Civil and Administrative Tribunal

New South Wales

Case Name:	Brett v Warhaftig
Medium Neutral Citation:	[2018] NSWCATAP 167
Hearing Date(s):	15 May 2018
Date of Orders:	11 July 2018
Decision Date:	11 July 2018
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member J McAteer, Senior Member
Decision:	The appeal is dismissed.
Catchwords:	STRATA SCHEMES MANAGEMENT ACT 2015 – Reallocation of unit entitlements – requirement for valuation of lots – insufficiency of evidence – opportunity to provide evidence – obligation of Tribunal to advise where evidence insufficient
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act, 2015 (NSW)
Cases Cited:	AFJ Software Pty Ltd v Wine Nomad Pty Ltd [2015] NSWCATAP 226 Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 Fairey Australasia Pty Ltd v Joyce [1981] 2 NSWLR 314 Mraz v R (1955) 93 CLR 493 at 514; [1955] HCA 59 Sahade v Owners Corporation SP 62022 [2015] NSWCATAP 146 Sahade v The Owners – Strata Plan 62022 [2014]

	NSWCA 208 State Rail Authority v Consumer Claims Tribunal and others (1988) 14 NSWLR 474
Category:	Principal judgment
Parties:	Jonathan Keith Brett (Appellant) Susan Warhaftig (First Respondent) Samuel Lackey (Second Respondent) Julie Mountford (Third Respondent) The Owners – Strata Plan 71497 (Fourth Respondent)
Representation:	Appellant: In person S Lackey (in person) for all respondents
File Number(s):	AP 18/11001
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Opportunity Division
Citation:	Not applicable
Date of Decision:	27 February 2018
Before:	J Smith, Senior Member
File Number(s):	SC 17/50796

REASONS FOR DECISION

Introduction

1 The appellant is the owner of a unit in Strata Plan 71497 located at Rose Bay.

2 The building is a 3 lot strata scheme which was registered on 3 November 2003. The first to third respondents are the owners of the other 2 lots, the fourth respondent being the Owners' Corporation.

3 By application SC 17/50796, filed in the Tribunal on 27 November 2017, the appellant applied to the Tribunal for an order under s 236 of the *Strata Schemes Management Act, 2015 (NSW)* (Management Act), that the unit entitlements in respect of the lots be reallocated. The appellant contended that the initial unit allocation was unreasonable when the strata plan was registered.

4 The application was determined on the papers and was dismissed by the Tribunal on 27 February 2018. The Tribunal provided written reasons (reasons).

5 The appellant appeals the decision.

Notice of Appeal and history of appeal proceedings

6 The appellant filed a Notice of Appeal on 5 March 2018. The appeal was filed in time.

7 The grounds of appeal can be summarised as follows:

(1) The appellant was unaware that the documentation supplied was insufficient;

(2) The Tribunal has been unable to consider the facts in this case;

(3) The appellant had been told that he was the only party who had provided evidence and therefore assumed his evidence was sufficient;

(4) The appellant is not a professional valuer and relied on the valuer who provided evidence on his behalf to support his contention; and

(5) Had the appellant been aware of the deficiencies in his evidence he would have arranged for a valuation of all 3 units.

8 The appellant provided written submissions. He also appeared in person at the hearing and provided oral submissions.

9 The appellant said the decision was not fair and equitable but did not seek leave to appeal.

10 He said that the Tribunal did not properly take account of the mandatory factor as required by the decision of the Court of Appeal of the Supreme Court of New South Wales in *Sahade v The Owners – Strata Plan 62022* [2014] NSWCA 208.

11 The appellant submitted he had provided “an enormous amount of evidence to show that the Unit Entitlements were unreasonable” and “were not based on the respective values of the lots”. This included “evidence of the value at which the units were sold shortly after the registration”. The appellant submitted that the relative values of the sale prices achieved demonstrated “the obvious unreasonableness of the allocation of the unit entitlements when the strata plan was registered”.

12 The appellant says the appeal was dismissed on a technical ground namely that the application was not accompanied by a certificate specifying the valuation. The appellant also submitted that the finding at [24] of the reasons to the effect that "the applicant provided no evidence to which the Tribunal can have proper regard to fulfil the requirements of s 236(2)" ignores the evidence which the appellant had provided and the independent valuer's certificate "which clearly states the unit entitlements are based on the respective value of the lots". In relation to the valuer's certificate, the appellant says it was in conformity with s 236(5) of the Management Act.

