sarraf in cross examination and were not advanced in submissions to the Tribunal and therefore the Sarraf Property Group did not have an opportunity to address these matters. This finding was itself wrong, and an error of law, because:

(a) the Sarraf Property Group were not, by their own election, parties to the proceedings and therefore, as such, could not have had any opportunity to make submissions or "address" these matters, and therefore were not deprived of any such opportunity. It is trite law that procedural fairness can only be afforded (or denied) to a party to proceedings;

(b) Norman Sarraf was simply a witness in (not a party to) the proceedings who gave evidence that he was close and longstanding friends with the author of the Dakhoul Report. Dakhoul did not give any affidavit or witness statement or any other form of evidence to the Tribunal. The Sarraf Property Group were given an opportunity to be joined to the proceedings before the Tribunal but elected not to do be joined. In these circumstances, no obligation arose to afford procedural fairness to any of these entities;

(c) the assertion by the Appeal Panel (at [139]) that such "adverse" findings were not advanced in submissions is incorrect, and completely at odds with its (accurate) observation in the preceding paragraph (at [138]) that Keevers had submitted to the Tribunal at first instance that Dakhoul had no level of objectivity

or professional independence given that he was a close friend of Norman Sarraf. This is the very submission which was in effect accepted by the Tribunal (in [79]) and it was wrong for the Appeal Panel to find that it had not been advanced before the Tribunal; and

(d) the Owners Corporation, as a party to the proceedings, had every opportunity to, and did, engage with the submission put by Keevers that the Dakhoul Report lacked objectivity or professional independence. The Owners Corporation cannot have suffered any procedural unfairness.

The defendant's submissions

172 The Appeal Panel did not make the errors asserted by the plaintiff concerning the Appeal Panel's finding that there was procedural unfairness There were a number of secondary factual findings that informed the principal finding that procedural unfairness infected the findings concerning (at [140]) the Sarrafs (as witnesses), Dakhoul as a person available for cross-examination and to the Owners Corporation, as a party relying on their evidence.

173 The first instance finding that Dakhoul had inflated his costings because of his association with the Sarrafs (at [79]) impeached the credit of Norman Sarraf and John Sarraf given that, implicit in such a finding, was that Norman Sarraf, John Sarraf or both had asked Dakhoul to act dishonestly, improperly and unprofessionally in the preparation of his report. The Appeal Panel properly described these findings as seriously adverse to Dakhoul and to Norman Sarraf (at [134]).

174 The proposition, which was to the effect that Dakhoul had engaged in fraud at the Sarraf Property Group parties' request, was not put to Norman Sarraf or John Sarraf in cross-examination, which eviscerated the rules of fair dealing prescribed by *Browne v Dunne* (1893) 6 R 67 at [60] as affirmed in *Kuhl v Zurich Financial Services Australia* [2011] HCA 11; (2011) 243 CLR 361 at [71].

175 The Appeal Panel's reference to the unfairness to the Sarraf Property Group having an opportunity to address the matters (at [139]) was, clearly enough, a shorthand reference to the Owners Corporation's witnesses John Sarraf and Norman Sarraf, who either through their evidence or by submissions put by the

Owners Corporation, could have responded had they been given the opportunity.

176 *Further,* the Owners Corporation served Dakhoul's report and made Dakhoul available for cross-examination after being required to do so by Keevers' solicitor (at [132]). In those circumstances, the *Browne v Dunne* (1893) 6 R 67 rule also applied to Dakhoul who could have been called by the Owners Corporation to address the allegations against him, had they been made.

177 The Appeal Panel set out the submissions Keevers did make (at [137]), which concerned what Keevers described as the materiality of the defects identified in the Dakhoul report, not whether Dakhoul had dishonestly inflated his costings at the Sarrafs' request. The Owners Corporation had no opportunity to respond to that submission. The notion that a litigant can make allegations of collusion, favouritism, unethical behaviour and, in essence, fraud against witnesses, or persons who were available for cross-examination, but not confront them with such matters – which is what Keevers submits in this Court – is an affront to the concept of our system of justice.

Resolution

178 There were a number of expert reports relied upon by the parties. They had a disagreement on some costly matters such as differing views between them as to whether the roof membrane had to be replaced and adequacy of the damp courses.

179 At the hearing before the Tribunal Member, Keevers Bourke and Fardell relied upon an expert report of Mr Magro. The Owners Corporation relied upon the report of Dakhoul. On appeal, the Appeal Panel was entitled to consider factual matters.

180 I agree that, in order to afford procedural fairness**,** where a witness is made available for cross examination, as Dakhoul was before the Tribunal, he should have had specific allegations put to him in cross-examination before adverse findings were made against him. Dakhoul estimated the costs of fixing the defects in the strata building was 1,006,425.00. Magro estimated repair of the defects at $77,650.00. In my view, leave to appeal should not be granted as it is reasonable clear that there has not been an injustice in the sense of going

beyond what was reasonable arguable that the Appeal Panel was in error. Nor does this ground of appeal raise issues of principle or questions of public importance.

Appeal Grounds 2(b)-(d) – findings of fact and evidence

181 These grounds of appeal follow from what is raised in Gound 2(a) concerning the Dakhoul report. They are:

(a) it was not open (to the Tribunal) to conclude that a cost estimate was inflated because there was no probative evidence for such conclusion and the Tribunal erred in so doing (Reasons 1 [141]-[142]) in circumstances where there was no probative evidence for such conclusion; (**No probative evidence**)

(b) material from an expert witness report was not capable of supporting a conclusion that the costs estimate was inflated (Reasons 1 [166]) in circumstances where such material was not capable of supporting such a conclusion; (**material not capable of supporting conclusion**)

(c) it was not open (to the Tribunal) to conclude that the building work the subject of the special levy went beyond what was required by s 106 of the *Strata Schemes Management Act* because there was no probative evidence to support such conclusion and such conclusion was an error of law (Reasons 1 [168]-[169]) in circumstances where there was probative evidence for such conclusion. (**No probative evidence**)

182 Section 80(2)(b) of the *NCAT Act* permits the Appeal Panel to:

> **80 Making of internal appeals**
>
> …
>
> (2) Any internal appeal may be made—
>
> …
>
> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

183 The Appeal Panel stated:

> "[141] Furthermore, in our opinion, as we now explain (in paragraphs 143 to 166, the conclusions in [79] were unjustified because, on the basis given by the Tribunal, it was not open to it to conclude that the cost estimate in the 2017 Dakhoul report was inflated, or that Mr Dakhoul had set out to achieve an inflated cost estimate, because there was no probative evidence for such conclusions.
>
> [142] In our opinion, the Tribunal erred in law in doing so.

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

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

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

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

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

[148] In addition, as to the Tribunal's reference to the rising damp cost estimate, the SPG appellants submitted that the Tribunal intimated that the cost was or appeared to be unnecessary because there was a damp course in place. However, they submitted that the Tribunal missed the point because it made no reference to the "overwhelming" evidence in relation to the need to replace the damp course, including evidence about moisture ingress and that damp courses deteriorate and lose their effectiveness (at AS 28).

