Civil and Administrative Tribunal

New South Wales

Case Name:	Cahn v The Owners – Strata Plan No 586
Medium Neutral Citation:	[2018] NSWCATAP 234
Hearing Date(s):	4 September 2018
Date of Orders:	9 October 2018
Decision Date:	9 October 2018
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member R Seiden SC, Principal Member
Decision:	(1) Leave to appeal is refused and the appeal is dismissed. (2) No order for costs.
Catchwords:	STRATA SCHEMES MANAGEMENT ACT – order for removal of dog – assistance animal within the meaning of the Disability Discrimination Act, 1992 (Cth) – whether concession made that dog was not an assistance animal – competing evidence concerning conduct and management of dog – relevance of subsequent evidence regarding proposed training
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) The Constitution (Cth) Disability Discrimination Act, 1992 (Cth) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act, 2015 (NSW) Strata Schemes Management Regulation, 1997 (NSW) Strata Schemes Management Regulation, 2016 (NSW) Supreme Court Act, 1970 (NSW)
Cases Cited:	Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns [2018]

	HCA 15 Burns v Corbett; Gaynor v Burns [2017] NSWCA 3 Coleman v Power (2004) 220 CLR 1; [2004] HCA 39 Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 Collins v Urban [2014] NSWCATAP 17 Johnson v Dibbin; Gatsby v Gatsby [2018] NSWCATAP 45 Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6 Small v K & R Fabrications (W'gong) Pty Ltd [2016] NSWCA 70 Suttor v Gundowda (1950) 81 CLR 418; [1950] HCA 35 White v Betalli (2006) 66 NSWLR 690; [2006] NSWSC 537 Zistis v Zistis [2018] NSWSC 722
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Appellant: Tracy Cahn Respondent: The Owners – Strata Plan 586
Representation:	Appellant: In person Respondent: J Crittenden (Solicitor) Solicitors: Appellant: Not applicable Respondent: Jane Crittenden, Lawyer
File Number(s):	AP 18/49092
Publication Restriction:	The solicitor for the respondent is not to publish or disclose the contents of MFI 1 or MFI 2 to the respondent or any other person without an order of the Tribunal.
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	19 October 2017

Before:	A Bell SC, Senior Member
File Number(s):	SC 17/30766

REASONS FOR DECISION

Introduction

1 On 19 October 2017, the Tribunal ordered the appellant to remove her dog named Lola (a silky terrier) from her lot (lot 3) and common property in the strata scheme known as Strata Plan 586, located at Rose Bay. The Tribunal published reasons for decision (Reasons).

2 Those proceedings in which the order for removal of the dog was made was application SC 17/30766 (Original Application). The applicant was the Owners Corporation of the strata scheme, the respondent to the appeal (Owners Corporation).

3 In making an order for removal of the dog, the Tribunal made the following findings:

(1) The Owners Corporation had adopted model bylaws contained in schedule 2 of the *Strata Schemes Management Regulation, 2016 (NSW)* (2016 Regulation) which prevented a lot owner from keeping an animal on common property without the written approval of the Owners Corporation, which approval could not be unreasonably withheld: Reasons at [7]-[8].

(2) The appellant made an application to the Owners Corporation to keep Lola in her lot. That application was made after the original proceedings were commenced. That application was refused by the Strata Committee of the Owners Corporation because:

(a) Lola is allowed to roam on common property unleashed;

(b) Lola causes a nuisance to the other occupants by regularly barking within Lot 3 and on common property at all hours of the day and night; and

(c) the appellant failed to clean up after Lola defecates on the common property.

Reasons at [16].

(3) Following refusal of consent by the Owners Corporation, no application was made by the appellant to the Tribunal in respect of the decision to refuse permission to keep Lola on the premises: Reasons at [9].

(4) The appellant had “clarified in her evidence that [Lola] is not an assistance animal” within the meaning of the *Disability Discrimination Act, 1992 (Cth)* (DD Act): Reasons at [13].

(5) Lola was causing a nuisance and disturbance in that it roams on common property unleashed, barks loudly and there was a failure of the appellant to always clean up after the dog when it defecates on common property. These facts together with the failure of the appellant to remove the dog on earlier requests of the Owners Corporation made it appropriate for the Tribunal to make an order for removal of the dog: Reasons at [21]-[23]. Consequently, the Tribunal concluded the Owners Corporation acted reasonably in refusing consent: Reasons at [17].

(6) The bylaw requiring consent was not otherwise harsh, unconscionable or oppressive: Reasons at [20].

Notice of Appeal and history of appeal proceedings

4 The appellant filed a Notice of Appeal dated 14 November 2017. She also filed an application for a stay of the order to remove Lola, which was granted on 17 November 2017.