13 In oral and written submissions the appellant said that the approach taken by the Tribunal in resolving the dispute was technical and failed to have regard to the obligation of the Tribunal to determine the real issues in the dispute in a just, cheap and quick manner. In oral submissions, the appellant submitted the Tribunal was to be a place of "easy access", the issue being one of fairness. The appellant relied on the decision of the High Court in *Mraz v R* (1955) 93 CLR 493 at 514; [1955] HCA 59.

14 The appellant said he should have been given an opportunity to rectify the technical form of the certificate either at a directions hearing or at the final hearing by the Tribunal. In this regard, the appellant said he had been informed that his application could be determined by the Tribunal considering written submissions and documents.

15 The appellant also submitted that the position adopted by the respondents, namely "that there was no obligation to allocate unit entitlements by value alone and many were done on the area" constituted an admission that the developer did not take account of the respective values of the lots when setting unit entitlements and confirm the initial unit allocation was unreasonable.

16 In addition, the appellant sought leave to rely on new evidence, found behind tab 12 of his bundle. This was a report prepared by Mr Beau Bowen of Quadrant Real Estate Evaluations Pty Ltd dated 18 April 2018. The appellant said he believed the report from the first valuer was sufficient based on what he had been told. He said that if he knew there was a deficiency, he would have provided the new evidence. In relation to whether the report could have been

provided prior to the original hearing, the appellant said he could not have obtained the necessary information due to the inexperience of the valuers with whom he was dealing. In any event, he said the original report falls within the requirements of s 236(4) of the Management Act.

17 The respondents filed a reply to appeal and provided written and oral submissions. Mr Lackey, one of the respondents, appeared for all respondents, including the Owners' Corporation.

18 The respondents submissions can be summarised as follows:

(1) the Tribunal was correct to dismiss the application because of insufficiency of evidence;

(2) the parties had agreed that the application be determined on the papers. Directions had been made to permit the parties to file and serve evidence and submissions. Therefore, the appellant had been given an opportunity to present his case;

(3) the Tribunal was not obliged to give advice concerning the sufficiency of evidence. The appellant had on opportunity to provide all evidence upon which he wished to rely and should not be given a second chance to provide a new valuation to better support his application;

(4) the decision in *Sahade* does not confine the relevant considerations to be respective value of the Lots only and there is no obligation on a developer to allocate units by value alone. The appellant speculated about how the developer calculated unit entitlements and did not provide any evidence to prove these assumptions. Further, the appellant has not shown that the entitlements were unreasonable at the time of registration;

(5) the Lot areas are relevant to determining the proper unit entitlements;

(6) in relation to the decision made, an analysis of the unit allocation, when considered in the context of the floor area of each lot, confirms that the initial unit allocation was reasonable.

19 In oral submissions, the respondent said that the Tribunal was justified in rejecting the valuation evidence of the appellant because there was no relevant analysis by the expert. Further, the respondents submitted that no admission had been made to the effect that the developer failed to take account of the respective valuations of the Lots.

20 The respondents also suggested that the agreement between the parties that a decision would be made on the papers meant that "the NCAT decision would be final with no right of appeal". As far as we are aware no order was made to

this effect and no evidence has been provided that the parties have reached any agreement which might bind them so as to preclude the appellant from exercising his rights under s 80(2)(b) of the *Civil and Administrative Tribunal Act, 2013 (NSW)* (NCAT Act).

21 In relation to the application to adduce fresh evidence, being the new valuation report, the respondents say leave should be refused as the appellant has been given an adequate opportunity and time to provide information in support of his application. Further, the respondents say that the valuation provided is supported by sales data which is "irrelevant and not remotely comparable". In this regard the respondents say that the analysis of the valuer does not make "reference to the living areas or rates per square metre they have utilised in forming the evaluation figures". Lastly, insofar as the valuation was "influenced by the original purchase prices of the units" the respondent says these are not necessarily reflective of the value at the time of registration of the strata plan, some sales occurring some months after registration and others possibly influenced by the developer seeking to "offload" the units due to "unknown circumstances".