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

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

…

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

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

> [163] Mr Magro's report consisted of a letter (four pages) to Mr Keever's solicitor dated 23 March 2020. It was headed "Preliminary Inspection" of the premises and it referred to a "preliminary visual inspection" on 20 March 2020. It said that the report was for discussion purposes only.
>
> [164] The evidence from Mr Magro that the Tribunal was referring to (in [78 (9)]) was the following passage:
>
> > In my opinion, the schedule of defects [in the 2017 Dakhoul report] is outdated as some of the major opponents have been rectified, and on the surface, the associated costs appear exorbitant. *This area is outside my area of expertise* and I strongly recommend that a new schedule be compiled and costed by an experience (sic) remedial works investigator. A remedial investigator would prepare a Scope of Works and call tenders to establish the order of total cost [our emphasis].
>
> [165] Only one matter is capable of being identified as an outdated aspect (as referred to by Mr Magro) and that is the capping to the parapet walls on the roof. (In his report, Mr Magro stated that a new capping over the roof parapet had been installed). However, as we have already mentioned, this work post-dated the 2017 Dakhoul report and is not capable of justifying any criticism of that report.
>
> [166] In our opinion, the material from Mr Magro referred to by the Tribunal was not capable of supporting a conclusion that the cost estimate in the 2017 Dakhoul report was inflated, or that Mr Dakhoul had set out to achieve an inflated figure.
>
> …
>
> [168] For the same reasons as set out in paragraphs 143 to 166 (except for our reasons concerning the matters in [78 (6) and (7)], which concern costs only and not the building work to be carried out), in our opinion, it was not open to the Tribunal to conclude that the building work the subject of the special levy went beyond what was required by s 106 of the SSMA, because there was no probative evidence to support such a conclusion.
>
> [169] This was an error of law."

The plaintiff's submissions

184 In [141] of its primary reasons, the Appeal Tribunal found that that there was no probative evidence to support the Tribunal's conclusion that the costs estimate in the Dakhoul report was inflated. This finding was wrong for the following reasons.

185 First, the Tribunal identified (in [78] of its Reasons) 9 separate reasons (each grounded in or supported by evidence) as to why it considered that the Dakhoul Report was not a reliable basis for the 2017 Special Levies. In order to (properly) make a finding that there was no probative evidence to support the Tribunal's conclusion regarding the Dakhoul report, the Appeal Panel needed

to demonstrate that each and every one of the 9 separate reasons identified by the Tribunal had no basis in evidence. This it did not do.

186 Second, there was at least *some* probative evidence before the Tribunal (at [78(5)]) supported the Tribunal's conclusion [78(5)] that a number of Mr Dakhoul's costs estimates appeared to be high. For example, in relation to the $84,700 for work on the roof, there was evidence before the Tribunal (referred to at [153]) from the expert engineer Mr Magro that, in his opinion, it was not necessary to remove the roof membrane, and therefore that Mr Dakhoul's estimate (which relied on removing the newly installed membrane in order to do other work) for this item was excessive. Further, there was clear evidence before the Tribunal that there was no need for the capping of parapet walls (costed at $23,100 by Mr Dakhoul) to take place because that capping had been undertaken after Mr Dakhoul had issued his report (and therefore was no longer necessary): see [155].

187 *Third,* the Appeal Panel's criticism of the Tribunal's conclusions in [78] of its reasons was, in substance, that there was an absence of findings, not a complete absence of any evidence to support the conclusion. For example, at [150] and [154] the Appeal Panel observed that the submissions of Keevers provided no answer to the absence of any findings by the Tribunal about the necessity of particular items of work. However, an absence of positive findings about particular items is a different thing to a (complete) absence of evidence - an absence of specific findings does not equate to a (complete) absence of any evidence.

188 This is most starkly shown by the way in which the Appeal Panel approached the Tribunal's references to evidence at [78(6)-(7)] which demonstrated that, according to Mr Dakhoul's report and proposal, a total amount of $552,495 for building work became a total of $1,006,425 (once preliminaries, builder's margin, contingencies and GST had been added) and then a project management fee of $94,710 would be payable to Mr Dakhoul (if the work were to proceed). The Appeal Panel simply noted that there were no findings that these amounts were inflated or why that was the case. Significantly, it did not suggest that there was no evidence which could support such a finding (but

rather only that no such finding was made, even though it could be argued that there was such a finding made, at least impliedly). The important matter is that there clearly was evidence before the Tribunal (in the form of Mr Dakhoul's own costs estimate, calculations and fee proposal) which it regarded as supporting its conclusion that the Dakhoul Report did not provide a reliable basis for the 2017 Special Levies.

189 This erroneous approach is also demonstrated by the Appeal Panel's repetition at [160] that there was no finding by the Tribunal that identified matters were not urgent, which, again, does not entail a conclusion that there was no evidence to support such a conclusion. Tellingly, it is also repeated at AP Reasons [162] in relation to the evidence of the expert Mr Magro. As is recorded at AP Reasons 1 [164], Mr Magro gave expert evidence that in his opinion the schedule of defects is outdated as some of the major [components] have been rectified, and on the surface, the associated costs appear exorbitant. This evidence provides support for the Tribunal's conclusion with respect to the Dakhoul Report, and itself establishes that Appeal Panel was wrong to find that there was no evidence to support that conclusion, and also that such material was not capable of supporting that conclusion.

190 The same must be said with respect to the finding at [168]-[169] that it was not open to conclude that the building work the subject of the 2017 Special Levies went beyond what was required by s 106 of the *Strata Schemes Management Act*, given that this finding was (erroneously) made for the same reasons.

191 In summary with respect to Grounds 2(b)-(d), the Appeal Panel's findings that there was no probative evidence to support the Tribunal's conclusion that the costs estimate in the Dakhoul report was inflated, and that the material from Magro was not capable of supporting such a conclusion, were manifestly wrong and cannot be sustained. In their place, a finding should be made that it was open for the Tribunal to conclude that the costs estimate in the Dakhoul Report was inflated, and therefore that there was no error in the Tribunal reducing the 2017 Special Levies in the way that it did.

The defendant's submissions

192 The plaintiff challenges the Appeal Panel's finding that it was not open to conclude that the cost estimate in the 2017 Dakhoul Report was inflated "because there was no probative evidence" supporting that conclusion This is an attack on the Appeal Panel's assessment of facts. No legal error exists These appeal grounds should be rejected at the outset the plaintiff has not demonstrated any error in the Appeal Panels conclusion that there was "no probative evidence" to justify the Tribunal's conclusion that the cost estimate in the 2017 Dakhoul report was inflated, or that there "was no probative evidence" that the works the subject of the special levy went beyond s 106 of the *Strata Schemes Management Act*. The matters raised by the plaintiff involve no issues of principle, questions of general public importance or an injustice which is reasonably clear in the sense of going beyond what is merely arguable.

