Civil and Administrative Tribunal

New South Wales

Case Name:	Guo v The Owners Strata Plan No 70067
Medium Neutral Citation:	[2018] NSWCATAP 260
Hearing Date(s):	21 August 2018
Date of Orders:	2 November 2018
Decision Date:	2 November 2018
Jurisdiction:	Appeal Panel
Before:	Prof I Bailey AM SC, Senior Member G Sarginson, Senior Member
Decision:	In AP 18/25774 1. To the extent necessary leave to appeal is refused. 2. Appeal dismissed. In AP 18/34399 3. Leave to Appeal refused 4. Appeal dismissed 5. Application for Stay refused In both Appeals 6 Any application for costs of the appeal along with submissions and documentation to be filed in the Tribunal and served on or before 14 days from the date of this decision. 7. Any reply to the costs application including submissions and documentation to be filed in the Tribunal and served on or before 14 days thereafter. The submissions are to address whether the decision on costs may be made on the papers.
Catchwords:	APPEAL – Strata Schemes – Appellant sought declarations as to s 104 of the Strata Schemes Management Act - power of Tribunal

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 2015
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 EB 9 & 10 Pty Ltd v The Owners SP 934 [2018] NSWSC 464 Walsh v The Owners SP No 10349 [2017] NSWCATP 230
Category:	Principal judgment
Parties:	Zhi Jun Guo, (Appellant) The Owners –Strata Plan 70067, (Respondent)
Representation:	Solicitors: Appellant self-represented Sachs Gerace Broome (Respondent)
File Number(s):	AP 18/25774 and AP 18/34399
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Before:	Senior Member L Wilson
File Number(s):	SC 18/01482

REASONS FOR DECISION

1 These unnecessarily complicated internal appeals concern an appeal, AP 18/25774 from a decision of the Tribunal, in proceedings SC 18/01482, dated 11 May 2018, that the Application be dismissed because the Tribunal did not have power to make the declarations sought by the Applicant, and an appeal in AP 18/34399 from a decision of the Tribunal, dated 18 July 2018, that the Applicant pay the Respondent's costs of the proceedings SC 18/01482.

2 The main issue involved in AP 18/25774 is whether the Tribunal has the power to grant relief in the form of declarations under the provisions of the *Strata Schemes Management Act 2015* ('the SSMA') and whether the Appeal Panel should depart from the principles enunciated by the Appeal Panel in *Walsh v The Owners SP No 10349* [2017] NSWCATAP 230 ('*Walsh*').

3 The issues involved in the costs appeal, AP 18/34399, to a considerable degree depend upon the conclusion of the Appeal Panel in the substantive appeal proceedings, AP 18/25774.

4 The Appeal Panel will also address the application by the Appellant for a stay of the Orders made on 18 July 2018.

Background

5 On 1 December 2016 the Applicant, Mr Guo, filed an application in proceedings SC 16/52603 (the 2016 proceedings) seeking orders against the Respondent under s 62 (repairs to common property) and s 162 (the appointment of a strata managing agent) of the *Strata Schemes Management Act* 1996 (the 1996 Act). In November 2016 the 1996 Act was replaced by the *Strata Schemes Management Act* 2015 (the SSMA). The application having been made after the SSMA came into operation was dealt with by the Tribunal under the provisions of the SSMA sections 106, 232, 237(1(c) and 240.

6 On 20 April 2017 the Tribunal, in the 2016 proceedings made Orders (the 2017 Decision):

> 1. Pursuant to Strata Schemes Management Act 2015, section 237, Premier Strata Management Pty Ltd, of 6/175 Briens Road Northmead 2124 be appointed the strata managing agent for Owners Corporation SP 70067 to exercise all of the functions of the Owners Corporation and may exercise all the functions of the Chairperson, secretary, treasurer and executive committee.
>
> 2. The appointment in order 1 is to be for a period of one (1) year commencing on 21 April 2017 and ending on 20 April 2018.
>
> 3. The appointed strata manager shall be remunerated by the Owners Corporation in accordance with the schedule of fees forming part of the correspondence from Strata Management Pty Ltd dated 30 March 2017, attaching form of strata management.
>
> 4, The application is otherwise dismissed.