5 The hearing of the appeal has been adjourned on several occasions. This was because the Appeal Panel was concerned there may be a question about whether the Tribunal had jurisdiction to hear and determine these proceedings insofar as they raised a federal matter within the meaning of the Constitution (Cth), the question being whether Lola was an assistance animal within the meaning of the DD Act.

6 Subsequently following the publication of a decision of the Appeal Panel in *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45 (*Johnson v Dibbin*), the Owners Corporation applied for the proceedings to be fixed for hearing. In that decision, the Appeal Panel determined that the Tribunal was a court of a State within the meaning of the Constitution. As such, insofar as proceedings before it raised a federal matter, the Tribunal had jurisdiction to determine such a claim.

7 The decision in *Johnson v Dibbin* is presently the subject of an appeal to the Court of Appeal of the Supreme Court of New South Wales. That appeal was heard by the Court of Appeal earlier this year and the decision remains reserved.

8 Even though the appeal to the Court of Appeal in *Johnson v Dibbin* remained unresolved, on 22 June 2018 the Appeal Panel determined that the present appeal should be fixed for hearing and made orders to this effect. Reasons for this decision were provided. In relation to those reasons we note:

(1) the appellant failed to appear on the application to list this appeal for hearing; and

(2) in any event, the Owners Corporation said no jurisdictional issue could arise having regard to the provisions of the *Strata Schemes Management Act, 2015 (NSW)* (2015 Management Act) and the fact that Lola is not an assistance animal within the meaning of the DD Act, a matter to which we will return below.

9 At the commencement of the hearing of this appeal, the Appeal Panel noted that the Supreme Court of New South Wales had, in the meantime, published a decision concerning the jurisdiction of the Tribunal in *Zistis v Zistis* [2018] NSWSC 722 (*Zistis*). In that decision Latham J concluded that the Tribunal was not a court of a State within the meaning of the Constitution and therefore the Tribunal had no jurisdiction to determine a federal matter.

10 For the purpose of this appeal, both parties accepted that the decision in *Johnson v Dibbin* was correctly decided and should be followed.

11 We should briefly deal with this agreement.

12 The decision in *Johnson v Dibbin* was made by an Appeal Panel constituted by the President, a judge of the Supreme Court of New South Wales, Deputy President Boland, an acting Judge of the District Court of New South Wales and Dr Renwick SC. The decision in *Zistis* was by a single judge in the Supreme Court of New South Wales.

13 As neither party suggested we were bound as a matter of precedent to follow *Zistis*, we propose to accept the concession and follow the decision in *Johnson v Dibbin*, notwithstanding the contrary view taken by Latham J in *Zistis*. In doing so we should note that the principles of stare decisis and precedent found in the common law do not easily fit an appellate structure where:

(1) a decision of the Appeal Panel when constituted by the President or other judge is to the Court of Appeal of the Supreme Court of New South Wales: see s 48 of the *Supreme Court Act, 1970 (NSW)* (SC Act); and

(2) a decision of an Appeal Panel when constituted by Members other than a judge is to a single judge of the Supreme Court of New South Wales: see s 49 of the SC Act.

14 Each of *Johnson v Dibbin* and *Zistis* might be considered decisions standing above us, at equal level to each other, and in the same hierarchy: each is a decision of a judge or judges which is appealable to the Court of Appeal. Notwithstanding that an appeal from the Appeal Panel not constituted by a judge, does not lie to an Appeal Panel constituted by a judge, the structure of the Tribunal includes the President, a judge of the Supreme Court, at its apex. Accordingly, *Johnson v Dibbin* and *Zistis* are each a decision that might be said to bind the Appeal Panel, as presently constituted, for this appeal.

15 Neither party has suggested we need to decide the issue of which decision, if either, we were bound to follow. Rather, both parties accept we should follow *Johnson v Dibbin*, the conflict having been drawn to their attention.

16 In *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39, McHugh J said at [79]:

> In my view – in constitutional and public law cases as well as private law cases – parties can concede issues even though the issue is a legal issue. The only power with which this Court is invested is judicial power together with such power as is necessary or incidental to the exercise of judicial power in a particular case. The essence of judicial power is the determination of disputes between parties. If parties do not wish to dispute a particular issue, that is their business. This Court has no business in determining issues upon which the parties agree. It is no answer to that proposition to say that this Court has a duty to lay down the law for Australia. Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue. If the conceded issue is a necessary element of the decision, it creates an issue estoppel that forever binds the parties. But that is all. The case can have no wider ratio decidendi than what was in issue in the case. Its precedent effect is limited to the issues.

17 A similar approach was taken by the High Court in *Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns* [2018] HCA 15 and in the Court of Appeal in *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 in respect of concessions made.