Consideration

22 This appeal concerns the sufficiency of evidence provided by the appellant in connection with an application to the Tribunal to make an order to reallocate unit entitlements in respect to a strata scheme at Rose Bay and the obligations of the Tribunal when determining the application on the papers in circumstances where both parties have consented to an order dispensing with a hearing under s 50(2) of the NCAT Act.

23 Pursuant to s 80(2)(b) of the NCAT Act, there is a right of appeal on a question of law. Otherwise leave to appeal is required. Insofar as leave is required, Sch 4 cl 12 of the NCAT Act applies because these proceedings relate to an application made in the Consumer and Commercial Division. Consequently, an appellant must demonstrate they may have suffered a substantial miscarriage of justice in order for leave to be granted. The principles applicable to the grant of leave were set out in the decision of the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17.

24 In relation to the application for leave to adduce fresh evidence in the appeal, Sch 4 cl 12(1)(c) provides that leave to appeal may be granted where an appellant may have suffered a substantial miscarriage of justice because "significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with)". The meaning of this expression was considered by the Appeal Panel in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 at [19]-[26].

25 It is appropriate to first deal with the application to rely on the new valuation report prepared by Mr Bowen.

26 Having regard to what the Appeal Panel said in *Al-Daouk* at [23], there is no evidence before us to suggest that the report now sought to be relied on could not reasonably have been obtained at the time of the original hearing. At its highest, the appellant submitted that the valuers he engaged did not know what they were doing or were unaware of the requirements in connection with expert evidence and the provisions of s 236 of the Management Act.

27 In terms of the obligation of an expert in the provision of the evidence, Procedural Direction 3 - Expert Witnesses sets out the requirements for such evidence. Section 236 of the Management Act and cases such as *Sahade* set out the matters relevant in determining whether an order should be made to reallocate unit entitlements. The fact that the appellant may have engaged the wrong expert or a person who was not capable of providing the necessary relevant evidence, is not sufficient to establish the new evidence sought to be relied upon was not reasonably available at the time the proceedings under appeal were being dealt with.

28 There is nothing in the report prepared by Mr Bowen that would suggest that information required by the valuer to prepare a relevant valuation was not reasonably available prior to the original hearing. To the contrary, the work of the valuer required a valuation of the lots so that the valuer could provide, "a certificate specifying the valuation, at the relevant time of registration … of each of the lots to which the application relates": see s 236(4) of the Management Act

29 It follows that we are not satisfied Mr Bowen's report is significant new evidence that was not reasonably available at the time the proceedings were originally heard or that leave should be granted to adduce new evidence on appeal. In this regard, a party is bound by the manner in which it conducts the original hearing and by the evidence presented at the hearing: see eg *Coulton v Holcombe* (1986) 162 CLR 1 at [9]; [1986] HCA 33.

30 The second matter raised in the appeal is that the Tribunal was in error in failing to inform the appellant of a deficiency in his evidence so as to give him an opportunity to correct this deficiency by providing further evidence.

31 This submission needs to be considered in the context of what occurred in this case. As the parties made clear in their submissions, there had been at least one earlier directions hearing at which orders were made by the Tribunal to allow the parties to provide their evidence and submissions. It appears common ground in the appeal that the parties consented to the application being dealt with by the Tribunal "on the papers" without a hearing. This is what occurred.

32 In its decision, the Tribunal identified the evidence and the submissions provided by the appellant. The evidence included "a valuer's certificate dated 17 March 2017, a letter from the valuer addressed to the applicant dated 16 March 2017 together with 7 pages, apparently provided by the valuer that gave some information about dealings in the respective lots and other properties in the area": reasons at [12]. The evidence also included minutes of an extraordinary general meeting held on 21 March 2017 at which a motion to change the unit entitlements was defeated: reasons at [13].

33 The Tribunal also noted that the respondents had filed submissions in reply on 19 December 2017, including a copy of the relevant strata plan SP 71497 which was first registered on 3 November 2003. The respondents also provided "a schedule of comparative initial sale prices" and noted that the valuer who provided the certificate had not inspected all 3 lots internally nor had the valuer provided a valuation report on all of the lots: reasons at [14]-[17]. Clearly, this submission put into issue the adequacy of the valuation evidence provided by the appellant.

