Civil and Administrative Tribunal

New South Wales

Case Name:	Anderson v The Owners - Strata Plan No. 61034
Medium Neutral Citation:	[2019] NSWCATAP 61
Hearing Date(s):	12 February 2019
Date of Orders:	19 March 2019
Decision Date:	19 March 2019
Jurisdiction:	Appeal Panel
Before:	Dr R. Dubler SC, Senior Member J. McAteer, Senior Member
Decision:	(1) Appeal AP18/45142 is dismissed and leave to appeal is refused. (2) If either party seeks a costs order the following directions apply:. (a) The applicant for costs ("costs applicant") must file and serve any costs application, including submissions and any evidence in support, within 7 days of the date of these orders. (b) The respondent to the costs application is to file and serve any submissions and evidence in reply within 14 days from the date of these orders. (c) The costs applicant is to file any submissions in reply within 21 days from the date of these orders. (d) Any submissions are to include submissions on the issue of whether an order should be made pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW), dispensing with a hearing of the costs application.
Catchwords:	STRATA SCHEME – legal test for an owners corporation not functioning satisfactorily pursuant to s.237(3)(a) of the Strata Schemes Management Act – legal test for an owners corporation failing to perform

	one or more of its duties pursuant to s.237(3)(c) of the Strata Schemes Management Act APPEAL – whether findings that the Scheme was functioning satisfactorily, that agreements were not harsh or unconscionable or for an improper purpose were manifestly unreasonable and against the weight of evidence – whether the Tribunal failed to consider facts, submissions and matters put forward so as to deny the appellants procedural fairness
Legislation Cited:	Civil And Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Regulation 2016 (NSW)
Cases Cited:	Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 45 LGR 635 Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 Collins v Urban [2014] NSWCATAP 17 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Lo v Chief Commissioner of State Revenue [2013] 85 NSWLR 86 Rathchime Pty Ltd v Willat [2017] NSWCATAP 87 Yates Property Corporation Pty Ltd (In Liquidation) v Darling Harbour Authority 24 NSWLR 156
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Colleen Anderson and Kenneth Anderson (Appellants) The Owners - Strata Plan No. 61034 (Respondent)
Representation:	Counsel: T. Berberian (Respondents) Solicitors: C & K Anderson (Self Represented)(Appellants) Small Myers Hughes Lawyers (Respondent)
File Number(s):	AP18/45142
Publication Restriction:	Unrestricted

Decision under appeal:

Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division.
Citation:	N/A
Date of Decision:	14 September 2018
Before:	K. Ross, Senior Member

REASONS FOR DECISION

Introduction

1 This is an internal appeal from the Consumer and Commercial Division. The Tribunal gave its decision on 14 September 2018 (the Decision). The Appellants are lot owners in SP61034, known as Meridian Resort Beachside at Old Bar. The Respondent is the Owners Corporation.

2 The Appellants have alleged that the management of the Scheme was not functioning satisfactorily and/or that the Respondent had failed to perform one or more of its duties. As a consequence, the Appellants had sought an order for compulsory appointment of Roderick Smith of the Strata Collective Pty Ltd as Strata Manager for a term of 24 months to exercise all of the functions of the Respondent together with the functions of chairperson, secretary, treasurer and executive committee.

3 The Tribunal dismissed the application and the Appellants have brought this appeal against that decision.

Proceedings Below

4 The background to the dispute between the parties is captured in the findings of fact made by the Tribunal at [6] as follows:

> "(1) The Owners Corporation SP 61034 ("the Owners Corporation") has since 2014 engaged AM & KL Davidson Pty Ltd as trustee for the Davidson Family Trust ("the Manager") as building manager.
>
> (2) The appointment was made pursuant to a Deed of Appointment and authorisation dated 31 March 2014 which incorporated 3 agreements ("the deeds"):
>
> > (a) Caretaker Deed dated 1 July 2007 ("the Caretaker Deed")

(b) Management Agreement dated 1 August 2007 ("the Management Agreement")

(c) Exclusive Rights Deed dated 1 August 2007 ("the Letting Agreement").

(3) The Owners Corporation pays remuneration to the Manager for the services performed under the Caretaker Deed and the Management Agreement. The Letting Agreement authorises the Manager to provide a letting service to owners who choose to utilise that service. No remuneration is paid to the Manager by the Owners Corporation pursuant to the Letting Agreement.

(4) Pursuant to clause 9 of the Management Agreement the scheduled works are defined. No earlier than 6 months and no later than 3 months before the commencement of each year the Manager may deliver to the executive a Yearly Works Notice setting out the scheduled works for the next year and the amount of increased remuneration sought for that work. The Owners Corporation also has the right to deliver a Yearly Works Notice to the Manager.

