



Civil and Administrative Tribunal

New South Wales

Case Name: McGinn v Shoebridge

Medium Neutral Citation: [2019] NSWCATAP 107

Hearing Date(s): 12 June 2018

Date of Orders: 26 April 2019

Decision Date: 26 April 2019

Jurisdiction: Appeal Panel

Before: F. Corsaro SC, Senior Member
J Kearney, Senior Member

Decision: **ORDERS:**

- (1) Appeal dismissed.
- (2) Leave to appeal refused.

DIRECT:

- (1) If the Respondents wish to seek an order for costs of this appeal in their favour, they are to file and serve a short outline of submissions as to why the Appeal Panel should make such an order and as to whether the question of costs should be determined on the papers within 14 days;
- (2) If the Appellant opposes any costs order being made, the appellant is to file and serve a short outline of submissions as to why such an order should not be made and dealing with whether the issue of costs should be determined by the Appeal Panel on the papers 14 days after receipt of the Respondents' submissions on costs; and
- (3) The Respondents are to file and serve any reply submissions on costs within 14 days after service of the Appellant's submissions.

Catchwords: APPEALS – no question of law – leave to appeal

refused – no question of principle
STRATA TITLES - claimed irregularities in conduct of
strata scheme – meetings – poll vote or secret ballot

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Beale v Government Insurance Office of NSW (1997)
48 NSWLR 430
Briginshaw v Briginshaw (1938) 60 CLR 336
Collins v Urban [2014] NSWCATAP 17
TAG Aviation Pty Ltd v Kirk [2017] NSWCATAP 41
Mifsud v Campbell (1991) 21 NSWLR 725
Pholi v Wearne [2014] NSWCATAP 78
Prendergast v Western Murray Irrigation Ltd [2014]
NSWCATAP 69
Segal v Waverley Council (2005) 64 NSWLR 177
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10
NSWLR 247

Category: Principal judgment

Parties: Sophia McGinn, (Appellant)
Robert Shoebridge, (First Respondent)
Will Campbell, (Second Respondent)

Representation: Solicitors:
S McGinn (Self-Represented) (Appellant)
Clyde & Co solicitors (Respondents)

File Number(s): AP18/14932

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 27 March 2018

Before: D. Charles, Senior Member

REASONS FOR DECISION

Summary

- 1 This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal (**the Tribunal**) dated 27 March 2018 (**the Decision**). On that day, the Tribunal dismissed an application by the Appellant, Ms Sophia McGinn (hereafter "**Ms McGinn**" or "**the Appellant**") because it was not satisfied (on the civil standard of proof) that Ms McGinn had established the grounds for the orders sought.
- 2 Ms McGinn has appealed from the Decision on a variety of grounds.
- 3 For the reasons that follow we have decided to dismiss the appeal and refuse leave to appeal.
- 4 Ms McGinn's English language skills were adequate to conduct the appeal. Where we have quoted from her written or verbal communication, we have done so without correction, as we believe the meaning is clear.
- 5 In the following reasons:
 - a reference to the "**SSMA**" is a reference to the *Strata Schemes Management Act 2015* (NSW);
 - a reference to the "**NCAT Act**" is a reference to the *Civil and Administrative Tribunal Act 2013* (NSW);
 - "**Strata Scheme**" is a reference to the strata scheme established on registration of Strata Plan 89088;
 - a reference to the "**Owners Corporation**" is a reference to the Owners Corporation established to manage the Strata Scheme;
 - "**the Committee**" is a reference to the strata committee appointed by the Owners Corporation; and
 - "**the AGM**" is a reference to the 2017 Annual General Meeting of the Owners Corporation held on 28 February 2017.

Background

- 6 The background to this appeal is conveniently set out in the Decision. In summary, Ms McGinn is a lot owner in the Strata Scheme. The Respondents in

the Tribunal, and to this appeal, are Mr Shoebridge who is the Chairperson appointed by the Committee; and Mr Campbell who is the appointed Secretary.

7 Mr Armstrong is the strata managing agent for the Strata Scheme.

8 Ms McGinn nominated herself for election to the Committee at the AGM, but her bid for election was unsuccessful. Ms McGinn's main complaints relate, but were not limited to, the conduct of the AGM.