34 The appellant filed submissions in reply in the proceedings at first instance. In relation to these submissions the Tribunal considered as irrelevant the issues raised by the respondents concerning when the appellant purchased his lot and the appellant's reply submissions to that issue. However, The Tribunal noted as relevant the fact that the valuer's report was attached to the original Tribunal application and that "whilst the valuer had not inspected all lots, internally the finishes were much the same in each lot": reasons at [26].

35 In his submissions on appeal, the appellant seeks to suggest that he was informed in some way by the Tribunal that his evidence was sufficient and it was on this basis that he consented to his application being dealt with on the papers. In this regard the appellant said at [8] of his written submissions:

> At the Directions Hearing on 19th January 2018 Mr G Meadows, Tribunal Member stated that "Mr Brett, the Applicant, was the only person to provide evidence" and gave the Respondents the opportunity to provide evidence. Based on the Tribunal Member's confirmation that the Applicant had provided evidence, the Applicant agreed that the matter could be heard on the papers.
>
> Had the Tribunal Member not made this comment, Mr Brett would not have agreed to have the matter heard on the papers. In addition, it should have been apparent to Mr Meadows that the certificate which the Applicant was relying on was defective and giving Mr Brett the opportunity to get this corrected before the matter was determined.

36 The sound recording of this directions hearing was not provided to the Appeal Panel in the present appeal. In any event, it is clear from the submission set out above that the Tribunal did not, at the directions hearing, give any advice or any indication one way or another as to whether the evidence filed by the appellant was sufficient to prove his case. There is no evidence to suggest the Tribunal embarked upon a consideration of the adequacy of evidence at the time of the directions hearing and, more particularly, no evidence to suggest that it had responded to any question from the appellant about these matters. All that has occurred is that the Tribunal has acknowledged evidence had been filed by the appellant and that the respondents should be given an opportunity to provide any evidence in reply.

37 The effect of the appellant's submission is that the Tribunal was obliged to give him advice about the adequacy of his evidence. We do not accept this submission.

38 The obligations of the Tribunal are, in part, set out in s 38 of the NCAT Act. Section 38(5) provides:

> The Tribunal is to take such measures as are reasonably practicable:
>
> (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
>
> (b) if requested to do so – to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
>
> (c) to ensure the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

39 While the Tribunal may be obliged to explain its procedure and allow parties to provide evidence and submissions so that they can participate in the proceedings and have a reasonable opportunity to be heard, any obligation does not usually extend to providing advice in contested proceedings about the adequacy of particular evidence that is challenged by the opposing party.

40 In the present case, the appellant was able to obtain independent legal advice if he wished to do so and was afforded an opportunity to prepare and present whatever evidence he thought was relevant and necessary to prove his claim. The fact that he had not done so did not require the Tribunal, when making its decision, to give him a second chance. Further, in their reply submissions, the respondents put in issue the adequacy of the report provided by the appellant: reasons [14]-[16]. The appellant had an opportunity to and did file submissions is reply: reasons at [18]-[19]. The appellant's reply submissions dealt with the valuer report they had provided.

41 It seems clear to us that the appellant proceeded on the basis of the evidence he provided, despite being on notice of the challenge to the valuation evidence by the respondents and thus had an opportunity to be heard.

42 In these circumstances, and where the appellant provided his consent to a decision being made on the papers, without a hearing, we are not satisfied there was any relevant error made by the Tribunal in proceeding in accordance with that consent and making its decision on 27 February 2018.

43 Accordingly, this ground of appeal fails.

44 The final issue to deal with concerns whether or not the Tribunal was correct in its decision to dismiss the application to reallocate units having regard to the evidence provided by the parties.