(5) Pursuant to clause 11 of the Management Agreement the Managers' remuneration is to be reviewed annually and is to be the amount agreed between the parties, or the amount as increased by CPI, whichever is the highest.

(6) In the event of a dispute, the deeds contained a dispute resolution clause providing for determination by an expert appointed by the Law Society.

(7) There is no evidence that either party has delivered a Yearly Works Order to the other. The Owners Corporation says however that the Manager sought an increase in remuneration including for the years commencing 2014 and 2015. The AGM minutes of 3 September 2016 detail that a claim for increased remuneration had been received from the Manager. The Manager made an offer to the Owners Corporation but agreement could not be reached in respect of the claims. The EGM minutes of 27 April 2017 detail that the Manager's claim for increased remuneration would be referred to expert determination.

(8) No legal advice was sought by the Owners Corporation in respect of the claims or the expert determination.

(9) John McDermott was appointed by the Law Society as the expert determiner. He engaged Barry Turner of BMCS to provide a report. The BMCS report was received by the Owners Corporation in August 2017.

(10) The BMCS report calculated that the annual remuneration payable to the Manager was $153,803.92, based upon the requirement in the Deed for the office to be manned for 69 hours per week. Barry Turner observed that it was not necessary for the proper management of the strata scheme for the office to be manned for 69 hours per week and stated that if that requirement was removed, and replaced with a requirement for the Manager to be available or contactable, the remuneration and therefore costs to the owners would be reduced.

(11) The Manager made a claim for back pay of $414,983.78 for the period 01 April 2014 to 31 July 2017, along with an offer to accept a lesser sum of $246,919.11, such offer open only for the duration of the AGM on 9 September 2017. The Owners Corporation at that meeting made a counter offer which was accepted by the Manager and by resolution 12, the claim for back pay

was resolved for the sum of $197,380.70, on the basis that the license fee for the Manager's use of a storage shed on common property was reduced to $1 per year from $200 per month.

(12) In addition the meeting resolved (resolution 26) to amend the Schedule of Works to no longer require the Manager's office to be attended. The minutes noted that:

> "Both parties agree to enter into discussions in good faith in respect of various terms and conditions contained within the Deed in conjunction with the recommendations outlined in the Management report provided by Barry Turner of BMCS."

(13) The meeting also resolved (resolution 28) that the Management deed and Caretaker deed be amalgamated.

(14) A notice for a meeting to be held on 23 October 2017 was circulated, attaching a proposed Management Deed including a reduction in the office hours. On 12 October 2017 an amended agenda was circulated with an amended deed and an explanation from the Manager indicating that the reduction in hours was an error. The second notice attached an amended Building Management agreement, which did not reduce the office hours.

(15) On 23 October 2017 the Owners Corporation resolved to enter into the new Building Management agreement. The meeting was conducted as a pre voting meeting. The Building Management Agreement was signed on 23 October 2017. There was no change in the office hours.

(16) The proposed motion to reduce the license fee payable for use of common property for the storage shed, from $200 per month to $1 per year, was lost.

(17) The Chairperson Virginia Mace gave evidence under cross examination that there was no negotiation with the Manager to reduce the office hours, because the Manager felt that the Owners Corporation had not acted in good faith in refusing to reduce the license fee for the storage shed, and because of the NCAT proceedings (filed on 12 October 2017).

(18) The Owners Corporation did not seek legal advice in respect of the claim by the Manager, either for back pay or for increased remuneration. The Owners Corporation did seek legal advice in respect of the NCAT proceedings and was represented by both solicitors and a barrister."

5 The primary submission of the Appellants below was that the Tribunal ought make an order under s.237 of the *Strata Schemes Management Act 2015* on the basis that the Respondent was not functioning satisfactorily in that:

"(1) It is in dereliction of its duties under the Act, exercises a power or makes a decision for an improper purpose, or fails to exercise a power (Submissions 20/08/2018 para 16), or

(2) It is not acting in the interest of all lot owners, despite a majority approval or vote (submissions 20/08/2018 para 22), or

(3) There is oppression of the minority because:

(a) an action of the [Respondent] is unfair or

(b) there is a lack of reasonable commercial justification or

(c) a power has been exercised for a purpose beyond its scope or

(d) there is advantage to one group without a similar advantage to others (Submissions 20/08/2018 para 23)."

6 The submissions before the Tribunal below centred upon the complaint made as to how the Respondent has dealt with the Manager's claims for back-pay and increased remuneration and has entered into new deeds and agreements. It was asserted before the Tribunal below that the Respondent was acting for the benefit of the Manager and lot owners who rent through the Manager and not all lot owners as a whole. Various other allegations were made about the Respondent.