193 The "9 separate reasons" said by the plaintiff to support the Tribunal's finding were each separately considered and rightly rejected by the Appeal Panel (at [143]-[166]).

194 In relation to Tribunal's reasons:

(a) The Appeal Panel correctly found that the fact that Dakhoul was one of Norman Sarraf's best friends and that Sarraf Property Group had used him extensively for many years, was not a sufficient basis to arrive at such a conclusion (Substantive Decision at [143]);

(b) The Appeal Panel correctly held that Haldezos did not make a concession that aspects of the report went beyond the s 106 obligation (at [144]), which in any event was unrelated to whether the costs were inflated.

195 The plaintiff seeks to rely on Magro's evidence to assert that there was some probative evidence to support the Tribunal's conclusion that Dakhoul's costs estimates "appear to be high" in relation to the removal of the roof membrane and the capping of the parapet walls (Tribunal's reason 78(5)). However, this evidence was expressly considered and rejected by the Appeal Panel (at [153]-[156], [163]-[166]) as not being "capable of supporting a conclusion that the cost estimate in the 2017 Dakhoul report was inflated" (at [166]):

(a) as identified by the Appeal Panel, Magro's report was headed "Preliminary Inspection", for discussion purposes only and the

area of costs was "outside [his] area of expertise" ([163]-[164]) Because of this, even without its other deficiencies Magro's report provided no 'probative evidence' that Dakhoul had inflated his costs;

(b) further, while the Appeal Panel referred to Magro's view that it was not necessary to remove the membrane to repair the structural roof defects (at [153]), it rightly pointed out that the Tribunal made no finding to this effect (at [154]), nor did the Tribunal refer to Dr O'Donnell's evidence that in order to undertake the structural work, to the roof membrane had to be removed to make the whole roof comply with Australian Standards (at [152]);

(c) similarly, the Appeal Panel's finding (at [155]-[156]), that the subsequent work to replace the parapet capping, "after" Dakhoul issued his report provided no "probative evidence" that Dakhoul's costings were inflated, is correct as a matter of timing and the plaintiff's assertion is logically wrong, raises no legal issue and should be rejected; and

(d) as the Appeal Panel noted (at [162]) given the preliminary nature of Magro's report and its qualifications, it was understandable that the Tribunal did not make findings based upon it. On no basis did it provide "probative evidence" that the cost estimate in the 2017 Dakhoul report was inflated.

196 Contrary to the plaintiff's submission, the Appeal Panel's criticism of the Tribunal's conclusions, at [78], was not because of a "(complete) absence of evidence".

197 This is not a phrase used by the Appeal Panel although the Appeal Panel did rely on an absence of findings that the costings in the 2017 Dakhoul reports were inflated and why that was the case, it also found that there was "no probative evidence" for the conclusion that the cost estimate was inflated (at [141]). In particular:

(a) the fact that Dakhoul was one of Norman Sarraf's best friends and that Sarraf Property Group had used Dakhoul extensively for many years was not a sufficient basis upon which to arrive at such a conclusion (at [143]);

(b) the Tribunal was correct to conclude that Haldezos had not made the concession referred to (at [144]);

(c) the Berner Report could not be given any weight in view of the Tribunal's conclusion that it was not willing to make any findings based upon his reports (at [150]; and

(d) the Magro Report was not capable of supporting a conclusion that the costs estimate in the 2017 Dakhoul report was inflated ([163]-[166]).

198 The matters referred to by the Tribunal (Tribunal's reasons at [78(6)-(7)] about the quantum of amounts in the 2017 Dakhoul report for such matters as preliminaries, builder's profit, GST and a fee proposal for Project Management were not, as submitted by the plaintiff, evidence that those amounts were inflated, let alone "probative evidence'. As the Appeal Panel observed, the Tribunal made no findings that these amounts were inflated or why that was the case (at [158]). That is unsurprising given there was no evidence that could have supported such a finding.

199 The plaintiff's assertion that the Appeal Panel erred by observing that there was no finding that works were urgent (Substantive Decision at [160]) is misconceived:

(a) First, the observation was correct and the plaintiff does not submit otherwise;

(b) Secondly, urgency or non-urgency of works was irrelevant to whether or not the 2017 Dakhoul report had inflated cost estimates. As the Appeal Panel observed referring to relevant authorities, urgency is not the test for compliance with s 106 of the *Strata Schemes Management Act*.

200 Beyond assertion, the plaintiff does not identify any "probative evidence" which supports his contention that the Appeal Panel erred in finding (at [168]) that it was not open to conclude that the building work the subject of the 2017 Special Levies went beyond that which was required by s 106 of the *Strata Schemes Management Act*.

201 As stated by the Appeal Panel (at [120]), the Haldezos "concession" was one of the few matters that might have conceivably justified the Tribunal's positive conclusion that works went beyond s 106 of the *Strata Schemes Management Act*, however it was not in fact a "concession' for the Appeal Panel's reasons at [120]-[126] and [144].

202 The only other conceivable matters, were the damp course work and the roof membrane removal, which did not support the Tribunal s conclusion:

(a) First, the Tribunal made no findings that the work was unnecessary (at [150] and [154]);

(b) Secondly, it did not refer to the evidence that it was necessary (at [148] and [152]); and

(c) Thirdly, the Bemer report and the Magro report had no "probative value as stated at [38(d)], [39(c)] and [39(d)].

Resolution

203 The Appeal Panel was entitled to make their own factual findings based on the material that was before the Tribunal. The Tribunal Member concluded that the Dakhoul report inflated the costings. The Appeal Panel pointed out that some of the costings related to repairs of defects that had been carried out after the date of the report.

204 Further, the Appeal Panel stated that the Tribunal Member had made findings related to deficiencies in the Magroo report which was a "Preliminary inspection" and stated it was for "discussion purposes only". While Margo correctly said that some of the schedule of defects had been rectified, he expressed the view that on the surface, the associated costs appear exorbitant but then acknowledged that "this area is outside my expertise".

205 Magro strongly recommended that a new schedule be compiled and costed by an experienced remedial works investigator. Nevertheless, the Tribunal Member relied on Magro's sums as a basis for the amount of levies to be paid by the unit owners. It is not correct, as the plaintiff contends, that the Appeal Panel had to overturn all nine findings in order to reach a different result. The Appeal Panel also referred to matters concerning the quantum of amounts in the 2017 Dakhoul report for such matters as preliminaries, builder's profit, GST and a fee proposal for Project Management were not, as submitted by the plaintiff, evidence that those amounts were inflated, let alone "probative evidence" (Tribunal's reasons at [78(6)] and [78(7)]). As the Appeal Panel observed, the Tribunal made no findings that these amounts were inflated or why that was the case (at [158]).

206 It is my view that leave to appeal these grounds of appeal should not be granted as it is reasonably clear that there has not been an injustice in the sense of going beyond what was reasonable arguable that the Appeal Panel

was in error. Nor does this ground of appeal raise issues of principle or questions of public importance.