45 Having set out the relevant provisions of the Management Act, the Tribunal dismissed the application for the following reasons:

(1) Section 236 permits the Tribunal to make an order reallocating unit entitlements if it considers the initial unit allocation was unreasonable when the strata scheme was registered: reasons at [21];

(2) In determining whether the initial unit allocation was unreasonable, regard is to be had to the respective values of the lots and such other matters as the Tribunal considers relevant. Any application for reallocation must be accompanied by a certificate specifying the valuation at the relevant time of each of the lots: reasons at [22]

(3) The applicant provided no evidence of the value of each of the lots. The valuer's certificate does not provide a valuation of the lots but simply provides a schedule which may have been based on some valuations: at [23];

(4) There is no evidence enabling the Tribunal to make a relevant determination: reasons at [24];

(5) The documents attached to a letter dated 16 March 2017 on which the appellant relies gives no indication of how the valuer went about his valuations or the conclusion he reached: reasons at [25];

(6) The appellant did not demonstrate that the original unit allocation was unreasonable. While there may be a difference between a valuation certificate and the initial unit allocation, that fact may not be sufficient to demonstrate the initial unit allocation was unreasonable. Rather, it may be necessary for the valuer preparing the valuation is to provide details of the valuation method adopted, the reason for such approach and an opinion concerning why the initial unit allocation is unreasonable: reasons at [25].

(7) While an inspection of each lot within a strata scheme may not be necessary in order to provide an appropriate valuation, in the absence of such an inspection it is available to an opposing party to "demonstrate by appropriate evidence how the lots differ internally and how that may affect the valuation": reasons at [27]

46 In challenging this decision, the appellant relied on the decision of the Court of Appeal in *Sahade*. That is involved a consideration of s 183 of the *Strata Schemes Management Act, 1996* (NSW) (1996 Act). Section 183 was in terms similar to s 236 of the Management Act. Relevantly, s 236 provides:

236 Order for reallocation of unit entitlements

(1) **Tribunal may make order allocating unit entitlements**

The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots:

(a) was unreasonable when the strata plan was registered …

…

(2) **Matters to be taken into consideration**

In making a determination under this section, the Tribunal is to have regard to the respective values of the lots and to such other matters as the Tribunal considers relevant.

…

(4) **Application to be accompanied by valuation**

An application for an order must be accompanied by a certificate specifying the valuation, at the relevant time of registration or immediately after the change in the permitted land use, of each of the lots to which the application relates.

(5) **Qualifications of person making valuation**

The certificate must have been given by a person who is a qualified valuer within the meaning of the Strata Schemes Development Act 2015.

…

47 In *Sahade*, Basten JA (with whom McColl JA agreed), expressed the following views concerning an application to reallocate unit entitlements and what factors were relevant to its determination:

(1) A comparison of the respective values of the lots constitutes a mandatory and primary consideration: at [22];

(2) A reallocation requires the Tribunal to be satisfied the initial unit allocation was unreasonable; at [22];

(3) the factors to be taken account of in considering whether or not an order for reallocation should be made are not limited to the respective values of the lots: see eg at [35] in relation to liability for rates, maintenance and upkeep and levies and at [47] in respect of control.

48 Similarly in that case, Sackville JA said, at [91], a reallocation of units which alters voting rights and in turn causes a decrease in the value of a lot may also be a relevant factor.

49 In the remitted proceedings, in a further appeal, the Appeal Panel said in *Sahade v Owners Corporation SP 62022* [2015] NSWCATAP 146, at [41] and following, that the degree of unreasonableness and the extent to which

adjustment is required may also be factors to be considered in determining what, if any, order for reallocation of unit entitlements should be made.

50 It is clear from these decisions that the primary, but not only, consideration in resolving an application under s 236(1)(a) of the Management Act is the value of the respective lots at the time of the strata plan was registered. It is also clear from s 236(4) that the application for an order must be accompanied by "a certificate of valuation, at the relevant time of registration … , of each of the lots to which the application relates".

51 The appellant said it in his written submissions that he had provided:

> a) an enormous amount of evidence to show that the Unit Entitlements were unreasonable;
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> b) an enormous amount of evidence to show that the Unit Entitlements were not based on the respective values of the lots;
>
> c) an enormous amount of evidence to show that the Unit Entitlements were not based on a Valuation;
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> d) a fully independent Valuation to show what the Strata entitlements should have been;
>
> e) an independent Valuer's certificate certifying that the Unit entitlements shown in the Schedule (of the Valuer's certificate) are apportioned in accordance with Schedule to Strata Schemes Development Act 2015;
>
> f) Evidence of the value at which the units were sold shortly after registration. The sales prices at that time would be the exact amount of the value of each of the units (hindsight is 20/20) and the Unit Entitlements should have closely approximated these sales prices. The fact there was such a huge discrepancy between the relative values of the sale prices achieved and the allocation of Unit Entitlements shows the obvious unreasonableness of the allocation of the unit entitlements when the strata plan was registered".