7 The Appellant did not pursue an appeal from the 2017 decision.

8 On 10 January 2018 the Appellant commenced proceedings SC 18/01482 in which he sought two ‘orders’:

> 1. A declaration that, that for the purposes of s. 104 of the Act the applicant was successful in the 2016 proceedings.
>
> 2. A declaration that, for the purposes s. 104 of the Act the respondent applicant was unsuccessful in the 2016 proceedings.

9 Section 104 of the SSMA provides:

> **104 Restrictions on payment of expenses incurred in Tribunal proceedings**
>
> (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.
>
> (2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.
>
> (3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal.

10 On 11 May 2018 the Tribunal made Orders in proceedings SC 18/01482 (the 2018 Decision):

> 1. The application is dismissed because:
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> The Tribunal has no jurisdiction to determine the application.
>
> 2. By Consent, if either side wishes to apply for an award for costs in their favour, they shall provide to the other party and the Tribunal, either in person or by post, a copy of all documents (see note below), on which they rely by 04 June 2018.
>
> 3. By consent, if the other party wishes to have submissions taken into account opposing the costs orders, it shall provide to the other party and the Tribunal, either in person or by post, a copy of all documents (see note below), on which they rely by 25 June 2018.

11 In the course of the 2018 Decision the Tribunal noted the relief which the Appellant sought in the 2016 proceedings:

12 On page 1 of 11 of the attached submissions the applicant specifically sought an order that Whelan Property Group be appointed for 12 months to exercise the functions of the OC, in the alternative to that order an order that Whelan Property Group be appointed to exercise the functions of the OC necessary to carry out rectification of the common property, and in the alternative to both orders that the OC complete common property rectification by a set date.

13 The principal reason for the decision in Order 1 of the 2018 decision was that the Tribunal did not have jurisdiction was explained:

> I am not satisfied I have power to make the two declarations sought: *Walsh v The Owners SP No 10349* [2017] NSWCATAP 230 at [60].

14 The Appeal Panel in *Walsh v The Owners SP No 10349* [2017] NSWCATAP 230 ("Walsh") at [58] to [60] states;

> 58. The Tribunal is a body created by statute. It has no inherent power. Any power to make an order must come from the wording of the legislation: *Crawley v Cochrane* (Supreme Court (NSW), 14 October 1998, Cohen J, unrep) at 14. The kinds of orders the Tribunal may make under s 232 are not specified in that provision. Under s 240 of the SSM Act, "[T]he Tribunal may deal with an application for an order under a specified provision of this Act by making an order under a different provision of this Act if it considers it appropriate to do so". For example, if the Tribunal finds, in accordance with s 232(1)(e), that the owners corporation has breached any of the statutory duties imposed by s 106, the Tribunal may award damages to an owner for any reasonably foreseeable loss suffered by the owner as a result of the contravention: SSM Act, s 106(5). Part 6 ends by outlining the various kinds of orders the Tribunal may make about common property. Those orders include orders requiring the owners corporation to carry out work on common property: SSM Act, s 126.
>
> 59. Section 241 of the SSM Act empowers the Tribunal to make orders similar to mandatory and prohibitory injunctions:
>
> > The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.
>
> 60. A declaration has been defined as "a decision of a court or judge on a question of law": Mick Woodley ed, *Osborn's Concise Law Dictionary*, (11th ed 2009, Sweet & Maxwell). The Tribunal held that there is no provision for such relief in the SSM Act. That is not strictly correct. If the Tribunal makes an order under s 232, it may also "declare" that the order is to have effect as a decision of the owners corporation: SSM s 245(1)(e). But the Tribunal was correct to conclude that, unlike the general power to give injunctive relief, the Tribunal does not have a general power to give declaratory relief. If a finding needs to be made or a Tribunal needs to 'declare' that it is satisfied of a particular matter, it expresses those views in the body of the decision, rather than in a separate order. For example, in a particular case the Tribunal may conclude that the owners corporation has breached the duty in s 106 to maintain and repair common property. That conclusion is expressed in the reasons for decision rather than as a separate order. If the Tribunal decides to make an order for damages as a consequence of that breach, that conclusion would be expressed as an order.

15 The Tribunal made Findings on the issue of whether either party was "successful" or "unsuccessful" in the context referred to in s. 104 of the SSMA:

> The applicant sought five orders in the 2016 Proceedings. None of them were made by the Tribunal. The first three were argued, and the Tribunal declined to make the three orders sought. The Tribunal did not allow the applicant to amend to add two further orders sought. That meant that the applicant could have lodged a fresh application for those two orders, but that is beside the point. The point is the five orders the applicant wanted the Tribunal to make were not made.