18 In these circumstances, it is unnecessary to decide the question of whether the common law doctrine of precedent would compel us to follow *Zistis* and/or whether that doctrine is otherwise altered in its application to decisions of the Tribunal when sitting as an Appeal Panel constituted by a judge. Rather, where

there is no obvious principle that would require us to follow *Zistis*, we should accept the parties' mutual concession.

19 Lastly, it is doubtful this issue arises in this case in any event. This is because it is arguable that the only issue that was raised in the original proceedings was whether Lola was, in fact, an assistance animal, not whether there had been a contravention of the DD Act or whether there was a defence to any claim for discrimination under the DD Act. In this regard, the Owners Corporation conceded in the appeal that bylaw 16, breach of which was said to give rise to the entitlement for an order to remove Lola, did not operate in the case of an assistance animal: see s 139(5) of the 2015 Management Act and *White v Betalli* (2006) 66 NSWLR 690; [2006] NSWSC 537 (*White v Betalli)* at [52] and following. Accordingly, it may be said that no federal matter arose to which the provisions of the Constitution might apply to otherwise deprive the Tribunal of jurisdiction to resolve disputes concerning the keeping of animals in contravention of bylaws made under the 2015 Management Act.

20 Consequently, we will proceed on the basis of the agreed position.

21 At the hearing of the appeal, the appellant handed up two documents. One was a report said to be from a psychologist and the other was a report from a doctor concerning the daughter of the appellant. These documents became MFI 1 and MFI 2 in the appeal. The solicitor for the Owners Corporation sought access to these documents. The appellant objected. Access was granted to the solicitor for the Owners Corporation but the Appeal Panel made a suppression order in the following terms:

> The solicitor for the respondent is not to publish or disclose the contents of MFI 1 or MFI 2 to the respondent or any other person without an order of the Tribunal.

22 Copies of the documents were provided to the solicitor for the Owners Corporation. Ultimately, the appellant withdrew the tender of MFI 1 and the copy provided to the solicitor for the Owners Corporation was returned to the appellant. MFI 2 was relied upon by the appellant, a matter to which we will return below. In the circumstances we should formally record the order preventing publication.

23 There is one final preliminary matter, before we turn to this Appeal. Shortly after the commencement of the Appeal, the appellant mentioned that her solicitor was travelling. The Appeal Panel inquired whether she was applying for an adjournment, but the appellant confirmed that she was not seeking an adjournment and wished to proceed.

24 The appellant's grounds of appeal and submissions can be summarised as follows:

(1) Lola is an assistance animal within the meaning of the DD Act, providing assistance to her daughter who has an anxiety disorder. As such, the bylaws could not operate to require removal of the animal.

(2) The Tribunal was in error in its reference to the particular bylaw number concerning the keeping of animals. In any event, insofar as the model bylaws under schedule 3 of the 2016 Regulation were adopted by the Owners Corporation in substitution for the bylaws in schedule 1 of the *Strata Schemes Management Regulation, 1997 (NSW*, the resolution to adopt bylaw 5 – Option B in respect to the keeping of animals was not passed until after the Original Application was made by the Owners Corporation to the Tribunal.

25 In making this submission, the appellant does not set out what bylaw was previously applicable to this strata scheme in respect of the keeping of animals. However, this strata plan was originally registered on 24 January 1964: see tab 3 page 10 of Owners Corporation's bundle). Consequently, it would seem from the operation of s 134(3) of the 2015 Management Act and reg 35 of the 2016 Regulation that, following commencement of the 2015 Management Act, the bylaws for this strata scheme are those contained in Schedule 2 of the 2016 Regulation, until they were amended by special resolution of the Owners Corporation.

26 Bylaw 16 in Sch 2 is in the following terms:

> **16 Keeping of animals**
>
> (1) Subject to section 157 of the Strata Schemes Management Act 2015, an owner or occupier of a lot must not, without the approval in writing of the owners corporation, keep any animal on the lot or the common property.
>
> (2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.
>
> Note. This by-law was previously by-law 27 in Schedule 1 to the Strata Schemes (Freehold Development) Act 1973 and by-law 28 in Schedule 3 to the Strata Schemes (Leasehold Development) Act 1986.

27 As the bylaws in Sch 2, bylaw 16 and Sch 3 bylaw 5 – Option B are relevantly the same concerning written approval and consent not being unreasonably withheld, nothing in this appeal turns on the point of when the bylaws might have been amended. In this regard, we also note the reference by the Tribunal to bylaw 16 of Sch 2 of the 2016 Regulation (which unlike bylaw 5 of Sch 3 makes reference to s 157 of the 2015 Management Act) indicates the Tribunal proceeded on the basis that the bylaws in Sch 2 applied to the application made by the Owners Corporation. This is consistent with the appellant's submissions about when the Sch 3 bylaws were adopted and consistent with the Owners Corporation's written submissions dated 20 August 2018: see para 18(a).