52 The valuer's certificate and evidence relied upon in the hearing at first instance, dated 17 March 2017, was provided by Mr Adams from Value One, National Property Consultants. This certificate was attached to the original Tribunal application. Also attached was a letter dated 16 March 2017 and copies of various sales information. That sales information related to searches on a website known as "realtor.com.au" in respect of properties in the Rose Bay area and included sale information for the Lots in the Strata Scheme. Also in evidence in the original application was a copy of Strata Plan 71497.

53 The certificate certified "that the unit entitlements shown in the schedule here with are apportioned in accordance with Schedule 2 of the Strata Schemes

Development Act, 2015. The Schedule of Unit Entitlements recorded the following:

Lot No.		Unit Entitlement
1	(Warhaftig)	30
2	(Lackey and Mountford)	29
3	(Brett)	41
	Aggregate	100

54 The letter dated 16 March 2017 was in the following terms (formal parts omitted):

> We refer to your email dated 6th March, 2017 wherein you requested that we provide valuation advice in relation to the unit entitlement allocation within the above development. We subsequently carried out an internal inspection of Unit 3 and are advised that the remaining units are of similar specification. Should this be incorrect, we reserve a right to review our submission.
>
> Unit entitlements shown within the attached valuation certificate are based upon retrospective valuations made by me on 16th March, 2017 being as at the date of registration of the Strata Plan (3rd November, 2003). Should the changes within the appended valuation certificate be considered 'fair and reasonable' with the remaining Owner's Corporation members, please contact our office for an updated certificate and accompanying forms for lodgement with the relevant department/s.
>
> This valuation advice is for the use of the party or parties to whom it is addressed and is not to be used for any other purposes. No liability or responsibility is accepted or undertaken to any third party or parties which may use or rely on the whole or any part of this submission or its conclusion. No liability or responsibility is accepted or undertaken in the event that the party or parties to which it is addressed use this submission for any other purpose apart from the expressly outlined. Only a signed original of this valuation certificate should be relied upon and no responsibility will be accepted for photo copies of the certificate or signatures of the certificate.
>
> Should further information be required, please do not hesitate to contact the undersigned.

55 As is evident from the letter, the valuer did not offer any opinion concerning whether or not the initial unit allocation was unreasonable. Further, the valuer did not provide a valuation for each lot at the relevant time.

56 However, there was some evidence of the value of each lot shortly after the registration of the Strata Plan. This evidence was summarised at para 4.2 of the appellant's submissions attached to his original application. This material recorded the following:

(1) Lot 1 was $1,390,000 on 23 February 2004;

(2) Lot 2 was sold for $1,250,000 on 10 May 2004;

(3) Lot 3 was sold for $1,750,000 on 29 April 2004.

57 Also evident from the sales data is that the properties have been sold several times, that is the present owners are not the owners at the time the strata scheme was registered.

58 In relation to information contained in the strata plan concerning each of the lots, the following is evident:

(1) Lot 1 is on the ground floor, having an area of approximately 262 m², including a basement carpark/storage area of 36 m².

(2) Lot 2 is on the first floor, having an area of approximately 177 m², including a basement carpark/storage area of 45 m².

(3) Lot 3 is located on the ground floor and first floor, having a total area of approximately 430 m², including a basement carpark/storage area of 115 m².

59 As recorded in the Tribunal's reasons, the appellant made submissions about these matters in the proceedings at first instance. The effect of these submissions, as recorded in the reasons for this decision, and having regard to what was said in the appellant's application (contained in the documents provided as evidence) was that the Tribunal ought to have been satisfied, by reason of respective values of the lot, that the initial unit allocation was unreasonable and that a reallocation should be made in accordance with the table of unit allocations as proposed by the certificate. In the absence of valuation evidence from the respondent, the appellant says his evidence ought to have been accepted.