Appeal Ground 3 – an attack on the Appeal Panel's findings that some first instance findings were infected with factual error

207 I will deal with appeal grounds 3(a) and 3(b) together.

208 The grounds of appeal are that the Appeal Panel erred in law in:

(a) upholding Ground 6 of the appeal below, and in so doing finding that the Tribunal's conclusions (about preferring the evidence of the plaintiff and Casabon to that of Sarraf, and that Norman Sarraf said at a meeting that the renovation work would never be carried out) were impugned and undermined by material errors of fact (at Reasons 1 [215]-[216]) without identifying any such errors of fact; and

(b) upholding Ground 5 of the appeal below (at [225]) and in so doing failing to give any, or sufficient, weight to the unchallenged findings made by the Tribunal (at [108] of its Reasons for Decision of 25 May 2020) which, individually and collectively, supported the conclusion that the special levy had been imposed for an improper purpose.

209 The Tribunal Member stated at [63] and [108]:

"[63] It is clear, from matters including

(1) the imposition of the special levy,

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

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

(4) the conversation with Mr Keevers after the 2017 AMG, and

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

That the objective of the owners of lots 15 and 18 was to acquire all four units, dismantle the strata scheme and redevelop the site and that remains an underlying motivation.

…

[108] Relevant to this issue, the Tribunal makes the following findings:

(1) The building work upon which the special levy was based went beyond the obligation under section 106 of the SSMA to maintain and repair.

(2) The building work upon which the special levy was based derived from a report prepared by a close friend of Norman Sarraf.

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

(4) There was neither consideration of an existing 10-year plan for capital works nor preparation of a fresh 10-year plan for capital works.

(5) No opportunity was provided for payment of the levy by instalments.

(6) Immediately prior to the AGM in November 2017 at which a decision was made to impose the levy, Norman Sarraf put pressure on Ms Bourke to sell lot 16 in order to avoid having to pay the levy.

(7) In February 2018, after the AGM and shortly prior to the commencement of legal proceedings to recover the special levy. Norman Sarraf put pressure on Mr Keevers to sell lot 17.

(8) During that meeting. Norman Sarraf offered to buy lot 17 for $1.5 million.

(9) At that meeting Norman Sarraf asserted to Mr Keevers on 20 February 2018 that such building work would not be carried out.

(10) Consistent with that assertion, that building work has not been carried out.

(11) At both the meeting with Ms Bourke and the meeting with Mr Keevers, Norman Sarraf made it clear that the owners of lots 15 and 18 wanted to own all four lots and would take steps to achieve that goal.

(12) During his oral evidence, Norman Sarraf said that lots 15 and 18 were purchased with the intention to develop them at some time in the future.

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

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

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

(16) Of the remaining amount of the special levies that have been received, a substantial amount has been used to cover administrative expenses and the size of the deficit in the administrative fund, which was $164,308.69 as at 31 October 2019. In those circumstances, it is not surprising that the lot owners submitted that money paid in response to the special levy is being used to fund the lawyers acting for the Owners Corporation in these proceedings.

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

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

210 In relation to these grounds, the Appeal Panel stated at [193]-[222]:

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

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

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

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

> (1) Mr Sarraf's evidence was recollection unaided by any contemporaneous record and contained a concession that he cannot recall specifics of the conversation. (His concession was somewhat more limited - he gave an account of what he said about the three scenarios and then said he did not remember the specifics of the rest of the conversation as it was mainly "chit chat" about the current market prices).
>
> (2) The evidence of Ms Casabon and Mr Keevers was aided by notes made shortly after the conversation occurred.
>
> (3) The tenor of the conversation was consistent with Norman Sarraf's earlier conversation with Ms Bourke.
>
> (4) Ms Casabon's evidence served to corroborate that of Mr Keevers as did the evidence of Ms Bourke in relation to the earlier meeting.
>
> (5) The evidence of Ms Casabon and Mr Keevers was not diminished in cross-examination.
>
> (6) For reasons indicated above, the Tribunal did not consider the uncorroborated evidence of Norman Sarraf to be reliable.

[197] The respondents submitted that the Tribunal made no error in deciding to prefer the evidence of Ms Casabon and Mr Keevers to that of Norman Sarraf. They relied on all of the six reasons given by the Tribunal. If the Tribunal erred by relying upon the point that the evidence of Ms Casabon and Mr Keevers was aided by notes (reason (2)) then this was not a highly significant matter because the other reasons, they submitted, provided an ample and proper basis for its conclusion.

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

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

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

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

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

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

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

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

> P You sent another text message to Ms Bourke in December 2017 soon after the invoices for the special levies had been sent out, didn't you?
>
> S Can you refer me to the page please, Mr Phillips?
>
> P Well, before I do that, do you recall sending the text message along those lines?
>
> S Can you refer me to the page Mr Phillips so I can have a look at what I sent because I send 3,000 messages a day to people, so if you could just refer me to the page please, I'll answer the question.
>
> P Mr Sarraf, I'll just try and get a page number for you.
>
> S I've got the text in front of me, if you just refer me to which text.
>
> P It's actually-if you go to page 16 to 27 Mr Sarraf in Item 19.
>
> S Yes. If you can just give me the first line, because I think maybe our pages are a bit different but is it the one, "Hi Peter, I hope it wasn't too stressful, is that the one you're referring to?
>
> P Yes.
>
> S Okay. Yep. Yep.
>
> P Just before you read that, in the question I just asked you a minute ago, I suggested that you sent a text message in early December after the invoices had been sent out. Mr Sarraf, I just want to withdraw that suggestion and put to you that this is a text message which you're

now looking at which I had in mind and I want to suggest to you that you actually sent this text message on the afternoon or evening of the AGM on 28 November 2017. Do you agree with that?

S Yes. Mr Philips. That's why I asked you to confirm. I was a bit confused as to what you were saying, but now, yes.

P I'm sorry for confusing you Mr Sarraf, I didn't mean to do so.

S No. I'm sure you didn't, I was just confused, because I know I sent a message the following-either that afternoon, or the following day with what I'm looking at in front of me, yes.

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

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

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

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

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

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

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

> (1) The cross-examination of Ms Casabon revealed that she made some notes of the conversation *at* that meeting *and used them* to prepare her affidavit but did not thereafter keep those notes: at [39].
>
> (2) Ms Casabon indicated that her affidavit was prepared by their solicitor asking her questions which she answered: at [39].
>
> (3) Mr Keevers' account of the meeting *is similar* to Ms Casabon's account but not without differences: at [40].

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

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

[210] As to (1), (2) and (3) above, Ms Casabon's evidence in cross-examination was clear in one respect about the preparation of her affidavit, namely that the contemporaneous notes she said she had prepared of the meeting (*after* the meeting) were *not* used in the preparation of her affidavit because she had disposed of such notes (transcript, line1, page 1296 and lines 2-10, page 1298). She went on to say that she had prepared other notes later on from her memory of the meeting before her affidavit was prepared, but it was not clear what role these notes played in the preparation of her affidavit, which she indicated had been prepared with her solicitor asking questions about what happened (transcript, line 27, page 1298-line 35, page 1299). She did not keep these later notes (transcript, line 3, page 1300).