> On the other hand, the OC opposed the compulsory appointment of a strata manager but the Tribunal did order the compulsory appointment. The appointment was for all functions of the OC and for the period sought by the applicant (12 months). But the manager was the manager proposed by the OC in their alternative case (its primary case being no appointment). On balance I find that the OC was not unsuccessful in the 2016 Proceedings (s. 104(2)). I find that the applicant was not successful in the 2016 proceedings. I also find, in any event, that the OC did not levy a contribution on the applicant in respect of its costs and expenses of the 2016 proceedings.

16 The Tribunal also concluded that:

> If I had found that the Tribunal had the power to make the declarations sought, which I do not, I would decline to make the declarations for the reasons set out above.

17 The parties provided submissions in accordance with Orders 2 and 3 of the 2018 Decision and on 18 July 2018 the Tribunal made Orders in SC 18/0142:

> 1. The Tribunal Orders that the applicant pays the respondent's costs of and incidental to the proceedings (including the costs application), such costs to be agreed or assessed.

18 On 26 July 2018 the Applicant filed an Application for a Stay of Order 1 of the 2018 Decision. This application was adjourned to the hearing of the appeals.

19 Sometime after delivery, on the 20 April 2017, of the 2017 decision, the Respondent paid its costs of the 2016 proceedings from its administrative fund. The administrative fund was made up by contributions from all 44 lot owners.

20 The objective on the part of the Applicant in commencing the 2018 proceedings was apparently to obtain declarations which would allow the Applicant to challenge any levy by the Respondent upon the Applicant in breach of s.104(1) of the SSMA and to challenge the payment of the Respondent's costs of the 2016 proceedings from the Respondent's administrative fund contrary to S 04(2) of the SSMA. The Applicant however did not seek any orders in these terms in the 2018 proceedings.

21 The 2018 proceedings sought only that the Tribunal make declarations in the terms at [8] and sought no orders, or relief, under any provision of the SSMA.

Grounds of Appeal

22 The Appellant relies on four grounds of Appeal:

(1) The Tribunal has jurisdiction to declare a party to Tribunal proceedings 'successful' or 'unsuccessful' for the purposes of s 104 of the SSMA.

(2) Decision not fair and equitable.

(3) Decision of the Tribunal against the weight of the evidence.

(4) Significant new evidence is now available that was not reasonable at the time of the hearing.

Ground 1.

23 The Appellant identifies this as a question of law for which, pursuant to s80 (2)(b) of the *Civil and Administrative Tribunal Act 2013,* leave to appeal is not required. Although the Respondent does not refer to the issue as a question of law, in the Reply to the Appeal states:

> Not only was the Senior Member correct in the Senior Member's interpretation of the powers of the Tribunal, the Senior Member was bound by the Decision of the Appeal Panel in *Walsh v The Owners Strata Plan No 10349* [2017] NSWCATAP 230.

24 The Appeal Panel agrees that the Tribunal was bound by *Walsh.* Further the question as to the powers of the Tribunal to make declarations concerning rights under the SSMA was considered by the Supreme Court in *EB 9 & 10 Pty Ltd v The Owners SP 934* [2018] NSWSC 464 in which Kunc J at [41] stated:

> First, it was submitted that the Court should take into account that when a specific proposal was to be acted upon by the defendant, the plaintiff would have the full panoply of rights afforded to it in NCAT (see Part 12 of the *Management Act*). The answer to this is that NCAT does not have the power to make declarations: see *Walsh v Owners Corporation SP No 10349* [2017] NSWCATAP 230 at [60]. The defendant did not suggest otherwise. A party in the position of the plaintiff is entitled to approach this Court to seek to persuade it that a declaration of right is the appropriate relief.