7 The main conclusions of the Tribunal below were as follows:

(1) The evidence shows that the management of the Strata Scheme is functioning. Meetings of both the Owners and the Committee are called and held, levies are raised and collected, and accounts paid. It cannot be said that the management of the scheme is not functioning: [14].

(2) Whilst the Manager sought increased remuneration to approximately $82,000 per year and a one-off back-payment of approximately $24,000, there was no evidence that, in seeking increased remuneration, the Manager was acting unconscionably: [16]-[17].

(3) The Tribunal was not satisfied that the Manager was engaging in unconscionable conduct in pursuing a reduced sum for back-pay on condition that the offer to accept a reduced amount was only open until the end of the meeting: [21]-[22].

(4) The Tribunal below was not satisfied that the terms of the agreements entered into, which were the same terms and conditions as the previous agreements, were, as alleged by the Appellants, harsh and unconscionable: [25].

(5) The Tribunal rejected the Appellants' complaint that the Respondent ought to have sought legal advice in respect of seeking to set aside the agreements, on the basis that it could not be said that the Respondent was not functioning satisfactorily because it did not explore, by way of seeking legal advice, an option not supported by the majority of its lot owners: [26].

(6) The Tribunal concluded that considering all of the above matters, it could not conclude that overall the management of the Scheme was not functioning satisfactorily: [27].

(7) The Tribunal was satisfied that, overall, meetings had been held in accordance with the Act: [28].

(8) Whilst the Tribunal accepted the Appellants' submission that the Strata Manager ought not to have demanded costs of $50 per letter when seeking payment of outstanding levies, the Tribunal was not satisfied that this matter, on its own, justified the orders sought by the Appellants: [29].

(9) Overall, the Tribunal rejected the Appellants' contention that the Respondent had failed to maintain the common property, even though there were some issues which required attention, as these relatively minor matters did not justify the making of the orders sought: [30].

(10) The Tribunal accepted the Appellants' submission that Ms Karen Davidson was not entitled to remain on the committee (at [31]) and that in breach of the Regulations, there was no book maintained in which to record pecuniary interests and conflicts of interest (at [32]), however, it declined to make the order sought on the basis of these two matters.

(11) Overall, the Tribunal concluded that it was satisfied that, whilst the Appellants and a number of other lot owners do not agree with the decisions taken by the majority in relation to the Manager's remuneration, it cannot be said that the decisions taken were unjustified, or could be said to be taken for an improper purpose and, overall, the Respondent is not in dereliction of its duties under the Act: [34].

Ground 1

8 The first ground of appeal is as follows:

> "The Tribunal made an error of law in failing to appoint the compulsory strata manager and in doing so incorrectly interpreted and applied the legal tests for an Owners Corporation:
>
> > (a) not functioning satisfactorily pursuant to Section 237(3)(a) of the Strata Schemes Management Act;
> >
> > (b) failing to perform one or more of its duties pursuant to s.237(3)(c) of the Strata Schemes Management Act;
> >
> > (c) not acting satisfactorily as a result of its oppression of the minority lot owners."

9 The Appellants, as we understand their submissions, made complaints about the "legal tests" as applied by the Tribunal as follows.

10 First, the Appellants complained that the Tribunal regarded the test as being whether or not the Strata Scheme was functioning satisfactorily at the date of the hearing. The Appellants sought to argue that whilst the "present" may be very important, what happened in the past will affect the present and future for all owners. It is clear that the Tribunal did consider carefully the past events

which were raised. Hence, it cannot be said that there was any legal error in the way in which the Tribunal applied the relevant statutory test.

11 Second, the Appellants complained about paragraph 14 of the Decision wherein the Tribunal stated that the:

> "…first observation which the Tribunal makes is that the Act does not speak of dysfunction in the Strata Scheme, but rather the test is whether the management of the Strata Scheme is not functioning, or not functioning satisfactorily."

12 The complaint of the Appellants appears to be that the Tribunal during the hearing did use the word "dysfunction" or "dysfunctional". In our view, this does not demonstrate any misinterpretation or error of law in applying the relevant statutory tests.

13 Otherwise, we are unable to discern in the Appellants' submissions any complaint which could properly be regarded as falling within this first ground of appeal which focuses upon the allegation that the Tribunal incorrectly interpreted and applied the legal tests under either s.237(a) or (c) of the *Strata Schemes Management Act 2015*.