9 Ms McGinn alleged that:

- (1) a secret ballot took place at the AGM to elect the Committee, without the approval required under s 29 of the SSMA;
- (2) Mr Armstrong added "*extra proxies*" with Mr Campbell's knowledge following the AGM to retrospectively mask that less than a quarter of the persons entitled to vote at the AGM were present either personally or by duly appointed proxies at the AGM, and therefore there was no quorum at the AGM;
- (3) Mr Shoebridge failed to have a "*revote*" knowing that extra proxies had been added after the AGM;
- (4) Mr Shoebridge had allowed a tempering valve (a mixing valve which mixes hot water with cold water to control the temperature of the hot water supply) to the building's water supply system without a special resolution of the Owners Corporation; and
- (5) there had been a misappropriation of funds that Mr Shoebridge had failed to investigate.

10 Ms McGinn alleged that Mr Armstrong, who was not a named party, played an active part in Mr Shoebridge's and Mr Campbell's misconduct by:

- (1) preparing the minutes of the AGM with "*extra proxies*";
- (2) reviewing certain financial reports before circulating them to the lot owners pursuant to a resolution passed at the AGM;
- (3) refusing to provide bank statements requested by Ms McGinn to verify that the Owners Corporation's funds had misappropriated, as she alleged; and
- (4) imposing a restriction knowing it to be illegal.

11 In the Tribunal, Ms McGinn sought orders:

- (1) Under s. 238 of the SSMA for the Respondents to be removed as Members of the Committee; and
- (2) Under s. 237 of the SSMA to appoint a compulsory agent to the strata scheme to exercise all functions of the Owners Corporation.

- 12 As against Mr Armstrong, Ms McGinn applied for an order under s. 60 of the NCAT Act to award costs against Mr Armstrong, as a non-party.
- 13 The issues appear to have been thoroughly ventilated in the Tribunal proceedings. The Tribunal recorded in the reasons [7] – [9] that the issues in dispute were set out in the Points of Claim and Points of Defence (served under directions made by the Tribunal on 13 September 2017) as well as Ms McGinn's Points of Reply to Defence. The Tribunal's reasons record that the Tribunal also had regard to Ms McGinn's written submissions in reply which were in addition to the Points of Claim, her Reply to Defence and the documents attached to her application (lodged with the Tribunal on 24 August 2017). Ms McGinn supplemented her application to the Tribunal with sworn oral evidence and oral submissions. Pursuant to directions of the Tribunal made 25 October 2017, Mr Shoebridge, Mr Campbell and Mr Armstrong provided written statements of evidence dated 18 January 2018 and written submissions. Each supplemented their defence to Ms McGinn's application by sworn oral evidence which was subject to cross examination by Ms McGinn.
- 14 The reasons of the Tribunal indicate that the Tribunal was not satisfied on the material before it that Ms McGinn had made out the alleged grounds on which she had based her application for the removal orders, and for the non-party costs order. Ms McGinn appeals from that decision.

Principles

- 15 Ms McGinn's rights of appeal are limited by s 80(2)(b) of the NCAT Act which provides that an appeal against a decision other than an interlocutory decision of the Tribunal may be made as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

Appeal as of right

- 16 The Appeal Panel in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 considered the requirements for establishing an "error of law" giving rise to an appeal as of right. Without expressing exhaustively possible questions of law, the Appeal Panel in *Prendergast* referred at [13] to the following as constituting errors of law:

- (1) whether there has been a failure to provide proper reasons;

- (2) whether the Tribunal identified the wrong issue or asked the wrong question;
- (3) whether a wrong principle of law has been applied;
- (4) whether there was a failure to afford procedural fairness;
- (5) whether the Tribunal failed to take into account a relevant (mandatory) consideration;
- (6) whether the Tribunal took into account an irrelevant consideration;
- (7) whether there was no evidence to support a finding of fact; and
- (8) whether the decision was so unreasonable that no reasonable decision-maker would have made it.

17 In *Prendergast* at [12], the Appeal Panel stated that where an appellant is not legally represented, the Appeal Panel may approach the appeal by generally examining the grounds of appeal to determine whether the appellant has, in fact, raised a question of law (subject to procedural fairness considerations that might apply).

Appeal with leave

18 As this appeal is brought from a decision of the Consumer and Commercial Division of the Tribunal, by virtue of cl 12(1) of Sch 4 to the NCAT Act, leave may only be granted under s 80(2)(b):

“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).”