25 His Honour also referred to submissions by the Plaintiff at [28 (7)]:

> There is a dispute between the parties evidenced by the chain incident, the Building Proposal, and the Garden Proposal. NCAT could not make a declaration, whereas this Court can, citing the well-known passage in the judgment of Brereton J in *Commonwealth of Australia v BIS Cleanaway Limited* [2007] NSWSC 1075 ("*BIS Cleanaway*"):
>
> > 24 (NSW) *Supreme Court Act* 1970, s 75, which substantially re-enacts (NSW) *Equity Act* 1901, s 10, provides as follows:
> >
> > > 75 No proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential ruling is or could be claimed or not.
> >
> > 25 Parliament plainly intended that the Court be able to make declarations without consequential relief, and any approach to the exercise of the discretion to decline declaratory relief that began from the proposition that it was inappropriate to make declaratory orders

without consequential relief would be inconsistent with s 75, since Parliament has plainly intended that the Court be empowered to make declarations of right without granting consequential relief. In *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297, Barwick CJ emphasised the extent and utility of that power (at 305):

> The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.
>
> Here the respondent was in business carrying out in relation both to ships and airports activities of the general kind proposed in this case. No doubt, duty free goods not desired to be personally carried by a departing passenger purchaser, or too large to be admitted to the cabin of an aircraft were being delivered by the respondent to the airport prior and at the date of the commencement of this suit. Further, there had been actual opposition by the Customs Department to the course which the respondent desired and intended to take. In my opinion the Supreme Court was right to entertain the respondent's suit in relation to both the declarations sought.

26 Nonetheless there are established categories of case in which the Court will generally decline, as a matter of discretion, to exercise its undoubted power to make a declaration. The importance of the established categories is that they facilitate a consistent and principled approach to the exercise of the discretion.

27 One such category is where the issue involved is "purely theoretical" [*Re Clay, Clay v Booth* [1919] 1 Ch 66 (declaration that plaintiff not liable under guarantee declined where no claim under guarantee had been made against plaintiff); *Mellstrom v Garner* [1970] 2 All ER 9 (declaration as to construction of covenant against canvassing customers declined where plaintiff had no intention of doing so); *Sanderson Pty Ltd v Urica Liberty Systems BV* (1998) 44 NSWLR 73 (no declaration should be made as to right to terminate an agreement in the absence of any election to terminate); *Rosesin v Attorney-General* (1918) 34 TLR 417 (declaration that plaintiff not liable to be called-up for military service not appropriate where he had not yet been called-up); *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 (declaration that defendants had repudiated contract not appropriate where plaintiff had plainly elected to affirm contract); and see generally Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 4th ed, [19-115]]. However, even though the issue is theoretical, the court has jurisdiction and may, exceptionally, exercise it [*Thorne v Motor Trade Association* [1937] AC 797 (declaration granted as to validity of rule of association notwithstanding absence of any dispute); *Ku-ring-*

> *gai Municipal Council v Suburban Centres Pty Ltd* [1971] 2 NSWLR 335 (declaration granted that correspondence between the parties did not constitute a contract, but the defendants were apparently asserting that there was a contract, so that the question was not merely hypothetical (at 341)); *Dinari Ltd v Hancock Prospecting Pty Ltd* [1972] 2 NSWLR 385 (declaration granted that dispositions not invalidated by statutory prohibition on accumulation of income); see generally Meagher, Gummow and Lehane, [19-120]]. Each of these cases had the feature that the declaration would at least quell a future potential dispute.
>
> 28 Another, related, category is where no good purpose would be served by granting declaratory relief [*Buck v Attorney-General* [1965] Ch 745; *Blackburn v Attorney-General* [1971] 2 All ER 1380; *Gardner v Dairy Industry Authority* (declaration if otherwise appropriate would have been declined where it had no foreseeable consequences, not leading to damages or other consequential relief but at best somehow prompting possible administrative or legislative action that that might improve the position of the appellants and others in their position); *Rivers v Bondi Junction-Waverley RSL Sub-Branch Ltd* [1986] 5 NSWLR 362 (declaration that election of directors involved irregularities refused where they did not affect the result)]. In this respect, it is generally inappropriate to grant declaratory relief if it will be inconclusive, in the sense that the proposed declaration would leave unresolved issues, with the parties still in dispute as to the consequences so that further litigation would be required to resolve the controversy [*Smart v Allen* (1970) 91 WN(NSW) 241; *Integrated Lighting & Ceilings Pty Ltd v Phillips Electrical Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 693, 702].

26 The Appeal Panel concludes that NCAT does not have power to make declarations under the SSMA and accordingly the appeal on Ground 1 should be dismissed. No basis has been established for the Appeal Panel to depart from the principle in *Walsh* and considering the principles of *stare decisis* and precedent, it would not be appropriate to do so in any event in circumstances where the principle was applied by the Supreme Court in *EB 9 & 10 Pty Ltd v The Owners SP 934* [2018] NSWSC 464.