28 Consequently, in addition to the issue of procedural fairness, the only issues to resolve were:

(1) whether Lola was an assistance animal, it being conceded by the respondent that the bylaw does not operate if Lola is an assistance animal;

(2) whether the Tribunal was correct in its finding concerning the conduct of Lola and supervision of Lola by the appellant; and

(3) whether the bylaw was harsh, unconscionable or oppressive.

29 In relation to the evidentiary findings, the following written and oral submissions were made by the appellant:

(1) The appellant did not have legal representation and the fact that she did not provide a statutory declaration was not a basis to reject her evidence and rely solely on the evidence provided by the Owners Corporation and its witnesses. She was not given "sufficient time or place to address certain issues". In oral submissions, the appellant indicated she did not press any issue of bias.

(2) The Tribunal erroneously found the appellant had ignored a letter stating she was to remove the animal "that was not in existence".

(3) Contrary to the conclusion at [15] of the Reasons, the appellant did not assault Mr Skurnik, a matter that had been subject of court proceedings which had been dismissed for lack of evidence. Further the appellant said she was not given sufficient opportunity to explain the situation and the outcome of that court case. In this regard the appellant said:

> I admitted to a police matter only - and nothing else. I never admitted to screaming profanities. I never admitted to strike him with an umbrella as he states.

The reasons of the Tribunal do not suggest any regard was had by the Tribunal to any personal disputation or physical conflict between the appellant and the Owners Corporations' witness, Mr Skurnik. No submissions have been made by the Owners Corporation suggesting it was a relevant matter in connection with the keeping of the dog. As such it is unnecessary to consider this aspect further.

(4) The appellant challenges the findings that Lola was unleashed, allowed to roam, caused a nuisance and defecated on common property. In respect of the issue of defecation, the appellant refers to photographs she says were in evidence before the Tribunal. In addition, the appellant says that a review of the Reasons and what was said at the hearing indicates that the Tribunal incorrectly had regard to the conduct of other dogs, not Lola, in reaching its findings of fact. One of those dogs included a dog belonging to the mother of the appellant, which is now deceased. The appellant explained in submissions that her mother's dog called Emily had died in about August 2015 (grounds of appeal paragraph 2.6) and that she had not acquired Lola until after this time, about 18 months to two years before the Original Application was heard. Therefore, particular evidence concerning various dogs in 2013 and 2016 referred to in Annexure A, B, C and D of the affidavit of Dr Harris could not have related to the conduct of Lola. Only those referred to in Annexures E and F related to Lola.

(5) In relation to whether the bylaw is harsh, unconscionable or oppressive, the appellant said the "new Strata laws provide that it is not unreasonable to keep an animal under 5kg on the property. The onus is on the Owners Corporation to exclude the animal. I believe their reasoning is both incorrect and unreasonable". In this regard the appellant refers to a "protocol" apparently provided by Woollahra Council in respect of when an animal constitutes a nuisance.

30 We note in making submissions concerning whether Lola was an assistance animal, the appellant relied upon a statement from Tertia Harry dated 15 November 2017. As is evident from the date, this statement was not in evidence before the Tribunal in the hearing at first instance. Consequently, leave will be required to rely on the document. In that document, the author describes herself as "Dog Fitness Trainer and Dog Obedience Trainer and the Owner of Xama Queen". That document says:

> This letter hereby states to confirm that Tracy Cahn will be booking her lovely dog Lola into Professional Dog Training for Obedience Training and Fitness Training to hopefully make her already well natured dog to be an even better dog so that she is suitable to be an assistance dog for her daughter Isabel Cahn.

I have met Lola personally and her temperament seems to be sound, however I do believe that with the right Fitness Training and Obedience Training, Lola will become suitable to be an assistance dog, one who is physically and mentally sound for it.

Our weekly training regime will consist of 9-10 hours of Holistic Dog Day Care including 3 hours of Physical Fitness comprising in a mix of Basic foundation round work principles and commands, Agility, and other Dog Fitness activities. With the other hours Lola is to be placed in various different situations, and exposed to different sounds, hopefully passing tests of these occurrences to make her a deemed suitable assistance dog.

…

31 In reply, the respondent provided written and oral submissions to the following effect:

(1) There was no denial of procedural fairness, the Tribunal having made procedural directions to allow the parties to provide relevant evidence and to attend the hearing, cross examine witnesses and make oral submissions, the appellant deciding not to cross examine the Owners Corporation's witnesses, Mr Skurnik and Dr Harris. Insofar as she was not legally represented, issues of leave were previously dealt with at a directions hearing on 9 August 2017 which the appellant failed to attend.

(2) There was no evidence that Lola was an assistance animal, the appellant herself giving "oral evidence that her dog was not an assistance animal": see Owners Corporation's written submissions dated 20 August 2018 at para 13(a). In these circumstances it was not open to the Tribunal to conclude the dog was an assistance animal.