19 In *Collins v Urban* [2014] NSWCATAP 17 the meaning of "*substantial miscarriage of justice*" was summarized at [71] and [79] as follows:

“[71] [I]t can be seen that the concept of a substantial miscarriage of justice refers to a failure in the way a matter was conducted or decided which deprived the appellant of a chance that was fairly open of achieving a better outcome than occurred.

...

[79] In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result . . . it will be generally be necessary for the party to

explain what its case would have been and show that it was fairly arguable. If the party fails to do this, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred."

- 20 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are set out in the decision of the Appeal Panel in *Collins v Urban* at [84]:

"The general principles derived from these cases can be summarised as follows:

(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: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];

(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."

- 21 Even if an appellant establishes that they may have suffered a substantial miscarriage of justice, the Appeal Panel then retains the discretion whether to grant leave under s 80(2) of the Act: *Pholi v Wearne* [2014] NSWCATAP 78 at [31].

Notice of Appeal

- 22 As the Appeal Panel noted in *Prendergast* at [11], it is necessary that a question of law be stated with precision, as an appellant's right to appeal arises from the question of law. However, in circumstances where the appellants are not legally represented, as is the case for Ms McGinn here, it is apposite for the Tribunal to approach the issue by looking at the grounds of appeal generally:

Prendergast at [12]. Therefore, it is necessary for the Appeal Panel to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise.

Grounds of Appeal – errors of law

23 The Notice of Appeal states the grounds and the written submissions of the parties amend those grounds to some extent. As the written submissions appear to encapsulate the issues in the appeal and the appellant responded to the respondent's submissions, the Appeal Panel approach Ms McGinn's challenges to the Tribunal's rejection of her application on six grounds, identified in the written submissions. . The Appeal Panel deals with McGinn's application for leave to appeal separately.

First Ground of Appeal - Whether an expert is required by the Act to establish misappropriation of funds

24 Section 238 of the SSMA states:

Orders relating to strata committee and officers

(1) the Tribunal may, on its own motion or on application by an interested person, make any of the following orders:

(a) an order removing a person from a strata committee,

(b) an order prohibiting a strata committee from determining a specified matter and requiring the matter to be determined by resolution of the owners corporation,

(c) an order removing one or more of the officers of an owners corporation from office and from the strata committee.

(2) Without limiting the grounds on which the Tribunal may order the removal from office of a person, the Tribunal may remove a person if it is satisfied that the person has:

(a) failed to comply with this Act or the regulations or the by-laws of the strata scheme, or

(b) failed to exercise due care and diligence, or engaged in serious misconduct, while holding the office.

25 This section of the SSMA gives the Tribunal a discretion to make a removal order in the circumstances referred to in s 238(2). In other words, before the Tribunal considers the exercise of its discretion to make a removal order, it must be satisfied that the person whose conduct is in question:

(1) failed to comply with the SSMA or the regulations; or

- (2) failed to exercise due care and diligence, or engaged in serious misconduct, while holding the office.

26 In paragraph [16] of the Tribunal's reasons, the Tribunal held:

16. As to the allegation of misappropriation of funds, the applicant raised her concerns in relation to shared expenditure and 'excessive' payments from the Administration Fund of the scheme. I accept the Respondents' evidence that they were entitled to rely on the audited accounts of the scheme. Other than her assertions in written submissions and oral evidence and a further submission that the strata scheme has failed to provide bank statements, there is no independent evidence (e.g. an expert report to challenge the audited accounts) to support the applicant's very serious allegations of fraud. I am satisfied on the evidence before me that there was no misappropriation of funds in the strata scheme which called for investigation by the strata committee.

27 Ms McGinn submitted in her written submissions to the Appeal Panel (at [12] – [14]) that because s 238 does not prescribe that an expert report is required to establish any of the allegations the Tribunal made a legal error because it held *that an expert report is required to establish misconduct*". In legal terms, the contention is that the Senior Member incorrectly construed s 238 as imposing a condition as to the type of evidence required to prove misconduct relating to the misappropriation of funds.

28 The Respondents submit that the Senior Member did not find that an expert report was required to establish a finding of misconduct. They say the Senior Member simply noted the absence of an expert report in his determination that the appellant had not made out her very serious allegations of fraud. They say this ground of appeal is misconceived. The Appeal Panel accepts the Respondents' submission.

