Civil and Administrative Tribunal

New South Wales

Case Name:	Marks v Owners SP 30190
Medium Neutral Citation:	[2023] NSWCATAP 21
Hearing Date(s):	29 November 2022
Date of Orders:	01 February 2023
Decision Date:	1 February 2023
Jurisdiction:	Appeal Panel
Before:	Mr S Westgarth, Deputy President Mr G Burton SC, Senior Member
Decision:	1. Leave to appeal is refused. 2. The appeal is dismissed. 3. Make no order as to the costs of the appeal.
Catchwords:	REAL PROPERTY – STRATA MANAGEMENT – changes to common property – levies – Strata Schemes Management Act 2015 (NSW) ss 24, 106, 108, 232 COSTS – nature of relief requires special circumstances – no special circumstances - Civil and Administrative Tribunal Act 2013 (NSW) s 60, Civil and Administrative Tribunal Rules 2014 (NSW) r 38
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 Collins v Urban [2014] NSWCATAP 17

	Craig v South Australia (1995) 184 CLR 163 Hanave PL v Wine Nomad PL [2022] NSWCATAP 361 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 Owen v Kim [2017] NSWCATAP 26 Owners SP 50276 v Thoo [2013] NSWCA 270 Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256 Pholi v Wearne [2014] NSWCATAP 78 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Stolfa v Hempton [2010] NSWCA 218
Texts Cited:	None Cited
Category:	Principal judgment
Parties:	Christopher Robert George Marks (appellant) Owners SP 30190 (respondent)
Representation:	Appellant in person Mr A Reif, strata manager (respondent)
File Number(s):	AP 2022/00290605
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	26 September 2022
Before:	Mr G Ellis SC, Senior Member
File Number(s):	SC 22/34067

DECISION

Outcome of appeal

1 For the reasons given below we have decided that leave to appeal should be refused and the appeal dismissed, with no order as to costs of the appeal.

Background, issues, procedural matters

2 The proceedings concern a strata scheme of five lots registered in 1985 in respect of a 1923 building in Bondi Junction, NSW. The appellant owns lots 4 and 5 in the scheme. The aggregate unit entitlement of these two lots is 26.23% so the appellant can, if so advised, block a special resolution.

3 In his application in SC 22/34067 filed 28 July 2022 the appellant sought an order under s 24(1) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) to invalidate two resolutions at an EGM held on 27 June 2022. He said that the resolution to approve works to the common property shared laundry required a special resolution under SSMA s 108. He also said that the resolution for a levy to undertake the works was not necessary as the amount for repairs that he considered were required could be paid out of the capital works fund. He had estimates for minor restoration and painting between $4,000 and $6,000.

4 The respondent owners corporation (OC) said that the works were repairs and maintenance to common property in compliance with its strict duty under SSMA s 106 and that a levy was required. The OC had obtained a quotation for the works. The scope of quoted works was much more extensive than the appellant's scope. The amount of the levy approved by the OC was in the order of $17000 .

5 On an interim application SC 22/34066 the appellant obtained on 2 August 2022 an order restraining action on the resolutions pending final hearing.

6 On 26 September 2022 the Tribunal dismissed the appellant's application and the interim restraining order was discontinued.

7 The appeal was filed, within time, on 29 September 2022 with an application to stay the primary orders. The stay application was dismissed with oral reasons on 9 November 2022.

8 The primary issue centred on the whether a special resolution was required. This in turn focused on the meaning of "add", "alter" and "erect" in SSMA s 108 compared with the usage of "maintain", "repair", "renew" and "replace" in SSMA

s 106(1) and (2), and the application of those meanings to the facts in light of the existing case law.

9 On the levy resolution the OC said that its quotation was reasonable and the special levy was consequential on the size of the quotation. The quotation exceeded the capital works fund which was in any event required for other purposes.

10 It is fair to say that the validity of the levy resolution rose or fell with the validity of the status of the first resolution as an ordinary resolution authorising repairs and maintenance.

Competing contentions

11 The arguments at the primary hearing were largely re-canvassed before us, with the modification necessitated by further evidence described below.