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

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

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

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

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

[215] The respondents submitted that even if there were some inconsistencies between the various accounts of how the affidavits were

prepared, there could be no doubting the correctness of the Tribunal's finding that the affidavits were prepared by the same solicitor and that alone accounted for the similarities and this did not detract from the Tribunal's remark that the fact that their evidence matches does not mean that their version of the conversation should be rejected.

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

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

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

Ground 5

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

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

> (1) Only 6 of the 18 separate findings (in [108]) which supported the ultimate conclusion of improper purpose were founded upon accepting the evidence of Ms Casabon and Mr Keevers over that of Norman Sarraf, namely those in (7), (8), (9), (11), (13) and (14) (see paragraph 52 (5) above). They submitted that the other 12 findings provided a proper and rational basis for the ultimate conclusion;
>
> (2) Further as to (1), they submitted that in particular the findings in (6), (12), (15), (16) and (17) of [108], strongly supported the ultimate conclusion, as also did the findings in [63] (1), (2), (3) and (5) of the reasons;
>
> (3) Various aspects of Norman Sarraf's evidence were consistent with the existence of the improper purpose found by the Tribunal;
>
> (4) Given aspects of this evidence from Norman Sarraf, the better and only proper inference is that during the meeting on 20 February 2018 Norman Sarraf did seek to pressure Mr Keevers into selling his unit, including by indicating that one possible outcome was that the work the subject of the special levies would not be undertaken.

> [221] We disagree. In our opinion, the Tribunal's findings about the scope and cost of the proposed building work behind the special levy and the finding that Norman Sarraf said that such work would never be carried out were critical aspects of the improper purpose conclusion.
>
> [222] The remaining findings and the other aspects of Norman Sarraf's evidence, which the respondents point to, leave open the prospect that at the time when the special levy resolution was passed the building works behind the special levy did need to be carried out in order to comply with s 106 and that the SPG appellants, whilst keen to acquire the respondents lots and prepared to exert pressure upon them to sell, did intend to cause the OC to carry out such works if the special levy contributions were paid and the respondents did not sell."

The plaintiff's submissions

211 At [217], the Appeal Panel found that the Tribunal's conclusion preferring the evidence of Casabon and Keevers over that of Norman Sarraf was impugned by material errors of fact (and accordingly upheld ground 6 of the appeal which was that the Tribunal had erred in so preferring). However, the Appeal Panel did not identify the "material errors of fact" to which it was referring. Nor did it, in the preceding paragraphs of its reasons where it addressed this ground (at [193]-[217]) identify (at least with any precision) any such material errors of fact. In so doing, the Appeal Panel itself fell into error.

212 In its Reasons at [44], the Tribunal set out reasons why it preferred the evidence of Casabon and Keevers to that of Norman Sarraf. This was not a general finding as to the reliability or otherwise of Norman Sarraf as a witness. Rather it was a limited finding with respect to the relative reliability of the evidence of Casabon and Keevers on the one hand, and Norman Sarraf on the other. This was of significance only because there was a dispute on the evidence as to precisely what was said by Norman Sarraf during the February 2018 meeting.

213 Of the 6 reasons given by the Tribunal at [44] of its reasons, those numbered (1) and (4) were not referred to, and were left undisturbed, by the Appeal Panel. Thus, there remain undisturbed findings by the Tribunal that: (i) Norman Sarraf's evidence was recollection unaided by any contemporaneous record and contained a concession that he could not recall specifics of the conversation; and (ii) the evidence of Casabon and Keevers was not diminished in cross-examination. These two matters alone provide an ample and proper basis for the Tribunal to conclude (as it did) that the evidence of

Casabon and Keevers as to what was said during the February 2018 meeting should be preferred to that of Norman Sarraf.

214 In assessing the respective reliability of the evidence of the witnesses before it, the Tribunal found (Tribunal reasons at [31]) that when questioned about an SMS message he had exchanged with Bourke, Norman Sarraf sought to deflect the question by suggesting he sends 3000 message per day which was plainly an exaggeration. The passage of the transcript of the cross examination of Norman Sarraf is set out at [203].

215 An appellate tribunal should be reluctant to disturb findings of fact (especially those related to the credit or respective reliability of witnesses who have given oral testimony) by the tribunal at first instance which has had the advantage of observing the demeanour and candour of the witnesses. Trial by transcript can seldom be an adequate representation of an oral trial before a first instance tribunal.

216 Notwithstanding these well-established principles, the Appeal Panel usurped the role of the Tribunal as the trier of fact, and (at [204]) found that Norman's Sarraf's reference to sending 3000 messages per day was not (as the Tribunal had found) an attempt to deflect a question and plainly exaggerate the true position, but instead was an "obvious and inconsequential exaggeration". In so finding, the Appeal Panel, aided solely by the transcript, but with no appreciation of the overall context of the particular evidence or the precise tone used by the witness in answering the question, was at a distinct disadvantage to the Tribunal, and ignored the warnings referred to above with respect to the reluctance which should be shown before any appellate interference occurs with respect to factual findings at first instance based (entirely) on oral testimony.

217 In any event, even on the face of the transcript alone, the Appeal Panel erred by finding that the reference by Norman Sarraf to 3000 text messages was an "inconsequential exaggeration". The Tribunal found (at [31]) that in giving the answer, Norman Sarraf was not only plainly exaggerating but was seeking to deflect the question. The Appeal Panel's reasoning at [204] does not identify any (proper) basis for it to overturn the Tribunal's finding, especially bearing in

mind the advantages enjoyed by the Tribunal in assessing the live witnesses giving viva voce evidence to it.

218 At [108] of its Reasons, the Tribunal made 18 separate findings of fact upon which it based its ultimate finding (at [109]) that the 2017 Special Levy was imposed for an improper purpose (namely to put pressure on the minority lot owners to sell their lots to the majority lot owners in order to facilitate a redevelopment of the property).

219 At [219], the Appeal Panel found that the Tribunal's improper purpose conclusion was undermined because it was supported by the finding that Norman Sarraf said at the February 2018 meeting that the renovation work would never be carried out and by errors of law concerning the conclusions that the works (and concomitant costs) the subject of the 2017 Special Levies went beyond what was required by s 106 of the *Strata Schemes Management Act*. The Appeal Panel erred in coming to this conclusion.

220 The Appeal Panel was also in error in finding (in effect) that, even if the Tribunal had made an error in preferring the evidence of Casabon and Keevers over Norman Sarraf about what was said at the February 2018 meeting, there were not sufficient additional unchallenged findings to support the Tribunal's conclusion with respect to improper purpose. This was because there were sufficient unchallenged findings made by the Tribunal which supported the ultimate improper purpose finding.