Ground 2

14 The second ground of appeal is as follows:

> "The Tribunal made an error of law in that its findings detailed below were manifestly unreasonable and against the weight of evidence:
>
> (a) that the Tribunal cannot conclude that overall the management of the Scheme is not functioning satisfactorily – para 27 of the Judgment.
>
> (b) that it is not satisfied that the terms of the agreements (between the Owners Corporation and the Building Manager) were harsh or unconscionable – para 25 of the Judgment.
>
> (c) that it cannot be said that the decisions taken by the Owners Corporation in relation to the Manager's remuneration cannot be justified, or could be said to have been taken for an improper purpose."

15 Whether a decision is so unreasonable that no reasonable decision-maker would make it, will amount to an error of law: *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 [13](8); *Associated Provincial Picture Houses Ltd v Wednesday Corp* (1947) 45 LGR 635; *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 at [10]. On the other hand, whether a finding is "against the weight of evidence" does

not amount to an error of law and leave to appeal is required. In this regard, the Appellants sought leave to appeal to the extent that its second ground of appeal did not amount to an error of law.

16 In our view, it cannot be said that the findings in question were “manifestly unreasonable” or so unreasonable that no reasonable decision-maker would make it. This obviously overlaps with the issue of whether or not the findings were “against the weight of evidence”. To avoid repetition, the reasons we come to below for concluding that the findings in question were not against the weight of evidence substantially also set out our reasons for concluding that the findings were not so “manifestly unreasonable” as to constitute an error of law.

17 As stated above, pursuant to s.80(2)(b) of the Civil And Administrative Tribunal Act 2013 NSW (NCAT Act), leave to appeal is required from a decision otherwise than on a question of law. Further, in granting leave to appeal, the Panel is required to be satisfied of the matters set out in clause 12 Schedule 4 to the Act. That clause provides:

> “(1) An appeal panel may grant leave under s.82B of this Act for an internal appeal against a Decision only if the appeal panel is satisfied the appellant may have suffered 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).”

18 Ordinarily it is appropriate to grant leave to appeal only in matters that involve issues of principle; questions of public importance or matters of administration or policy which might have general application; an injustice which is reasonably clear; a factual error that was unreasonably arrived at and clearly mistaken; or the tribunal having gone about the fact-finding process in such an unorthodox manner or in such a way that it is likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed: *Collins v Urban* [2014] NSWCATAP 17 at [84]. Further, in *Collins* the Appeal Panel at [77] stated the following:

> "As to the particular grounds in clause 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
>
> …
>
> (2) the decision under appeal can be said to be "against the weight of evidence" (which is an expression also used to describe the ground upon which a jury verdict can be set aside) when 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 Ltd v Stein Heurte SA* [2013] NSWSC 266 at [153]."

19 The Appellants in support of this ground of appeal made a number of particular factual submissions. Whilst we appreciate that the Appeal Panel needs to consider all of these matters in their totality, we proceed firstly to deal with each of these individual submissions in turn.

20 First, the Appellants refer to the claim that at the annual general meeting of 9 September 2017 the invoices delivered with the agenda were illegible and owners were given one week to read and understand them prior to voting at the AGM. It was open to any of the owners to follow up on the alleged illegibility of the invoices in question and also to seek not to deal with the issue of the Manager's claims at the AGM, but to postpone consideration of it. Further, as the Tribunal stated at [22], "it is common for offers to be put and to remain open for a short period of time".

21 In our view, this point does not demonstrate in any significant fashion that overall the management of the Scheme was not functioning satisfactorily.

22 Next, the Appellants complain that the Strata Manager and Strata Committee displayed resolution 12 at the AGM as an ordinary resolution but it was required to be a special resolution as it related to a licence for a storage shed on common property. Even assuming this to be the case, the resolution in question was overtaken by different resolutions at subsequent meetings. In our view, this matter does not demonstrate that the Tribunal's conclusion as to the overall the management of the Scheme was "against the weight of the evidence".

23 Next, the Appellants complained that the Strata Manager did not function satisfactorily, as either the Strata Manager or the Chairperson at the AGM, in

that he failed to advise owners at the AGM on 9 September 2017 that the Owners Corporation's insurance policy would cover the Owners Corporation for $50,000 worth of legal fees to defend the threatened legal action by the Manager. In our view, this matter does not demonstrate lack of satisfactory functioning in circumstances where the resolution or view of the majority of the lot owners was to seek to compromise with the Manager rather than take the Manager to court and engage in legal fees. It was open to owners to pursue and ask questions on this if they wished.