12 The appellant said that the laundry needed only restoration by painting and minor repairs for which he had received relatively small estimates of cost which would come within and fulfil the OC's strict duty to repair and maintain under SSMA s 106 and not require a levy. In contrast, the OC's broader scope of quoted works was not a "like-for-like". Rather, it changed the laundry's use by adding a fourth washing machine and by other works that went beyond repair and maintenance and required a special resolution under s 108, "by virtue of the introduction of new and different materials and finishes and the replacement of original elements of heritage significance such as the door and window joinery, that could readily be repaired and restored as required by s 106. In this case, s 108 is clearly applicable, as the laundry is being altered to improve and enhance it, and thus requires a special resolution to do so".

13 The OC said that the proposed works had no effect on the building's heritage status and did not change the fundamentals of the laundry externally or internally. Increasing the number of washing machines by one, to four, in a common laundry that had in earlier history been a storeroom was reasonable and not beyond repairs and maintenance, particularly where there had previously been four machines with four power points that had been reduced to three machines (but still four power points) about 10 years ago. There was no change in the functionality and size of the laundry. The appellants' alternative

scope was inadequate to fulfil the OC's duty under SSMA s 106. The appellant's change to his garage roof from slate to colourbond, next to the laundry, had a more significant heritage effect than the required and proposed laundry works.

14 The OC cited *Stolfa v Hempton* [2010] NSWCA 218 at [10] as giving primacy to the concept of repairs and maintenance because of the OC's strict liability duty and the necessary renewing and improving effect of repairs and maintenance. This was so even if in the course of such repair and maintenance there was an alteration to common property which upgraded, improved or enhanced what was there before. The present works were not materially different from that description. *Owners SP 50276 v Thoo* [2013] NSWCA 270 at [3]-[7] was cited to support the contention that renewal or replacement was incidental to the need and duty to repair and maintain.

15 The appellant in response contended that the proposed works went well beyond the enhancement endorsed by those authorities. The scope of works, in particular the works to add back in the new fourth washing machine, clearly added to and altered the existing characteristics and character of the laundry and erected a new item within the laundry. Nothing in SSMA s 106 overrode s 108 in respect of such a significant alteration. He relied on his own expert opinion as a heritage architect of 40 years to reach and justify the significance of the change to a heritage item.

16 Before us on appeal, each party sought to adduce further evidence.

17 We granted leave to the OC to adduce a heritage exemption certificate from the Council that post-dated the primary hearing and an updated quotation to accord with the requirements of the certificate. On the case law summarised below, this was genuinely fresh evidence of significance that was not reasonably available at the primary hearing. The certificate, dated 7 October 2022, described the approved works as "of a minor nature" that "would not adversely affect the heritage significance of the heritage item". Exemption was refused for the proposed changes to exterior-facing elements being the door and window surrounds. Exemption was given for repair or replacement of those

items with timber-framed doors, windows and archetraves “with design, detailing and dimensions to match the existing”.

18 We refused the appellant leave to adduce a report by a waterproofing consultant on the condition of the laundry and required works as it did not meet the case law test summarised below.

19 In submissions the appellant accepted that the matters for which the Council had not given heritage exemption reduced the scope of contention, but adhered to his contention that changes in surface finish from painted to tiled and timber to plasterboard, some plumbing and electrical work and addition of the fourth washing machine required a special resolution under SSMA s 108. He said that the reference to “minor” was in the context of a heritage assessment, not the requirements of the SSMA.

Primary decision

20 The primary decision effectively accepted the arguments of the OC and dismissed the application for those reasons.

21 The primary member referred to the case law cited above and discussed below and to SSMA ss 24(1) and 229 which empowered the Tribunal to make the orders that the appellant sought if appropriate.

22 Having referred to the evidence, which included the appellant’s own evidence as an expert opinion in his own cause, the photographs and the competing quotation and estimates, the primary member found that the required work was extensive and significant. The scope of works proposed by the OC was necessary and reasonable, as was the quotation obtained. The appellant’s narrower scope of works was not sufficient to address what was required. The reasonable quoted amount for the OC’s proposed works required a levy.

23 The primary member then applied *Stolfa v Hempton* to find that the works proposed by the OC were not materially different from the character of the works in that case. As in *Stolfa* the OC’s proposed works came within SSMA s 106 as repairs or maintenance even though the outcome would improve or enhance the common property. Adding a fourth washing machine as an “understandable addition when there are four lots” did not exceed repairs and

maintenance (as the appellant pointed out, there were in fact five lots, but four owners with his owning two lots).