29 Paragraph [16] of the Senior Member's reasons concerned the probative value of the material on which Ms McGinn was relying to prove a serious allegation of misappropriation of funds. The Senior Member's reference to "an expert report" was by way of example of the type of independent evidence that the Tribunal considered would be required to question the accuracy or reliability of the Owners Corporation's audited accounts. It is necessary to appreciate that Ms McGinn did not have evidence of any misappropriation of funds beyond what the Senior Member described as "[Ms McGinns] assertions in written submissions" and "oral evidence" and "further submission that the Strata Scheme ha[d] failed to provide bank statements". As opposed to that material,

the Tribunal had evidence of the state of the Owners Corporation's audited accounts. The Tribunal did not find that an expert report was the only evidence by which Ms McGinn could establish to the Tribunal's satisfaction that there had been a misappropriation of funds. It referred to an expert report as an example of the type of "*independent evidence*" to justify a finding of misappropriation of funds.

- 30 The *Briginshaw* principle (*Briginshaw v Briginshaw* (1938) 60 CLR 336) applies in cases where serious allegations have been made, or a finding is likely to produce grave consequences. This directs attention to the cogency and the strength of the evidence required to prove these matters. In short, the more serious the allegation, the stronger the evidence needs to be.
- 31 The Senior Member was not bound to apply the rules of evidence. The material which Ms McGinn placed before the Senior Member was subject to a question of weight, not admissibility. The Tribunal was entitled to approach the issue of the alleged misappropriation of funds by requiring Ms McGinn to establish misappropriation not by Ms McGinn asserting that this happened, but by reference to evidence, which the Tribunal described as "independent" (meaning independent of Ms McGinn) rather than by inexact proofs, indefinite testimony, or indirect inferences.
- 32 The Tribunal was not satisfied that there had been a misappropriation of funds, in the face of audited accounts, and the lack of any independent evidence to show that the accounts were inaccurate.
- 33 The Tribunal dismissed Ms McGinn's application for a removal order on the basis of Mr Shoebridge's alleged failure to investigate a misappropriation of funds, on the basis that the evidence did not establish that there had been a misappropriation, and Mr Shoebridge's entitlement to rely on the audited accounts, which the Tribunal considered were not put into question by Ms McGinn's material. This was a finding that the Senior Member was entitled to make. Having regard to the serious nature of the allegations, the Appeal Panel sees no legal error in the Tribunal finding that it was not prepared to find a "*misappropriation of funds*", in the light of the audited accounts, on the basis of McGinn's submissions and oral evidence.

34 There was no error of law. The Appeal Panel dismisses this challenge to the Tribunal's orders.

Second ground of appeal – [the Senior Member] knew there is no resolution authorised the excessive amount of levy contribution into building management accounts, but still concluded no misappropriation of funds, with the reason that there is no expert report being submitted but failed to provide which provision requires that

35 A successful challenge to the Tribunal's decision on this basis requires Ms McGinn to establish:

- (1) the Senior Member "knew" that the Owners Corporation had not properly resolved to make levy contributions into the building management account;
- (2) the Senior Member "knew" that the contributions made were "excessive", by reference to some unstated basis where contributions would not be "excessive"; and
- (3) this knowledge should have led the Senior Member to find that funds had been misappropriated.

36 Ms McGinn's written submissions do not address this ground. Even if Ms McGinn were correct in submitting what the state of the Senior Member's knowledge was, the Senior Member's failure to find a misappropriation of funds is not an error of law.

37 The Respondents rely on their submissions for appeal ground one but also say that the appellant has conflated what Ms McGinn says that the Senior Member knew, as opposed to what Ms McGinn submits the Senior Member should have found. The Appeal Panel accepts that submission. There is no error of law. The Appeal Panel dismisses this ground.

Third ground of appeal – [the Senior Member] erred in contemplating that there is no secret ballot at the AGM when he acknowledged vote is a "private" poll.

38 Ms McGinn submits that the election of the Committee at the AGM was invalid because it was a "secret ballot", without the approval required by s 29 of the SSMA. One of those necessary steps for a secret ballot, for instance, is that the Committee needs to determine to hold a secret ballot, or there is a vote by at least one-quarter of the persons entitled to vote that a secret ballot should be held (s. 29(1) SSMA).