24 Next, the Appellants complain that the Strata Manager did not function satisfactorily at the AGM in failing to ensure the meeting was conducted in "a proper manner" which involved the following specifics:

(a) failing to advise owners that legal advice should be obtained in relation to the claim;

(b) stating at the meeting "it did not require legal advice and a vote was required there and then"; and

(c) acting with bias towards the Manager and in a bullying manner to owners.

25 As explained by the Tribunal below at [17], in response to the Manager's initial claim for increased remuneration, the Owners Corporation agreed to refer the matter to expert determination and the expert determination, when received, supported the Manager's claim. In fact, the amount of remuneration which the expert determined was much more than the amount which the Manager had sought in September 2016 or April 2017.

26 This obviously placed the Owners Corporation in a difficult bargaining position with respect to the Manager. As also explained by the Tribunal at [21], the Manager claimed the sum of $414,983.78, or a reduced amount of $246,919.11, such offer open for the meeting only. An option to obtain legal advice was also included in the agenda. The minutes recorded that a counter-offer was put at the meeting, and accepted by the Manager. There were two conditions attached and accepted by the Owners Corporation – a requirement for the term of the agreements to be maintained at 10 years every 2 years, and reduction of the licence fee of $200 per month for the use of the cleaning shed on common property. The meeting did not resolve to obtain legal advice.

27 As explained by the Tribunal at [22]:

> "It was open to the meeting to resolve to obtain legal advice. But the meeting chose not to do so, and resolved to settle the Manager's claim for a known amount rather than to take the risk of a higher amount. The Tribunal is not satisfied that the management of the Scheme can be said not to have been acting satisfactorily in respect of this issue."

28 In our view, the matters and evidence put forward by the Appellants in this regard do not demonstrate that the Tribunal's conclusion was against the weight of the evidence. Further, the evidence does not establish the contention of the Appellants that the Strata Manager "acted with bias towards" the Manager or that it was engaging in "bullying".

29 The Tribunal at [28] referred to the evidence of various lot owners that the meeting in September was "chaotic". The Tribunal concluded:

> "However, the evidence is that the most recent meeting was well run and organised. It is clear that the issues surrounding the Manager's remuneration have caused a great deal of upset amongst lot owners. However the Tribunal is satisfied that overall meetings have been held in accordance with the Act."

30 In our view, the matters raised in this regard in respect of the September meeting do not demonstrate that the relevant conclusions of the Tribunal were against the weight of the evidence.

31 Next, the Appellants submit that the Strata Scheme is not functioning satisfactorily because it has failed to protect itself from the unreasonable and unconscionable conduct of the Building Manager. In this regard, it repeats its submission made below that the new Building Management Agreement entered into with the Manager was "on oppressive and unreasonable terms". The reasoning of the Tribunal on this matter was as follows (at [24]-[26]):

> "24. … on 23 October 2017 a pre-voting meeting AGM was held. The Owners Corporation agreed to enter into new deeds with the Managers on substantially the same terms and conditions as the existing deeds. There was no reduction in the office hours and no amendment to the terms of the Agreements. At the same meeting a resolution to reduce the licence fee for the use of a cleaning shed on common property (one of the conditions agreed to at the September meeting) was lost.
>
> 25. The Tribunal is not satisfied that the terms of the Agreements entered into were, as alleged by the Applicants, harsh and unconscionable. They were the same terms and conditions as the previous agreements. However, in failing to negotiate to reduce the hours, the Strata Committee failed to follow up on the motion passed at the September meeting. Despite this, however, the Owners Corporation resolved to enter into the Agreements.

> 26. One of the allegations made by the Applicants is that the Owners Corporation ought to have sought legal advice in respect of the proceedings to set aside the Agreements. The setting aside of the Agreements was one of the orders initially sought by the Applicants in these proceedings. Any such proceedings can only be brought by the Owners Corporation. It is clear that the majority of owners do not seek to set aside the Agreements. It cannot be said that the Owners Corporation is not functioning satisfactorily because it does not explore an option not supported by the majority of its lot owners."

32 The thrust of the complaint of the Appellants is that the new Agreements, in not ensuring the reduction of hours spent by the Manager at the office as Manager (as opposed to letting agent for individual lot owners who seek to rent out their properties), results in an unreasonable burden being placed upon all lot owners in terms of fees being paid to the Manager. The fundamental difficulty with this submission is, as acknowledged by the minutes of the AGM of September 2017, that the existing deeds still had years to run. The Manager could continue to receive its fees under those agreements and with the existing requirements of manning the office. Only with the consent of both parties could there have been any amendment of the deeds.

33 As noted by the Tribunal at [25], the allegedly harsh and unconscionable agreements entered into were on the same terms and conditions as the previous agreements and which would have continued in any event absent consent of the Manager. At the same time, based upon the expert determination, the Manager appeared to be on reasonably strong grounds for seeking back-pay in excess of that which was finally agreed upon.