Grounds of appeal

24 In *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [12] the Appeal Panel said:

> "In circumstances where the appellants are not legally represented, it is apposite for the Tribunal to approach the issue by looking at the grounds of appeal generally. It is necessary for the Appeal Panel to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise to the respondent."

25 Adopting that approach, and having listened to the oral argument on the appeal hearing and reviewed the written material, we consider that the appellant raised as a primary ground of appeal that the primary decision exhibited errors of law in its interpretation and application of the words identified earlier in SSMA ss 106 and 108.

26 The appellant also said that the primary member erred in law in permitting late evidence of the change from a slate to a colourbond roof as an irrelevant consideration. The change had occurred without contention about twelve years earlier.

27 To the extent that the application of the statutory provisions raised errors of fact, the appellant also effectively sought leave to raise those matters. It was raised in terms of procedural fairness but the unfairness was said to be not giving sufficient consideration to the appellant's photographic and other evidence.

28 The appellant relied upon the comparison between his own scope of works, based on his expertise as a heritage architect, and the quoted works proposed by the OC to establish the distinction between, on the one hand, repairs and maintenance (with required renewal or replacement in conjunction) under SSMA s 106 and, on the other hand, alterations or additions to improve or enhance the common property which required a special resolution under s 108.

Principles governing appeals

29 Section 80 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides as follows:

"(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."

30 Clause 12 of Schedule 4 to the NCAT Act states:

"An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

(a) the decision of the Tribunal under appeal was not fair and equitable, or

(b) the decision of the Tribunal under appeal was against the weight of evidence, or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with)."

31 A Division decision is a primary decision of the Consumer and Commercial Division. The primary decision here is such a decision.

32 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not taking into account a relevant consideration, which includes not making a finding on an ingredient or central issue required to make out a claimed entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

33 These categories are not exhaustive of errors of law that give rise to an appeal as of right. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel enunciated the following as specifically included:

(1) whether the Tribunal provided adequate reasons;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

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

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

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

(8) whether the decision was legally unreasonable.

34 Turning to errors of fact, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, an Appeal Panel stated at [76]–[79] and [84(2)] as follows:

> "76 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
>
> 77 As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
>
> > (1) If there has been a denial of procedural fairness the decision under appeal can be said to have been "*not fair and equitable*" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
> >
> > (2) The decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42*, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].
>
> 78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial

> miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
>
> 79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to NCAT Act (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55]. …
>
> 84 The general principles derived from these cases can be summarised as follows: …
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> > (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
> >
> > (a) issues of principle;
> >
> > (b) questions of public importance or matters of administration or policy which might have general application; or
> >
> > (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
> >
> > (d) a factual error that was unreasonably arrived at and clearly mistaken; or
> >
> > (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed."

35 Even if the appellant establishes that it may have suffered a substantial miscarriage of justice within cl 12 of Sch 4 to the NCAT Act, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]). The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

36 The question of what constitutes significant new evidence not reasonably available at the time the proceedings under appeal were being dealt with was considered by an Appeal Panel in *Owen v Kim* [2017] NSWCATAP 26. In that appeal the Appeal Panel stated at [37] –[39]:

> 37 In *Owners - SP 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29 the Appeal Panel stated at [109] in connection with cl 12(1)(c) of Schedule 4 to the *Civil and Administrative Tribunal Act*:
>
> 'In order to fall within this paragraph the appellant must be able to point to evidence which:
>
> (1) is significant; and
>
> (2) has arisen and is new in the sense that it was not reasonably available at the time the proceedings below were being heard.'
>
> 38 In *Leisure Brothers Pty Ltd v Smith* [2017] NSWCATAP 11 the Appeal Panel stated at [40]:
>
> 'The meaning of this clause was considered by the Appeal Panel in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111. At [23] – [24] the Appeal Panel said:
>
> '23 Unlike the WIM Act, the expression "reasonably available" is not qualified by the words "to the party". This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence by summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014] NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave under cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the appellant at the time of the hearing and could not reasonably be known due to fraud.
>
> 24 Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).'
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> 39 As stated at [27] in Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown:
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> 'the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.'

37 In *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 an Appeal Panel stated:

> An appeal does not provide a losing party with the opportunity to run their case again except in the narrow circumstances which we have described. Mr Ryan has not satisfied us that those circumstances apply to his case and we refuse permission for him to appeal.