(3) In relation to the appellant's application for consent of the Owners Corporation to keep the dog, the Owners Corporation says that its application was filed on 30 August 2017, any application for consent being made after that date, in September 2017.

(4) As to the challenges made by the appellant on a number of findings of fact, the Owners Corporation said that leave had not been sought and, in any event, should not be granted as the requirements of Sch 4 cl 12 of the *Civil and Administrative Tribunal Act, 2013 (NSW)* (NCAT Act) have not been satisfied.

32 In oral submissions, the solicitor for the Owners Corporation accepted that the bylaw would not operate to exclude Lola if she was an assistance animal. However, the Owners Corporation submitted there was no evidence of this fact. The Owners Corporation also submitted that the resolution of this factual question did not give rise to a federal matter.

33 In relation to the new evidence from Tertia Harry, the Owners Corporation said that in so far as the Appeal Panel might now conclude this evidence establishes that Lola is being trained to be an assistance dog, this evidence at

best establishes the dog was not appropriately trained as an assistance dog at the time of the original hearing. In so far as it might become an assistance dog within the meaning of the DD Act, this is not a reason to set aside the orders previously made by the Tribunal and remit the proceedings. Rather, to the extent necessary, fresh proceedings should be commenced.

34 Further, the solicitor for the Owners Corporation also made reference to the decision of White J in *White v Betalli*. In that case, when considering s 49(1) of the *Strata Schemes Management Act, 1996* (NSW) (1996 Management Act), a section similar to s 139(2) of the 2015 Management Act, his Honour said at [53] that a bylaw was not invalidated by that section, but rather its operation is limited in the circumstances prescribed.

35 As set out above, the respondent conceded that the bylaw did not operate in respect of an assistance animal within the meaning of the DD Act and, consistent with *White v Betalli*, the bylaw was not invalid. Rather its operation limited.

36 In relation to MFI 2, the only MFI finally relied upon by the appellant as new evidence, the Owners Corporation submitted this evidence should not be permitted as this type of evidence should have been produced at the original hearing and the Owners Corporation was not otherwise able to cross-examine the witness. The Owners Corporation relied on decisions of the High Court such as *Suttor v Gundowda* (1950) 81 CLR 418; [1950] HCA 35.

Consideration

37 There is a right of appeal on a question of law. Otherwise leave to appeal is required, such leave only to be granted by the Appeal Panel if the appellant may have suffered a substantial miscarriage of justice: see s 80(2)(b) and Sch 4 cl 12 of the NCAT Act. *Collins v Urban* [2014] NSWCATAP 17 sets out the principles applicable to the grant of leave.

38 Insofar as the proceedings at first instance and this appeal raise a federal matter, we are satisfied the Tribunal has jurisdiction having regard to the parties agreement that we should follow the decision in *Johnson v Dibbin*. There the Appeal Panel concluded that the Tribunal is a court of a State within

the meaning of the Constitution. Consequently, it is unnecessary to decide whether the question of whether Lola is an assistance animal is:

(1) a federal matter within the meaning of the Constitution; or instead,

(2) raises a question of fact to be determined under the 2015 Management Act for the purpose of deciding whether s 139(5) of the 2015 Management Act might otherwise prevent Lola being kept on Lot 3 without consent of the Owners Corporation.

39 Rather, the only questions to be resolved are:

(1) whether the Tribunal denied the appellant procedural fairness;

(2) whether the Tribunal erroneously concluded the appellant conceded Lola was not an assistance animal and/or erred in proceeding to deal with the matter on the basis that Lola was not an assistance animal;

(3) whether the Tribunal was in error in its findings of fact concerning the conduct of Lola and the appellant in her management of Lola when on common property; and

(4) whether the bylaw is harsh, unconscionable or oppressive.

40 Insofar as the Notice of Appeal does not seek leave because the form is not appropriately completed, in our view the unrepresented appellant has raised issues for which leave is required, the Owners Corporation has replied to these claims and we should deal with all issues raised without undue regard to technicalities and forms: see s 38(4) of the NCAT Act.

41 We will deal with each of these in turn.

Whether the Tribunal denied the appellant procedural fairness

42 We are not satisfied that there had been any relevant denial of procedural fairness.

43 In this regard:

(1) Directions were made by the Tribunal to allow the appellant to provide whatever evidence she wished in response to the Owners Corporation's application for an order that the dog be removed from the strata scheme. As is evident from a review of the sound recording, the appellant was afforded an opportunity to make submissions and provide evidence concerning the facts in dispute.

(2) While the Owners Corporation did not challenge the appellant's assertion that the appellant was not sworn as a witness, the sound recording reveals she was sworn as a witness.