Ground 2

27 The Appellant contends that the decision is not fair and equitable and refers to a submission in reply which he made in proceedings SC 18/01482:

> 26. If the view of the Appeal Panel is correct, i.e., a declaration by the Tribunal generally ought not to be made in a separate order, then the Tribunal, for the resolution of the present cost dispute, can invoke s 240(1) of the Act to make appropriate orders, including the *sought-after* declarations as part of the orders if necessary.

28 In the proceedings under appeal, SC 18/01482, there was no application to amend the 'orders' sought as set out at [8], which only referred to bare declarations.

29 Section 80 of the Act which deals with internal appeals relevantly provides:

> **80 Making of internal appeals**
>
> (1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made. (2) Any internal appeal may be made:
>
> > (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
> >
> > (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

30 The decision under appeal was made in the Consumer and Commercial Division of the Tribunal. When considering an application for leave to appeal from a decision of the Consumer and Commercial Division to the Appeal Panel, the Panel is required to be satisfied of the matters set out in cl 12 of Schedule 4 to the Act before leave can be granted. That clause provides:

> **12. Limitations on internal appeals against Division decisions**
>
> (1) An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> > (a) the decision of the Tribunal under appeal was not fair and equitable, or
> >
> > (b) the decision of the Tribunal under appeal was against the weight of evidence, or
> >
> > (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

31 These provisions were examined by the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17 at [65]-[79], which also decided that even if the Appeal Panel is so satisfied, there is a discretion to grant leave, and at that second stage further principles are to be considered, namely (at [84]):

> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact…;

> (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> > (a) issues of principle;
> >
> > (b) questions of public importance or matters of administration or policy which might have general application; or
> >
> > (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
> >
> > (d) a factual error that was unreasonably arrived at and clearly mistaken; or
> >
> > (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,…
>
> (3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: [citations omitted].

Consideration

32 The Appeal Panel notes at [11], [14] and [15] the careful consideration by the Tribunal as to the mixed result in the 2016 proceedings and considers that the analysis and the conclusion by the Tribunal does not disclose any of the errors of principle as identified in *Collins v Urban* see [30].

33 The analysis by the Tribunal identifies incontrovertible facts as to the relief sought by the parties in the 2016 proceedings and the conclusions of the Tribunal concerning those issues. The Appellant has not established that the finding at [14] involves an error of principle, a clear injustice, a factual error, or an unorthodox approach to fact finding.

34 The Appellant relied upon extensive submissions and many documents in four folders. The Appellant sought to establish that the Tribunal had conducted the proceedings and arrived at the decision is some way which offended the principles established in *Collins v Urban.*

35 The Appeal Panel having reviewed the submissions and the folders of documents upon which the Appellant relied concludes, that nothing has been disclosed which would justify a grant of leave to appeal under Ground 2.

Ground 3

36 The Appellant contends that the decision was against the weight of the evidence. The Appeal Panel understands that this contention relates to the decision in SC 18/01482. The decisions by the Tribunal and the Appeal Panel's conclusion in AP 18/25774 were all based solely on a question of law. There was no evidentiary conflict which needed to be resolved at first instance or on appeal.

37 Ground 3 is without substance and is accordingly dismissed.

Ground 4

38 The Appellant alleges that there is significant new evidence which was not reasonably available at the hearing by the Tribunal in SC 18//01482. The evidence relied upon are "strata records". The Appeal Panel does not accept that the materials are, or could have been, relevantly probative to the issues involved, and the decision in the 2018 proceedings.

39 Ground 4 is also without substance and should be dismissed.

40 The Appeal Panel understands that the appeal in AP 18/34399 only concerns the decision of the Tribunal made on 18 July 2018, see [16] as to the costs of the 2018 proceedings. This involves a discretionary order as to costs. For the reasons at [31] to [38] leave to appeal is refused and the appeal will be dismissed

Orders

In AP 18/25774

(1) To the extent necessary leave to appeal is refused.

(2) Appeal dismissed.

In AP 18/234399

(3) Leave to appeal refused

(4) Appeal dismissed

(5) Application for Stay refused

In both Appeals

(6) Any application for costs along with submissions and documentation to be filed in the Tribunal and served on or before 14 days from the date of this decision.

(7) Any reply to the costs application including submissions and documentation to be filed in the Tribunal and served on or before 14 days thereafter.

(8) The submissions are to address whether the decision on costs may be made on the papers

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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

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