34 In our view, it has not been demonstrated that the Tribunal's finding in this regard was against the weight of the evidence.

35 Next, the Appellants complained about the "pre-meeting voting" at the general meeting of 23 October 2017. It was alleged that this was in breach of the Strata Schemes Management Regulation 2016, Regulation 14 and Resolution 5 of the EGM of 27 April 2017. To counter any such allegations, the Owners Corporation arranged for further meetings to be held.

36 Counsel for the Respondent informed us that at such meetings further resolutions were passed which affirmed or confirmed the previous resolutions passed at the general meeting of 23 October 2017. It was explained to us that as a result the Appellants at the previous hearing before the Tribunal withdrew

their previous claim for orders setting aside the resolutions passed on 23 October 2017. The appellants did not dispute this before us.

37 It is not necessary for us to consider whether or not the pre-meeting voting at the general meeting of 23 October 2017 was valid or not. The fact that the Owners Corporation was able to deal with the allegation about the validity of previous resolutions in the manner described above, suggests that the strata scheme was functioning satisfactorily.

38 Next, the Appellants complain about the lack of regard for the evidence that the Owners Corporation failed to enter into any form of negotiation with the Manager to remove the manning of the office hours in accordance with resolution 26. The complaint being made again was that in failing to take up such negotiations with the Manager, the:

> "…practical result was effectively increasing unnecessarily and unreasonably to the detriment of the Owners Corporation and to the financial benefit of [the Manager], the Owners Corporation's payments under the new Building Management Agreement by $57,640 per year."

39 The Tribunal dealt with this issue at [24]-[25] of its decision. For the reasons given at [31]-[34] above, in our view, the failure to negotiate with the Manager to reduce the office hours does not show that the conclusion of the Tribunal on whether or not the management of the Strata Scheme was being satisfactorily managed was wrong and against the weight of the evidence.

40 Next, the Appellants complain that the Tribunal did not pay sufficient regard to the evidence of, what was described as, the Owners Corporation, Strata Committee and Strata Manager failing to act in a satisfactory manner to rectify its alleged error in executing the new Building Management Agreement with the Manager. The Appellants pointed to correspondence in this regard sent to the Owners Corporation seeking a settlement and resolution of their claims.

41 This issue was substantially dealt with by the Tribunal at [26] of its Decision. Therein the Tribunal noted that the clear majority of the owners did not seek to set aside the agreements entered into with the Manager. Accordingly, as the Tribunal put it:

> "[i]t is clear that the majority of owners do not seek to set aside the Agreements. It cannot be said that the Owners Corporation is not functioning

> satisfactorily because it does not explore an option not supported by the majority of its lot owners."

42 We are not satisfied that this conclusion of the Tribunal was wrong or not open to it.

43 Next, the Appellants referred to 11 witness statements provided by way of statutory declarations which represented 9 of the 12 minority lots. It was submitted that the evidence in the statutory declarations demonstrated oppression of the minority. The matters referred to in these statutory declarations by the Appellants are broadly conclusory in nature. They do not refer to any specific primary facts which could be said to evidence the Owners Corporation, Strata Committee or Strata Manager not functioning satisfactorily.

44 For example, in the Appellants' submissions to us reference was made to the following statements in the statutory declarations:

> (i) Statutory Declaration of David Holler: "We do not believe that meetings were conducted professionally and the best interests of the unit owners was the main focus."
>
> (ii) Statutory Declaration of Michael Ryan: "Bias towards the current caretakers - I would like to state that I am very unhappy with the dealing between the caretakers, Allen and Karen Davidson [the Manager], and Strata Professionals."
>
> (iii) Statutory Declaration of Shaheen Qasim: "Mr Thompson is biased towards the Davidson's. He is not impartial…"
>
> (iv) Statutory Declaration of Nick Eellicciotti: "Andrew does not run the show properly nor does Virginia. They are in favour of themselves and the property managers and not the owners."
>
> (v) Statutory Declaration of Carol Ryan: "I feel that Andrew was 100% for Karen and Allen Davidson, definitely not for the Owners."

45 These broad statements have very limited evidentiary value. They do not demonstrate, or clearly demonstrate, a proper basis for a conclusion that the Strata Scheme was being conducted in a manner that was oppressive to the minority or that the Strata Scheme management was biased or impartial. We are not satisfied that this evidence demonstrates that the conclusion of the Tribunal below was against the weight of the evidence.