(3) No findings were made by the Tribunal in connection with the assertion that any evidence given by the appellant may not have been in the form of a sworn statement. However, the Tribunal was not bound by the rules of evidence in determining this claim: see s 38(2) of the NCAT Act.

(4) There is no suggestion in the Reasons that the Tribunal did not have regard to the evidence of the appellant. Rather, the Tribunal preferred the evidence of the witnesses of the Owners Corporation.

(5) The appellant does not deny she was given an opportunity to cross-examine the Owners Corporation's witnesses.

44 In these circumstances, the challenge to the decision based on a denial of procedural fairness must fail.

Whether the Tribunal erroneously concluded the appellant conceded Lola was not an assistance animal and/or erred in proceeding to deal with the matter on the basis that Lola was not an assistance animal

45 The Tribunal said at [13] of its Reasons:

> Ms Cahn said that the first dog which had been owned by her mother was registered as an assistance animal (within the meaning of the Disability Discrimination Act 1992) but clarified in her evidence that the silky terrier is not an assistance animal.

46 The appellant said no concession was made to the effect that Lola was not an assistance animal. The Owners Corporation said she had made such a concession. The Reasons do not record a specific concession and, for the reasons that follow, it is unnecessary to finally resolve this matter although we will briefly deal with what was said.

47 In particular, we should note the evidence about what occurred at the hearing in this regard.

48 The passage of the transcript to which the Owners Corporation refers is found at tab 7 page 6 of the Owners Corporation's bundle. There the transcript records:

> Member: So just to make it clear about this, you make the point that there were two separate dogs.
>
> Ms Cahn: Correct.
>
> Member: The first dog.
>
> Ms Cahn: Was my mother's dog.
>
> Member: Was a registered disability dog.
>
> Ms Cahn: That's right.

Member: Which is now dead?

Ms Cahn: Yes.

Member: Now, is that the dog you are referring to as an assistant dog to your mother?

Ms Cahn: Yes.

Member: Not the current dog?

Ms Cahn: Not the current dog, no. It was the previous dog.

Member: Ok, Thanks.

Ms Cahn: The previous dog is not an assistance dog but if necessary I will have to get that for my daughter because she has a problem living in the same block of units as these men and she's continually harassed since she was 5 years old. And she doesn't feel safe and neither do I. And also in terms of money and time I can't, you know, I can't see why they want to spend so much money when, you know, in all decency they could be actually decent to me and ask me. If there were so many complaints why didn't any of those complaints reach me? Where are they? Where are the letters? Why has Woollahra Council not received any of those complaints? That's why I just believe very strongly that what they're attempting to do is very oppressive and very harsh and very unfair.

Member: Yes.

Ms Cahn: And that's pretty much it.

49 The second last answer, namely "I will have to get that for my daughter as she has a problem living in [this unit]", when considered in the context of her earlier answers concerning her mother's dog Emily being an assistance animal, leads us to the conclusion Lola was not, at that time, a registered or accredited assistance animal within the meaning of s 9(2) of the DD Act and nor was the appellant making such an assertion. Further, the appellant was not there making a positive assertion that Lola was otherwise trained as an assistance animal within the meaning of s 9(2) of the DD Act.

50 Finally, we note an exchange with Mr Prestipino, solicitor for the Owners Corporation in the hearing at first instance, concerning a submission by Mr Prestipino that there was no evidence that either Lola or Emily were assistance dogs. The Member said at tscp 11:

> Well, I think that became clear from what [the appellant] was saying, that it was the previous dog, which she says, was a disability animal, not the current one.

51 While the hearing concluded shortly after this statement was made by the Member, the appellant did not then seek to challenge this summary of what the appellant was claiming.

52 Irrespective of whether there was, at first instance, a concession that Lola was not an assistance animal in the full sense of that expression under the DD Act, or simply a concession that Lola was not registered or accredited as an assistance animal, is overtaken by the new evidence of Tertia Harry supplied by the appellant, which we have set out above. This evidence leads us to the view that Lola is not yet trained as an assistance animal: in particular where the letter says that the training proposed is "so that [Lola] is suitable to be an assistance animal" for the appellant's daughter and that "Lola will become suitable to be an assistance dog, one who is physically and mentally sound for it". These expressions, referring to a future outcome following training, and the content of Ms Harry's evidence when considered as a whole, lead us to conclude that Lola was not, as at 15 November 2017 (being after the date of the hearing at first instance), then trained as an assistance animal.

53 Section 9(2) of the DD Act defines an assistance animal as follows:

> (2) For the purposes of this Act, an ***assistance animal*** is a dog or other animal:
>
> > (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons with a disability to alleviate the effect of the disability; or
> >
> > (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
> >
> > (c) trained:
> >
> > > (i) to assist a person with a disability to alleviate the effect of the disability; and
> > >
> > > (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

54 No suggestion was made in the appeal that Lola was accredited under the law of a State nor that Lola was accredited by an animal training organisation prescribed by the regulations.