60 On the other hand, the respondents drew attention to the fact that the sales information in respect of each lot was at different dates and that the valuer had not inspected all 3 lots or provided a valuation report in respect of each of the lots.

61 An examination of all this material shows that the lots were of different sizes, on different floors and had different basement facilities for parking and storage. Further, the view expressed by Mr Adams in preparing his certificate, as recorded in his letter of 16 March 2017, was that "the remaining units are of similar specification", Mr Adams reserving to himself the right to review his valuation if this information was incorrect. Lastly, Mr Adams noted that he had only "carried out an internal inspection of Unit 3 [lot 3]".

62 As recorded above, the Tribunal rejected the appellant's evidence and submissions because the valuer had not prepared a valuation of each of the Lots. The Tribunal also concluded that there was no evidence enabling the Tribunal to make a necessary determination that the initial unit allocation was unreasonable.

63 In our view, the Tribunal was correct to reach its conclusion. The principles in *Sahade*, to which the appellant has referred and which we have set out above, make clear that a primary and mandatory consideration is the relative values of the lots. The evidence from Mr Adams is not sufficient.

64 As made clear by the Court in *Sahade*, the Tribunal must be satisfied that the initial unit allocation was unreasonable.

65 The evidence provided by the appellant at the original hearing does not allow such a finding to be made. Quite clearly, the lots are of different dimensions. That is, to use the language of Mr Adams, they have different "specifications". The primary assumption made by Mr Adams in providing his certificate is not established. Therefore, his evidence can have little or no weight in determining the relative value of the lots and the reasonableness of the initial unit allocation at the time of the strata plan was registered.

66 Further, the sales evidence provided to the Tribunal at first instance for each lot does little more than establish the following:

(1) Lots 1 and 2 are substantially smaller than lot 3, and, in 2004 were of similar value. However, the sales data is 3 months apart and some months after the strata scheme was registered.

(2) Lot 3 is substantially larger than either of the other two lots and, in April 2004 was sold for $1.75 million, approximately 25% more than Lot 1 sold in February 2004 and 40% more than Lot 2 sold in May 2004.

(3) Each of the lots have had multiple owners, there apparently being no challenge to the initial unit allocation for more than 13 years since the strata scheme was registered.

67 There is no evidence of value of the Lots in November 2003. On the other hand there is evidence that Lot 3 was of substantially greater value than the other two lots, a matter justifying a relatively higher unit allocation. There is also evidence to suggest Lots 1 and 2 were of similar value although the relative position being difficult to discern in the absence of proper opinion from a valuer. Certainly it could not be said on the material before the Tribunal at first instance that allocating those lots equal units was unreasonable (the appellant in his own case suggesting the relative difference between the two lots was only 1 in 100 of the total units.

68 The Tribunal explained why it rejected the evidence. The appellant, at least implicitly, appears to accept on appeal that the evidence of the valuer was not sufficient. The approach taken by the Tribunal does not demonstrate any legal error in the manner in which the Tribunal determined the application.

69 The appellant did not seek leave to appeal. However, even if leave had been sought, an analysis of the evidence does not reveal any relevant error for which leave to appeal should be granted.

70 Finally, the appellant made submissions to the effect that the issue was one of fairness and that fact the Tribunal had come to a decision that was unjust, based on a technicality.

71 As made clear in various decisions of the Tribunal, the Tribunal is obliged to determine proceedings according to law and on the basis of evidence provided, even though the rules of evidence do not apply: see eg Fairey Australasia Pty Ltd v Joyce [1981] 2 NSWLR 314 at 321 and Hope JA in State Rail Authority v Consumer Claims Tribunal and others (1988) 14 NSWLR 474 at page 477, applied in *AFJ Software Pty Ltd v Wine Nomad Pty Ltd* [2015] NSWCATAP 226. Having regard to the facts to which we have referred, we are not satisfied there is any relevant injustice in the decision of the Tribunal which would justify us setting aside the decision.

72 It follows that the appellant has not established this ground of appeal.

Orders

73 The appellant has been unsuccessful in establishing his grounds of appeal. Accordingly, the Appeal Panel makes the following order:

(1) The appeal is dismissed.

****

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

Principal Registrar

****

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