221 Of the 18 separate findings of fact made by the Tribunal Member (Appeal Panel reasons at [108]), 12 of them were not challenged on appeal and remained as ample support for the Tribunal's ultimate conclusion as to improper purpose. These findings included the following:

(a) immediately prior to the 2017 Special Levies being struck, Norman Sarraf put pressure on Bourke to sell Lot 16 in order to avoid having to pay the levy;

(b) Norman Sarraf gave oral evidence that Lots 15 and 18 were purchased with the intention to develop them at some time in the future;

(c) on 26 April 2019, half of the 2017 Special Levies that had been paid (by the Sarraf Property Group) were refunded;

(d) of the remainder of the 2017 Special Levies (not refunded) a substantial amount has been used to cover administrative expenses and the deficit in the administrative fund (and it was not surprising that the minority lot wonders submitted that the money paid in response to the 2017 Special Levies was being used to fund the lawyers acting for the Owners Corporation in the proceedings); and

(e) none of the 2017 Special Levies that had been received had been used to carry out urgent repairs needed to the stairs and landing (despite a repair notice having been received from Council);

222 At the Tribunal's Reasons at [63], the Tribunal also found (based on 5 matters, only one of which was the subject of any challenge) that the objective of the Sarraf property Group was to acquire all four units, dismantle the strata scheme and redevelop the site, which remains an underlying motivation. This finding was not challenged before, or disturbed or subject to any adverse comment by, the Appeal Panel.

223 Consequently, notwithstanding the Appeal Panel's findings with respect to the evidence in relation to the 2018 February meeting, there remained twelve unchallenged findings which supported the Tribunal's ultimate finding with respect to improper purpose.

224 At [222], the Appeal Panel found that these findings left open the prospect that at the time the 2017 Special Levies were struck, the Sarraf Property Group, whilst keen to acquire the lots of Keevers and Bourke and prepared to exert pressure on them to sell, intended to cause the Owners Corporation to carry out the works (if the special levy contributions were paid and the defendants did not sell). This finding is at odds with, and is undermined by and cannot stand with, the remaining unchallenged findings of the Tribunal referred to above. Further, in and of itself this finding is internally inconsistent.

225 The Appeal Panel could not, with any consistency or coherence, find on the one hand that the Sarraf Property Group were keen to acquire the other lots and exert pressure on their owners to sell, and accept that their intention was to dismantle the strata scheme and redevelop the site, and on the other hand, intend to carry out the works the subject of the special levies (if they were

paid), when armed with the knowledge that the special levies would be challenged and would not be paid by Keevers and could not be paid by Bourke.

226 The Appeal Panel's findings at [222] were completely at odds with both the remaining unchallenged findings as to the intentions and conduct of the Sarraf Property Group and the weight of the evidence, and cannot stand. If that finding is set aside, then the further findings (at [223]-[224]) that there was a prospect that there was no improper purpose should also be set aside. This would mean that the Tribunal's ultimate finding with respect to improper purpose (at [109]) should be restored.

The defendants' submissions

227 The plaintiff attempts to overturn the Appeal Panel's conclusions concerning factual matters, namely, that the Tribunal's conclusions about preferring the evidence of Casabon and Keevers to that of Norman Sarraf was impugned by material errors of fact. Being exclusively a factual matter this was a matter on which the Appeal Panel granted leave to appeal. Pursuant to s 83 of the *NCAT Act*, the Supreme Court does not have jurisdiction to grant leave in relation to alleged factual errors.

228 The plaintiff has no right to seek leave to appeal in relation to this ground. It should be dismissed. The plaintiffs reliance on *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 and *Rosenberg v Percival* (2001) 205 CLR 434; [2001] HCA 18 (plaintiff's submissions at [100]-[101]), illustrates that this ground of appeal relates to alleged factual errors, for which no appeal lies.

229 In any event, the plaintiff's submissions have no merit:

(a) the Tribunal set out 6 reasons as to why it preferred the evidence of Keevers and his wife (Ms Casabon). These reasons were cumulative and interdependent Because of this, the plaintiff's submissions – which attack the Appeal Panel's findings as to 2 of the 6 reasons – do not overcome the material errors in the 4 remaining reasons;

(b) in relation to the Tribunal's reason 6, the Appeal Panel explained why Norman Sarraf's reference to 'sending 3000 texts' was not a proper basis for the Tribunal to come to an adverse conclusion about his general reliability (Appeal Panel at [198]-[204]). It was not put to Sarraf or in submissions that this testimony was adverse to him. The Appeal Panel set out the transcript of the

evidence, including the innocuous and wrong question put by counsel for Keevers to Norman Sarraf, Norman Sarraf's response and the apology from the questioner. As the Appeal Panel held, the reference to 'sending 3000 texts was an obvious and inconsequential exaggeration meaning "he sent a lot of texts each day";

(c) in relation to the Tribunal's reasons 3 and 4, the Appeal Panel correctly found that Bourke's evidence of her conversation with Norman Sarraf contained no reference to Norman Sarraf saying that the "renovation would never be carried out", or that if Keevers paid his contribution the money would be used to buy Bourke's unit, so that the Tribunal's reasons 3 and 4 were wrong to the extent they suggested otherwise (at [205]). Further, the Appeal Panel correctly identified that the Tribunal failed to refer to Norm Sarrafs' text message to Bourke, which was inconsistent with a belief that the remedial work would never be carried out (at [206]);

(d) in relation to the Tribunal's reasons 2 and 4, the Appeal Panel correctly found that the Tribunal had made material factual errors concerning how Casabon and Keevers came to have made virtually identical affidavits, so that the value of their evidence was seriously prejudiced in the manner described by Palmer J in *Macquane Developments Pty Ltd & Anor v Forrester & Anor* [2005] NSWSC 674 (at [209]-[216]); and

(e) Although reason 5 was not directly addressed by the Appeal Panel, the evidence of Casabon and Keevers was diminished by cross-examination, because the accounts they each gave in cross-examination was inconsistent, they were irreconcilable with the fact that their 2 affidavits were relevantly identical, and their solicitor gave no explanation as to how the identical affidavits were prepared.

230 In any event, given the hearing was by way of telephone, the Appeal Panel had a recording of the evidence before them, and the Tribunal's findings were not expressed to be demeanour based, the Appeal Panel was in the same position as Tribunal to make factual determinations.

231 Ground 3(b) does not raise any error of law. It seeks to overturn the Appeal Panel's factual finding that the Tribunal was wrong it its finding that the 2017 Special Levy was imposed for an improper purpose. This was based upon the Appeal Panel's finding that the Tribunal made factual errors concerning (a) Norman Sarraf's evidence, (b) that the building works the subject of the special levy went beyond what was required by s 106 of the *Strata Schemes*

Management Act, and (c) that the estimated costs of the works were more than was reasonably required (Substantive Decision at [219]).