55 As to whether Lola had been otherwise "trained to assist a person with a disability" at the time of the hearing of the proceedings at first instance, the evidence to which we have referred above does not support such a conclusion.

56 It follows that, even if a concession was not made by the appellant, the evidence does not establish Lola is an assistance animal within the meaning of the DD Act. Consequently, the bylaw operates and, in the absence of consent of the Owners Corporation, the appellant was not entitled to keep Lola on her lot or on common property in the strata scheme.

57 Accordingly, we are not satisfied any relevant error has been established; and to the extent leave to appeal is necessary, it is not warranted (Sch 4 cl 12 NCAT Act).

Whether the Tribunal was in error in its findings of fact concerning the conduct of Lola and the appellant in her management of Lola when on common property

58 We have listened to the whole of the sound recording of the proceedings at first instance.

59 The sound recording shows that neither party cross-examined the other party's witnesses concerning the evidence given. The evidence was in conflict on the issue concerning the conduct of Lola and the management of Lola by the appellant. The Tribunal was required to evaluate competing versions of events.

60 In relation to the evidence of the Owners Corporation's witnesses, Dr Harris and Mr Skurnik, there was a lack of precision concerning their evidence, and whether they were referring to Lola or Emily. However, the evidence which was provided by these witnesses was consistent with the conclusions reached by the Tribunal.

61 For example, in the case of Dr Harris, he gave evidence in his affidavit affirmed on 30 August 2017 that there were 2 dogs (at para 6), the appellant having kept dogs on the premises "nearly [the] entire time" for more than 5 years (at para 5). Lola, which Dr Harris described as "the dog currently being kept within Lot 3", had been there "for approximately one or 2 years now" (para 6). Dr Harris made observations of that dog being allowed to run around "unleashed on common property, including in the enclosed full area", barking all hours and defecating or urinating on common property areas including in the garden and in the pool area – the appellant not always cleaning up afterwards (para 10 and 11).

62 On the other hand, the appellant said that Lola is not at the premises during the day, does not bark in a manner that might otherwise be described as creating a nuisance and that she always cleans up after Lola when she is on common property.

63 In relation to occasions on which Dr Harris said she had used inappropriate language when asked to remove her dog, the appellant said she did not remember this occasion. Similarly, she said she did not recall receiving any notice from the Owners Corporation concerning removal of dogs. However, there was evidence before the Tribunal of such communications being a letter from the strata managing agent to the appellant dated 30 July 2015 advising permission had not been sought or given by the Owners Corporation for the keeping of a dog and requesting it be removed (see tab 3 of the Owners Corporation's bundle provided in the proceedings at first instance).

64 While there was some confusion about which dog was being referred to by the witnesses for the Owners Corporation, and some time was spent during the original hearing trying to identify whether statements made were in respect of Emily or Lola, the Tribunal clearly accepted the version of events provided by Dr Harris and Mr Skurnik in preference to the evidence of the appellant. Implicitly, the Tribunal accepted the evidence that Lola (and previously Emily) was allowed to roam on common property unleashed, cause frequent nuisance by barking within Lot 3 and on common property at all hours of the night and day and that the appellant failed to clean up after the dog when it defecates on the common property. The Tribunal also accepted that the appellant had failed to remove Emily when requested to do so in 2015 and, despite her assertion to the contrary or lack of memory, she had been given written notice of that request: Reasons at [14]-[21].

65 While submissions were made by the solicitor for the Owners Corporation at the proceedings at first instance that the appellant was not telling the truth, the Tribunal did not make such a finding. However, the Tribunal clearly preferred the evidence given by the Owners Corporation's witnesses, including evidence about how the appellant had managed Emily at an earlier point in time: Reasons at [22].

66 The appellant had submitted in the proceedings at first instance that she has in some way been targeted by the Owners Corporation or the strata committee. The appellant also submitted that the photographic material which she had produced was indicative of Lola not acting in the manner asserted, particularly in relation to defecating on common property. She also said that her evidence should be preferred to that of the two witnesses provided by the Owners Corporation.

67 In circumstances where the evidence was in conflict, the Tribunal was entitled to prefer the evidence of the Owners Corporation's two witnesses, which were generally consistent with each other, to that of the evidence of the appellant. This preference is supported by the Tribunal's finding that certain evidence of the appellant should not be accepted, namely her assertion she had not been given notice to remove Emily from the premises. While the Tribunal has not spelt out by close analysis of all evidence as to why preference was given to the evidence of the Owners Corporation's witnesses, the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6 where the High Court approved the statement in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287. In this regard we note the principle is applicable to review on appeal in respect of a trial judge's reasoning as well as administrative decisions: *Small v K & R Fabrications (W'gong) Pty Ltd* [2016] NSWCA 70 per Basten JA at [54] (McColl JA and Simpson JA agreeing). It follows that no relevant error is established.