39 The Senior Member's finding on this issue is at [12] of the reasons:

In respect of the allegation of a secret ballot in contravention of the SSMA I accept the Respondents' evidence that what in fact occurred was a private poll in accordance with s. 14 Schedule 1 of the SSMA.

- 40 The question becomes was the Senior member entitled to make the finding he did and what is the evidence relating to the type of ballot which actually occurred?
- 41 Ms McGinn's written submissions argued that the Senior Member's conclusion that the vote was not a "secret ballot" is an error of law.
- 42 In support of this ground of appeal, Ms McGinn made oral submissions before the Appeal Panel as to what happened regarding the voting at the meeting. Ms McGinn argued that there was evidence before the Senior Member in relation to those matters. The Respondents submitted that there was not.
- 43 In order to resolve this, at the conclusion of the Appeal Panel hearing, Ms McGinn was given the opportunity to locate the evidence in the audio recording which supported her allegations. The nature of these allegations is evident from the directions made.
- 44 The Appeal Panel made directions at the end of hearing as follows:

The Appellant to provide to the Appeal Panel a typed transcript of evidence before the learned Senior Member at first instance, concerning:

- (1) the process adopted for the counting of the votes cast in the poll taken at the annual general meeting of the Owners Corporation (referred to as Strata Plan 47027 but in fact Strata Plan 89088) (**the AGM**) which is the subject of the Appeal (the Poll);
- (2) whether the votes cast in the Poll were counted in private or in a different room from the general attendees of the AGM;
- (3) whether the result of the Poll was announced or published to the AGM only after the persons attending the AGM had left the AGM room; and
- (4) whether the ballot papers which recorded the votes cast in the Poll were made available, or were available, to the attendees of the AGM at, or during the course of the AGM, and if not, when the ballot papers were made available.

- 45 The Respondents were given an opportunity to respond.
- 46 On 15 June 2018, Ms McGinn filed a document called "*Appellant's Transcript Evidence*". The only part relevant to the directions made is as follows:

"Transcript Evidence concerning the Poll as per direction order

The appellant made the following submissions at audio 12 min 30 sec:

The Appellant:

"Paragraph 15 is irrelevant, we are talking about secret ballot, Poll vote is talking about how the vote is counted, whether it is counted on number of owners or counted on unit value, and the secret ballot is talking about whether it is show hands or we fill out ballot paper.

At the time, we filled out ballot paper, its that simple."

Member Charles accepted that when poll is casted in the form of ballot instead of show hands, it is 'private' poll."

- 47 In submissions in reply to the Appellant's Transcript Evidence, the Respondents say that Ms McGinn's further submissions do not engage with the matters referred to in the directions. They submit that the Appeal Panel should infer that the appellant's inability to identify any evidence going to those matters in the directions, is proof of the proposition that there was, in fact, no evidence before the learned Senior Member in relation to those matters.
- 48 The Respondents also submitted during the Appeal Panel hearing that there was evidence that what occurred was a "*poll*" pursuant to s 14 of Sch 1 SSMA – we were referred to the witness statements of Mr Shoebridge who said at para 10 of his statement that at the AGM
- "...I demanded that a poll vote be conducted for the election of the Strata Committee, pursuant to section 14(3) of Schedule 1 to the SSMA."
- 49 The Respondents say this is corroborated by Mr Armstrong at para 13 of his statement and by Mr Campbell at 15 of his statement and by the formal Minutes of the meeting.
- 50 The Appeal Panel rejects the Respondents' submission that Ms McGinn's further submissions do not engage with the matters which were the subject of the Appeal Panel's directions. Ms McGinn makes specific reference to passages in the transcript of her evidence that refer to her having filled out a ballot paper. She submits that because of that fact, the vote was a "*secret ballot*".
- 51 The Appeal Panel rejects Ms McGinn's submission that the Tribunal made an error in not finding that the Committee was elected in a "*secret ballot*". The evidence to which Ms McGinn referred the Appeal Panel did not establish that the vote was a "*secret ballot*". The SSMA and regulations are silent as to the

method of counting votes. A show of hands or a ballot would be equally satisfactory. More informal methods can suffice with less contentious matters such as by public acclaim. In this case there was evidence from the appellant that that the vote occurred by ballot. Indeed, this is confirmed by the Minutes.