38 Section 81 of the NCAT Act provides that, in determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal. The section sets out a list of available orders which

is not exhaustive. That list includes: allowing the appeal, setting aside the primary decision and remitting the whole or any part of the case to the primary level of the Tribunal for reconsideration, either with or without further evidence and in accord with the Appeal Panel's directions, varying the primary decision, or quashing or setting aside the primary decision and substituting another decision. The Appeal Panel may exercise all the functions that are conferred or imposed by the NCAT Act or other relevant 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.

Relevant legislative and case law

39 SSMA s 106 relevantly provides as follows:

> "(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.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation."

40 SSMA s 108 relevantly provides:

> "(1) An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.
>
> (2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed."

41 In *Stolfa v Hempton* [2010] NSWCA 218 at [9]-[10] the Court of Appeal endorsed the primary judge's rejection of a submission to the effect that, even though the similarly-worded predecessor to SSMA s 106(1) and (2) required repairs and maintenance to be done to fulfil the OC's strict duty, a special resolution was required because the work in fact improved or enhanced the common property:

> "[10] The judge was correct to reject that submission. If, as a matter of fact, all the works satisfied the description in [s 106] as repair and maintenance, they were not subject to any requirement of a special resolution in [s 108]. The statute should not be construed so as to require the owners corporation to act, but then place a voting barrier in its path in complying with the statute."

42 Even though the replacement concrete floor at issue in *Stolfa* was different from and superior in construction to the wooden floor that it replaced, the purpose and effect of the work was to avoid or remediate defects in or damage to the building from the effects of age, use and time, not to introduce an enhancement or difference even if that was a consequence.

43 In *Owners SP 50276 v Thoo* [2013] NSWCA 270 at [3]-[8] the Court of Appeal referred to the equivalent to SSMA ss 106 and 108 and said:

> "[4] Replacement is a large concept. If a modest single-bulb light fitting is removed and a grand crystal chandelier is installed in its place, the former has obviously been replaced by the latter. There is also replacement if a substantial brick wall is erected on a site previously occupied by a flimsy brushwood fence. Replacement connotes no more than the installation of one thing in the place of another to achieve functional equivalence.
>
> [5] While [s 108] does not curtail the duty imposed by [s 106(2)] or impede performance of that duty, the existence of [s 108] does serve to shape the [s 106(2)] duty so that, in the ordinary course, anything amounting to alteration or addition for the purpose of improving or enhancing is beyond the concept of renewal or replacement with which [s 106(2)] is concerned.
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> [6] In determining how [s 106(2)] and [s 108] apply at any particular time, regard must be had to the attributes of the common property at some earlier reference point. The question of what amounts to renewal, replacement, alteration or addition must be answered by a process of comparison with the position that prevailed at the earlier reference point. The first such reference point is the time at which the strata plan is registered and the common property comes into being. The initial attributes are fixed at that time; and it is from that base that characterisation as renewal, replacement, alteration or addition is to be approached. Once any addition or alteration is made in accordance with the Act, the attributes of the common property are changed, a new reference point is identified and future questions of renewal, replacement, alteration and addition fall to be assessed by reference to the changed state at that new reference point.
>
> [7] Generally speaking, renewal or replacement of fixtures or fittings will, of its nature, involve improvement because old will be superseded by new. It may also entail alteration or addition, in that the new or replacement item may be larger than or otherwise different from the old. To the extent that alteration or addition is, in that way, incidental to renewal or replacement, [s 106(2)] both requires and allows it. But [s 106(2)] does not, at a particular time, impose a positive requirement for superior functionality, compared with that inherent in the nature and quality of the relevant part of common property as most recently fixed in the way I have mentioned.
>
> [8] In the present case, the duty imposed by [s 106(2)] in relation to the mechanical exhaust ventilation system did not require, at any given time, any alteration or addition for the purpose of improvement or enhancement. The duty was discharged by renewal or replacement that produced performance and functional efficiency at least equivalent to those that had pertained at the time that was, in the sense to which I have referred, the then most recent reference point. While the degree of performance and functional efficiency as

> at that most recent reference point continued, [s 106(2)] was not the source of any duty to act."