232 The Appeal Panel's conclusions in relation to each of those matters was correct for the reasons previously given.

233 The plaintiff's remaining submissions that the Appeal Panel's findings were internally inconsistent and at odds with other findings of the Tribunal (plaintiff's submissions at [106]-[111]) are all quintessential factual matters.

234 In any event, those were matters relied upon by Keevers before the Appeal Panel, they were considered by the Appeal Panel and the Appeal Panel disagreed with them as the Appeal Panel stated:

(a) the Tribunal's finding about the scope and cost of the proposed building work (that informed the special levy) and the Tribunal's finding that Norman Sarraf said that 'such work would never be carried out' were critical aspects of its improper purpose conclusion (at [221]);

(b) the remaining findings and other aspect of Norman Sarraf's evidence left open the prospect that at the time when the special levy resolution was passed the building works did need to be carried out in order to comply with s 106 and Sarraf Property Group parties – while keen to acquire the plaintiff's and the Bourke sisters' lots and prepared to exert pressure upon them to sell – did intend to cause the Owners Corporation to carry out such works if the special levy contributions were paid and the defendants did not sell (at [222]); and

(c) while the Appeal Panel was not itself in a position to make a final factual determination, if those were the facts, the Appeal Panel did not see how the raising of the special levy was affected by an improper purpose (at [223]-[224]).

235 The substance of the plaintiff's submissions is that its factual submissions before the Appeal Panel should have been accepted but were not. That does not demonstrate error, let alone a legal error and the plaintiff's misconceived application for leave to appeal in relation to ground 3(b) should be dismissed.

Resolution

236 These grounds of Appeal are essentially factual disputes that were ventilated before the Appeal Panel. The Appeal Panel disagreed with some factual findings made by the Tribunal member and provided reasons as to why. According to the Appeal Panel, some of these incorrect factual findings

concerned critical aspects of the improper purpose conclusion. In essence, the plaintiff disagrees with the Appeal Panel's findings. The Appeal Panel is entitled to disagree with specific findings, and conclude that they infected the Tribunal's decision as to improper purpose. Even if the Appeal Panel is wrong on these factual matters, they are not matters that be dealt with on an appeal to this Court as it is limited to a question of law, if leave to appeal were to be granted. Further, even if this Court could intervene, they are not matters which satisfy the test that leave to appeal should be granted.

237 It is my view that leave to appeal these grounds of appeal should not be granted as it is reasonably clear that there has not been an injustice in the sense of going beyond what was reasonable arguable that the Appeal Panel was in error. Nor does this ground of appeal raise issues of principle or questions of public importance.

Appeal Ground 4 – costs of the appeal

238 In Appeal Ground 4, the plaintiff contends that the Appeal Panel erred in finding and ordering that the plaintiff achieved substantial success in the appeal and that the plaintiff should pay their costs of the appeal below.

239 The Appeal Panel ordered at (6) that the second defendants are to pay the plaintiff's costs of appeal. It also set aside the orders made by the Tribunal concerning costs. The Appeal Panel ordered that the second defendants are to pay the plaintiff's costs below. In the Appeal Panel's costs decision, it stated at [29]-[33] (CB 158-159):

> "[29] First, the events that have transpired since our substantive decision, which we have already referred to, as well as the apparent refusal of the original strata manager to accept a new appointment, have no bearing upon our costs determination, which, in accordance with principle, must be founded upon the outcome of the appeal and any relevant aspects of the conduct of the parties in dealing with the appeal.
>
> [30] Secondly, the present circumstances are quite different to what occurred in the *Johnson* case. There, the respondents succeeded in upholding the Tribunal's decision about liability, whilst the appellant was successful in its challenge to the decision about quantum such that quantum was ordered to be redetermined. By contrast, the respondents did not succeed in upholding any aspect of the Tribunal's orders which were challenged or any of the key conclusions which supported the relief which was granted.

[31] Thirdly, whilst it may be appropriate to characterise the outcome as a "mixed" outcome in the sense that the SPG Appellants did not obtain all that it sought on the appeal or succeed on all issues that were put, we regard the SPG Appellants as achieving substantial success in the appeal (see *Grain Growers Limited v Chief Commissioner of State Revenue (No 2)* [2015] NSWSC 1445 at [20] and [25]) for the following reasons:

> (1) They have succeeded in having all of the orders made by the Tribunal which they challenged overturned.
>
> (2) Whilst the orders sought by the SPG Appellants on appeal extended to orders dismissing the respondents' claims in the proceedings and upholding the claims of the owners corporation, overwhelmingly, if not entirely, their grounds of appeal and submissions on appeal were directed at establishing that significant parts of the Tribunal's fact-finding were flawed rather than establishing that the claims and defences of the owners corporation should succeed on the merits. Such an approach was understandable given the extent of the evidence adduced to the Tribunal and the credit issues that arose.
>
> (3) The first respondent contended that out of 12 grounds of appeal the SPG Appellants failed to succeed on 4 of those grounds, namely Grounds 7, 8, 9 and an additional ground relating to the validity of an appointment to the Strata Committee. However, in fact, the SPG appellants failed to succeed on one of these grounds only, namely Ground 7 (a challenge to the Tribunal's conclusion that
> The Owners corporation had contravened s106 of the SSM Act by failing to repair the common stairs). We found it was unnecessary for us to deal with Ground 8 and the additional ground of appeal concerning a finding by the Tribunal in respect of an appointment to the Strata Committee (a matter addressed in our substantive decision at [269] to [272]). We upheld Ground 9 concerning the claim against Ms Bourke for unpaid levies.
>
> (4) Ground 7 was a subsidiary part of the challenge to the Tribunal's appointment of a compulsory strata manager (the main part was based upon the Tribunal's conclusions about the November 2017 special levy). Only a small part of the submissions of the parties was directed to this ground of appeal.

[32] Fourthly, we fail to see why the SPG Appellants should be refused costs of the appeal because of the matters in paragraph 29 (1), (5) and (6) above.

[33] As to the matter in paragraph 29 (1), the fact is that the SPG Appellants were joined as parties to the appeal in order to allow the appeal to be prosecuted. That order contained no limitation about their entitlement to costs and the respondents should have been aware that they were at risk of an adverse costs order in favour of the SPG Appellants.

> [34] As to the matter in paragraph 29 (5), on the appeal the respondents argued against the contentions as to the flaws in the Tribunal's fact-finding. In doing so, they exposed themselves to the risk of an adverse costs order if they were unsuccessful.
>
> [35] As to the matter in paragraph 29 (6), we have already said that the events which have transpired since our decision are irrelevant to our assessment of costs. As to the potential outcome of a redetermination, similarly, that is a hypothetical matter that can have no bearing on our present assessment."

The plaintiff's submissions

240 In their Amended Notice of Appeal, the relief sought by the Sarraf Property Group was that the application brought by Keevers (and Bourke and Fardell) should be dismissed and, in the debt recovery proceedings, that all orders sought by the Owners Corporation (that is judgment against Keevers and Bourke and Fardell for the full amount of the 2017 Special Levies) be made: see para 5 of Amended Notice of Appeal.