46 Next, the Appellants referred to the claim that there was improper use of common property by the Manager, who it was said had erected bollards to common property visitor parking spaces so that they could be used by letting guests with boat trailers when there was no authorisation by the Owners Corporation by special resolution for such use of the common property.

47 We are not satisfied that this relatively minor matter demonstrates that the Tribunal acted against the weight of the evidence in concluding that the Appellants below had not made out their case that the Strata Scheme was not functioning satisfactorily. The matter of the bollards on the visitor car parking spaces can be dealt with as a discrete issue on its own without, in our opinion, the making of the orders sought.

48 Next, the Appellants referred to the allegation that the Strata Committee called an electronic meeting on 10 October 2018 to have the DA submitted to Council to remove all visitor parking completely. We note that this postdates both the hearing and the Decision below. It is not appropriate for this Appeal Panel to consider this issue which has arisen since the Decision.

49 Next, the Appellants, under the heading “Continuation of Improper Use of Common Property and Abuse of Owners’ Rights”, made the following submissions:

(i) decision to spend $55,000 on upgrading the pool area without what was alleged to be the required special resolution;

(ii) owners failing to receive notification of meetings or such notifications arriving late;

(iii) Lyn Palmer has not received emails regarding agendas or minutes;

(iv) no maintenance on the property as outlined in some photographs has been addressed;

(v) doubling of unpaid levies due to the increased remuneration being paid to the Manager;

(vi) renovations taking place in Strata Committee members’ units without this being passed by the Owners Corporation for approval; and

(vii) emails from Strata Committee members who have abused their position.

50 We note that some of these allegations were not made at the original hearing and it would not be appropriate for us to permit these to be raised for the first time on appeal. As to the balance of the allegations that were originally made before the Tribunal below, we are not satisfied that they demonstrate that the conclusion of the Tribunal was against the weight of the evidence.

51 Next, the submission was put that the Tribunal did not pay sufficient regard to evidence that the Strata Committee failed to comply with its obligations and requirements under the *Strata Schemes Management Act* in that:

> (i) Karen Davidson was on the Strata Committee in breach of s.32(1)(a) of the *Strata Schemes Management Act*; and
>
> (ii) Virginia Mace and Karen Davidson failed to disclose both their pecuniary interest and conflict of interest in relation to matters involving Davidson in breach of Schedule 2, clause 18 of the *Strata Schemes Management Act*.

52 The Tribunal dealt with this issue at [31]-[32] as follows:

> "31. The Tribunal notes that Karen Davidson was a committee member when the 2015 Act commenced operation. She was taken, by the transitional provisions, to have been appointed to the committee on the commencement of the new Act. The Tribunal accepts the Applicants' submissions and finds that she was not entitled to remain on the Committee.
>
> 32. Ms Mace gave evidence that no book, as required by the Regulations, is maintained in which to record pecuniary interests and conflicts of interest. This matter should be rectified forthwith."

53 Implicitly, the Tribunal did not regard these matters as providing sufficient grounds for the compulsory appointment of a new strata manager. We are unable to conclude that this decision of the Tribunal was against the weight of the evidence such as to justify intervention by the Appeal Panel.

54 We also have considered the cumulative effect of all of the Appellant's submissions as referred to above and are not satisfied that intervention on the basis of the decision being against the weight of the evidence is justified.

55 Accordingly, we reject this ground of appeal.

Ground 3

56 The third ground of appeal is as follows:

> "3. The Tribunal has failed in its judgment to consider facts, submissions and matters put forward by the Applicant in its submissions in chief (dated 20

> August 2018) and its submissions in reply dated 24 August 2018 and so the Applicant has been denied procedural fairness."

57 Section 38 of the NCAT Act prescribes the procedure of the Tribunal generally. Relevantly, s.38(2) expressly requires the Tribunal's procedures to accord with natural justice. Subsections (5) and (6) also embody aspects of procedural fairness. Whether there was a failure to afford procedural fairness is an error of law: see *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 [13](4). Further, "if a Tribunal Member does not deal with an issue that was before him or her for determination that will be an error of law": *Rathchime Pty Ltd v Willat* [2017] NSWCATAP 87 at [70], citing *Yates Property Corporation Pty Ltd (In Liquidation) v Darling Harbour Authority* 24 NSWLR 156 at 186.

58 Nevertheless, the guiding principle is that an appeal court will reserve intervention to those situations in which it is left with no choice and an appeal court is entitled to consider the matter and, if appropriate reasons are given, may itself decide the matter itself: *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 444.