Consideration and conclusion

44 We do not discern any error of law, or error of fact in which we would be justified in granting leave to appeal, in the primary decision. The Tribunal's consideration of ss 106 and 108 of the SSMA was in accordance with the authorities to which we have referred.

45 The nature of the works in the scope of works in the OC's quotation were clearly required on the photographic and other evidence taken as a whole and were correctly found to be required to avoid or remediate defects in or damage to the building from the effects of age, use and time, not to introduce an enhancement or difference even if that was a consequence. The heritage exemption certificate reinforced that conclusion.

46 We do not consider that the appellant's own opinions changed that conclusion when assessed against the other photographic and documentary evidence, nor did treating the laundry as having the same heritage status and requirements as the rest of the building lead to a different conclusion on the application of SSMA s 106.

47 So far as we can discern, the change of slate to colourbond roof was recorded by the primary member but did not contribute materially to his conclusions.

48 Even if we came to a different assessment of the photographic and other evidence from the primary member, which we do not, we consider that the tests for grant of leave would not lead to exercise of the discretion to grant that leave. The decision was well within the parameters of an objective and reasonable weighing of the evidence.

49 Leave to appeal is refused and the appeal is dismissed.

Costs

50 The OC sought the strata manager's costs of preparation of and appearance on the appeal at $808. No supporting invoice or other evidence was provided. The appellant resisted a costs order on the basis that he was entitled to exercise his legal rights. There was no grant of leave for legal representation

for either party but, as stated earlier, the strata manager represented the OC with leave.

51 Rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) relevantly provides as follows:

> **"38 Costs in Consumer and Commercial Division of the Tribunal**
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—
>
> …, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000."

52 In *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 at [3]-[5] the Appeal Panel summarised the operation of r 38 as follows:

> "[3] Rule 38(2)(b) applies to the following proceedings:
>
> (1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;
>
> (2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that
>
> (a) there is credible evidence relating to the amount the Tribunal could award; and
>
> (b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.
>
> [4] Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.
>
> [5] Rule 38(2)(b) does not apply to proceedings:
>
> (1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or
>
> (2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:

> (a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or
>
> (b) the relief sought does not depend on there being a finding that a specific amount of money is owed."

53 In *Hanave PL v Wine Nomad PL* [2022] NSWCATAP 361 at [40]-[42] the Appeal Panel expounded aspects of the above summary:

> "[40] As made clear in *Malachite* at [75] and following, r 38 is not concerned with the value of rights that might be in issue or any change in wealth. Unlike s 101(2)(r) of the *Supreme Court Act 1970* (NSW), r 38 does not require consideration of whether the proceedings:
>
> > (1) involve a matter at issue amounting to or of a value of $30,000 or more, or
> >
> > (2) involve (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $30,000 or more.
>
> [41] Rather, r 38(2)(b) applies where "the amount claimed or in dispute in the proceedings is more than $30,000".
>
> [42] The questions to be determined are what is the amount "claimed", what is the amount "in dispute" and what are "the proceedings" in circumstances where there are two applications, the second in the nature of a cross-application ("cross application")."

54 It is clear on the *Malachite* test that r 38 did not apply to the present proceedings at first instance because of the nature of the relief sought, and accordingly does not apply to the appeal proceedings.

55 If rule 38 does not apply, the general cost provision in s 60 of the NCAT Act Applies. Under that provision, the OC would need to establish special circumstances within the meaning of s 60 of the NCAT Act to obtain a costs order in its favour. Special circumstances means out of the ordinary but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11].

56 No submission was made that there were special circumstances in the proceedings, other than the appeal proceedings persisted after the Council issued the heritage exemption certificate. The OC candidly said that the focus on heritage matters in the primary proceedings prompted its heritage application which reduced the scope of dispute. In that respect the appellant partly achieved his purpose (in obtaining door and window structure similar to the existing) and his remaining contentions were not unarguable.

57 We accordingly find no basis for a costs order in the OC's favour, even if the absence of a grant of leave for legal representation did not prevent a costs application and even if the nature of the amount claimed could be the subject of a costs order.

58 We note for completeness that there is nothing in SSMA s 104 or elsewhere that prevents the OC recouping its costs and expenses of the proceedings from lot owners pro-rated by levy.

Orders

59 We make the following orders:

1. Leave to appeal is refused.

2. The appeal is dismissed.

3. Make no order as to the costs of the appeal.

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