241 None of this relief was granted by the Appeal Panel which instead set aside the orders of the Tribunal (except for those reducing the 2017 Special Levies from $980,000 to $80,000) and remitting the whole of all proceedings to a differently constituted Tribunal for redetermination. This outcome was not within the scope of the relief sought by the Sarraf Property Group.

242 In these circumstances, Keevers submitted (for the reasons that are summarised at [28] of the costs decision) that there were several factors which militated against the Sarraf Property Group being awarded their costs of the appeal. Nevertheless, the Appeal Panel ordered that Keevers pay the Sarraf Property Group costs of the appeal. In ordering, the Appeal Panel found that:

(a) the defendants did not succeed in upholding any aspect of the Tribunal's orders: AP Reasons costs [30]; and

(b) while the outcome of the appeal was "mixed" (in that the Sarraf Property Group did not obtain all that was sought on the appeal or succeed on all issues that were put), the Sarraf Property Group nevertheless achieved substantial success in the appeal.

243 These findings were erroneous for the following reasons.

244 First, it was incorrect for the Appeal Panel to find that the defendants before it did not succeed in upholding any aspect of the Tribunal's orders. To the contrary, as a matter of substance, the Appeal Panel upheld the practical effect

of the Tribunal's orders in that the 2017 Special Levies were reduced from $980,000 down to $80,000 (and made any further aspects of the 2017 Special Levies subject to a further hearing and redetermination by the Tribunal). Such an outcome was what, in substance, Keevers was seeking to achieve in the proceedings he was bringing and was at odds with the relief sought by the Sarraf Property Group in the appeal (which was judgment against Keevers).

245 Second, having correctly found that the outcome of the appeal was "mixed", the Appeal Panel should not have gone on to find that the Sarraf Property Group achieved substantial success in the appeal. This is because the Sarraf Property Group did not achieve any, or most, of the relief sought in the appeal. In particular, they were unsuccessful in obtaining a judgment against Keevers. The substantive relief which the Sarraf Property Group apellants did achieve (namely the remittal of the proceedings to a new Tribunal) was not something which they had sought in the appeal.

246 Third, in circumstances where: (i) the outcome of the appeal was "mixed", and the substantive relief granted on appeal was a remittal for further determination (giving rise to the possibility that Keevers may succeed, and the Owners Corporation (and Sarraf Property) may fail, in relation to the proceedings as a whole; and (ii) the Sarraf Property Group were joined as plaintiffs having elected not to participate in the proceedings below, the appropriate and proper exercise of the Appeal Panel's discretion with respect to costs entailed an outcome either that each party to the appeal should bear its own costs of the appeal or alternatively that the costs of the appeal should abide the outcome of the remitted proceedings.

The defendants' submissions

247 The plaintiff's submissions concerning costs concern factual contentions, which were made to and rejected by the Appeal Panel. Neither the plaintiff's appeal nor his submissions raise any error of law, let alone an error of law that would justify the Supreme Court granting leave to appeal in relation to the costs. Keevers would need to identify a *House v The King* [1936] HCA 40; 55 CLR 499 error. He has not.

248 Even if the plaintiff were able to establish a legal error in the Appeal Panel's discretionary decision, leave to appeal ought not be granted given the use of court resources. Appeals as to costs alone must be scrutinised closely to determine whether such a use of resources is in the public interest: see *Huang v Attapallil & Ors* [2017] NSWCA 181, *Corcoran v Far* [2020] NSWCA 140 at [23].

249 In any event, the Appeal Panel did not make the factual errors asserted by Keevers:

(a) contrary to the plaintiff's submissions at [117], he did not succeed in upholding the Tribunal's $80,000 levy as matter of substance or at all, because, as the Appeal Panel noted (Costs Decision at [22]), that was an unchallenged element of the Tribunal s variation being a levy of $80,000 in respect of the repairs to the stairs, being work that was unrelated to the special levy raised in November 2017;

(b) as noted by the Appeal Panel, the Sarraf Property Group parties succeeded in having all of the orders made by the Tribunal which they challenged overturned (Costs Decision at [31(1)]. That included the Sarraf Property Group parties successful challenge to the Tribunal's decision concerning the special levy of $980,000, with all claims relating to that levy having to be redetermined (Costs Decision at [21]);

(c) As noted by the Appeal Panel (Costs Decision at [30]), Keevers did not succeed in upholding any aspect of the Tribunal's orders which were challenged or any of the key conclusions which supported the relief which was granted;

(d) The Sarraf Property Group parties achieved substantial success for the reasons articulated by the Appeal Panel (Costs Decision at [31]); and

(e) The Appeal Panel specifically considered and rejected the matters raised by the Keevers at [119] of his submissions (Costs Decision [33]-[35]).

250 In essence, the plaintiff repeats his submissions made before the Appeal Panel, and asks this Court to re-exercise the costs discretion in its favour. The plaintiff has not demonstrated any error, let alone any error of law.

Resolution

251 This ground can briefly be dealt with here. Costs are discretionary. The Appeal Panel, in its costs decision at [29]-[35] provided detailed reasons as to why they made the decision about who should pay the costs of the hearing before

the Tribunal Member. At [31], the Tribunal Member stated that while it may be appropriate to characterise the outcome as a "mixed" outcome in the sense that the Sarraf Property Group did not obtain all that it sought on the appeal or succeeded on all issues that were put, that they regarded the Sarraf Property Group as achieved substantial success in the appeal. The Appeal Panel also provided persuasive reasons, the main one being that Sarraf Property Group and Palonis succeeded in having all the orders made by the Tribunal which they challenged overturned (at [31]).

252 It is my view that leave to appeal should not be granted with regards to these appeal grounds as to costs, as it is reasonably clear that there has not been an injustice in the sense of going beyond what was reasonable arguable that the Appeal Panel was in error. Nor do these grounds of appeal as to costs raise issues of principle or questions of public importance.

Result

253 After carefully examining the plaintiff's grounds of appeal in detail, in my reasoning of each appeal ground and then taking an overall appraisal of the cumulative effect of the Appeal Panel's reasons, I am not satisfied that the appeal raised an injustice in the sense of going beyond what is reasonably arguable that the Appeal Panel was in error. The appeal grounds do not raise any matters of principle nor do they raise any questions of public importance. Leave to appeal is refused. The result is that the plaintiff's application of appeal fails. The summons is to be dismissed.

254 The result is that leave to appeal is refused. The amended summons dated 26 October 2021 is dismissed.

Costs

255 Costs follow the event. The plaintiff is to pay the defendants costs of this Appeal.

The Court orders:

(1) Leave to appeal pursuant to s 83(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) is refused.

(2) The amended summons filed 26 October 2021 is dismissed.

(3) The stay orders made on 8 July 2022 in this Court are dissolved.

(4) The plaintiff is to pay the defendants' costs.

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