59 Three matters raised under this ground of appeal were as follows:

> (i) that resolution 12 of the AGM of 9 September 2017 was invalid;
>
> (ii) that the "pre-meeting voting" used by the Owners Corporation for the general meeting of 23 October 2017 was in breach of Strata Schemes Management Regulations 2016, Regulation 14 and resolution 5 of the EGM dated 27 April 2017; and
>
> (iii) that the recommendation in resolution 1 of the Notice of General Meeting dated 23 October 2017 was incorrect and misleading and deceptive in that the proposed Building Management Agreements were in fact in conflict with resolution 26 of the AGM of 9 September 2017.

60 As explained above, the original complaints made about resolutions of previous meetings were withdrawn by the Appellants. This followed resolutions being passed confirming previous resolutions. In light of this position, it cannot be said that the Tribunal fell into error in failing to address these submission when in substance they were abandoned.

61 The next issue raised under this ground of appeal was “that the Strata Manager was not functioning satisfactorily at the AGM of 9 September 2017”. The Tribunal essentially dealt with the functioning of strata meetings, and in particular the meeting in September 2017, at [28] of its Decision. The submission as to the running of the annual general meeting on 9 September 2017 and the behaviour of the Strata Manager at that meeting was addressed, or sufficiently addressed, in the decision of the Tribunal.

62 We are not satisfied that there was a failure of procedural fairness in this regard.

63 The next issue raised under this ground of appeal was as follows:

> “Failure by the Owners Corporation to take action to rectify the overpayment under the new Building Management Agreement that equates to $570,647 over the 10 years of the Agreement.”

64 In our opinion, this submission was satisfactorily dealt with by the Tribunal in its Decision, including in particular at [26]. Accordingly, we reject this ground of appeal.

65 The next matter raised under this ground of appeal was as follows:

> “Failure to deal and address the evidence of bias of the Strata Manager to the Building Manager and failure to deal and address the evidence of individual lot owners including David Holler, Michael Ryan, Shaheen Qasim, Nick Eellicciotti and Carol Ryan.”

66 This really involves two separate issues. First, there is the allegation of a failure to deal and address the evidence of bias of the Strata Manager. The Tribunal dealt with the issue of "bias" in favour of the Manager by lot owners who utilise the letting services of the Manager, in particular, at [34] of the Decision.

67 Further, the evidence of bias by the Strata Manager was in the statutory declarations of certain lot owners. We have already, in substance, dealt with this evidence and its lack of probative value at [43] – [45] above. For the reasons set out in those paragraphs, we see no basis for overturning the Decision below on the basis of this evidence.

68 Alternatively, the conclusion of the Tribunal was that meetings overall were held in accordance with the Act, at [28], and control of the meetings were in the hands of a majority of the lot owners without there being oppression of the

minority. In light of these conclusions, we also see no basis for the making of the orders sought on the ground of alleged bias by the Strata Manager. Accordingly, we reject this ground of appeal.

69 Next, dealing with the alleged failure to deal with the evidence of some lot owners, we refer to paragraph [28] of the Decision. The Tribunal referred to the evidence given by a number of lot owners. Also we have dealt with this evidence at [43] – [45] above. As stated, this evidence is not of sufficient weight to justify overturning the Decision or requiring any rehearing. Accordingly, we reject this ground of appeal.

70 The next matter raised under this ground of appeal was as follows:

> "Improper use of common property – installation of bollards to visitor parking for holiday letters."

71 The Tribunal dealt with the issue of failure to maintain common property at [29]. We have dealt with the submission previously, at [46] – [47] above, as to whether or not the installation of bollards to visitor parking demonstrates a failure by the Tribunal to deal sufficiently with the evidence in this regard. For the reasons there given, we do not think the failure to deal more specifically with the issue of the installation of bollards to visitor parking justifies an overturning of the Decision or a rehearing of the matter

72 The last matter dealt with under this ground of appeal was as follows:

> "Improper actions and conflict of interest of Chairperson / Secretary of the Strata Committee."

73 In our opinion, the Tribunal sufficiently dealt with this submission at [31]-[32] of its Decision. Accordingly, we reject this ground of appeal.

74 In the result, we reject the third ground of appeal.

Orders

(1) Appeal AP18/45142 is dismissed and leave to appeal is refused.

(2) If either party seeks a costs order the following directions apply:.

(a) The applicant for costs ("costs applicant") must file and serve any costs application, including submissions and any evidence in support, within 7 days of the date of these orders.

(b) The respondent to the costs application is to file and serve any submissions and evidence in reply within 14 days from the date of these orders.

(c) The costs applicant is to file any submissions in reply within 21 days from the date of these orders.

(d) Any submissions are to include submissions on the issue of whether an order should be made pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW), dispensing with a hearing of the costs application.

****

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

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