68 Finally, the Tribunal made no findings concerning the failure to cross-examine, nor was the appellant criticised in any way for the fact she had not provided a written statement in the form of a statutory declaration or affidavit. This is hardly surprising having regard to the fact that neither party cross-examined the other party's witnesses and the appellant, in fact, gave sworn evidence at the hearing, the Tribunal administering an oath to the appellant prior to her presenting her position. Consequently, there is no basis to criticise the approach taken by the Tribunal in respect of these matters.

69 In these circumstances, it could not be said “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” and we are not satisfied the appellant may have suffered a substantial miscarriage of justice in all the circumstances.

70 Further, we are not satisfied that MFI 2 raises any “new” evidence in the sense that it (or evidence akin to it), was not reasonably available at the time of the Original Application and therefore is rejected: Sch 4 cl 12 (1)(c) of the NCAT Act.

71 Accordingly, leave to appeal is not granted: Sch 4 cl 12 NCAT Act.

Whether the bylaw is harsh, unconscionable or oppressive

72 During the original hearing, the appellant’s submissions concerning bias, oppression and harshness appeared to relate to her assertion she had been inappropriately targeted.

73 However, a challenge to a bylaw under s 150(1) requires a party to establish “that the by-law is harsh, unconscionable or oppressive” not that the lot owners, owners corporation or strata committee have acted in a manner which is harsh, unconscionable or oppressive. As such, the conduct to which the appellant refers is not relevant to determining whether the bylaw is itself harsh, unconscionable or oppressive.

74 On appeal, in addition to repeating her submissions concerning the conduct of the strata committee members, the appellant made the following submission at para 2.9 of the submissions attached to her Notice of Appeal.

> The new strata laws provide that (it) is not unreasonable to keep an animal under 5kg on the property. The onus is on the Owners Corporation to exclude the animal. I believe their reasoning is both incorrect and unreasonable.

75 This misstates the effect of the legislation. Where consent is refused, an aggrieved person may make an application under s 157 of the 2015 Management Act for the Tribunal to make an order permitting the animal to be kept. Otherwise, for the purpose of the application made by the Owners Corporation under s 156 of the 2015 Management Act, the Tribunal was required to be satisfied that there had been a “contravention of the by-laws”.

Absent the bylaw not operating (for example by reason of s 139(5) of the 2015 Management Act), where no consent had been obtained and no order made under s 157 following the challenge to the refusal to allow the keeping of Lola, there was a contravention in fact.

76 While the exercise of discretion may involve a consideration of the conduct of the owner and the animal in determining whether or not an order should be made under s 156, and/or raise issues about who has the onus of proof in respect of such matters, it is unnecessary to decide these issues in the present case. This is because the Tribunal made findings concerning the conduct of Lola and her management by the appellant. These findings were adverse to the appellant and to the extent they are relevant, the discretion was exercised in favour of removal of Lola.

77 Finally, the appellant did not otherwise assert that the bylaw was generally harsh, unconscionable or oppressive and therefore liable to be revoked under s 150(1) of the 2015 Management Act because it purported to prevent any dog being kept. In any event, no application had been made by the appellant under that section to challenge the bylaw nor was it argued that the model bylaw in the 2016 Regulation is invalid as being contrary to the 2015 Management Act.

78 Accordingly, this ground of appeal fails and to the extent relevant leave to appeal should be refused.

Conclusion and Orders

79 We have reached the conclusion that leave to appeal should be refused and the appeal should be dismissed.

80 In doing so, we should not be taken as expressing a view as to whether Lola should be permitted to stay on the premises if it is established she has been subsequently trained or is to be trained as an assistance animal.

81 It would be hoped in the circumstances of this case that any subsequent request for approval to keep Lola might be referred to the Owners Corporation in General Meeting. While we are not suggesting the Strata Committee has in any way acted unreasonably, nor are we suggesting there is an obligation to do so, such an approach might minimise the possibility of any further disputation

and give the owners in general meeting a chance to express their views about the keeping of animals.

82 Finally, in relation to any subsequent authorisation that might be granted, we note that this order would ordinarily cease to have effect: see s 156(2) of the 2015 Management Act.

83 In relation to the question of costs, our prima facie view is that there are no special circumstances that would warrant the making of an order for costs. While the views expressed by the parties are somewhat polarised, our initial view is that these proceedings could not be regarded as being out of the ordinary.

84 If either party has a different view, an application can be lodged within 7 days from the date our decision is published, such application to be supported by any relevant evidence and submissions.

85 Otherwise, we make the following orders:

(1) Leave to appeal is refused and the appeal is dismissed.

(2) No order for costs.

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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

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