- 52 The Appeal Panel accepts the Respondents' submissions that there was evidence (eg. Mr Shoebridge at para 10) that what occurred was a "*poll vote*" pursuant to cl 14 of Sch 1 SSMA. The Appeal Panel accepts that the vote for the election of the Committee was held by ballot, rather than a show of hands. This did not make the vote taken a "*secret ballot*". On the basis of the material to which Ms McGinn referred, and in the absence of any other evidence as to the nature of the ballot, it was open for the Senior Member to reject the contention that the Committee had been elected in a "*secret ballot*".
- 53 The Senior Member's use of the expression "private poll", properly understood, was to a "poll" within cl 14 of Sch 1 of the SSMA. The use of the word "private" does not add or detract from that conclusion. The Appeal Panel regards the Senior Member's finding as consistent with the Appeal Panel's view that the election of the Committee was held by ballot rather than a show of hands.

Fourth ground of appeal – [the Senior Member] erred in concluding 'no added extra proxies' when he knew that the minutes of the AGM recorded a quorum even though less than 25% owners and proxies attended the meeting

- 54 This ground of appeal relates to the following finding by the Senior Member at paragraphs [19] – [20] of the Tribunal's reasons:

19. At paragraphs 40 to 44 of the Points of Claim, the applicant alleges that the management of the scheme by Mr Armstrong under instruction of the strata committee is not functioning or not functioning satisfactorily (s 237(3)(a) of the SSMA) because of the issue of lack of consent for the tempering valve, the fact that the minutes of the AGM recorded a quorum even though less than 25% of owners and proxies attended the meeting, the issue of the 'added proxies', and the agent's refusal to provide bank statements to verify funds held in the scheme's trust account.

20. For the reasons given above (which included my acceptance of the Respondents' evidence as to the proper procedure being followed at the 2017 AGM and also my finding that there is no evidence to substantiate the allegation that questionable proxies were used), there is no evidentiary foundation for a finding that the scheme is not functioning or not functioning satisfactorily.

55 The Senior Member found that there was no evidence to substantiate the allegation that proxies had been added after the AGM for the purposes of creating the artifice that there was a quorum at the AGM. Ms McGinn has failed to establish any error on the part of the Tribunal. The evidence before the Tribunal did not prove “extra proxies” had been “added” following the AGM. The Appeal Panel finds no error in the Tribunal’s finding.

Fifth ground of appeal– [the Senior Member] made conclusions in para 13 – 14 and 20 – 25 without evidential support, it is an error of law.

56 This ground relates to the following findings by the Tribunal:

13. I also accept the Respondents' evidence that no proxies were added after the meeting. The applicant's evidence does not address non-compliance with the SSMA.

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14. I find that the allegations against Mr Campbell are not made out on the evidence and decline to make an order under s 238 of the SSMA removing Mr Campbell from the strata committee.

57 And later in the reasons:

20. For the reasons given above (which included my acceptance of the Respondents' evidence as to the proper procedure being followed at the 2017 AGM and also my finding that there is no evidence to substantiate the allegation that questionable proxies were used), there is no evidentiary foundation for a finding that the scheme is not functioning or not functioning satisfactorily.

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21. Nor is there a basis for making an order under s 237 on any of the other grounds set out in s 237(3) of the SSMA.

22. I find that there is no case for orders against Mr Shoebridge removing him as a member of the strata committee of the strata scheme. I decline to make an order under s 138 of the SSMA against Mr Shoebridge.

23. I find that there is no basis for making a non-party costs order against Mr Armstrong. The applicant relies on Mr Armstrong's purported "active part in the conduct". For the reasons set out above there is no "conduct" of Mr Armstrong capable of being impugned. There is no evidence of Mr Armstrong being involved in any misappropriation of funds.

24. I decline to make any order under s 237 of the SSMA.

25. The consequence of my findings is that the application must be dismissed.

- 58 Ms McGinn submits in paragraph [13] of her written submissions to the Appeal Panel that the Senior Member “... *failed to state what evidence the Respondents provided therefore the conclusion is without evidential support, it’s an error of law.*” and at [20] and [22] – [25] that the Senior Member drew a number of conclusions without giving any reasons or evidence.
- 59 The Respondents say that the Senior Member’s finding in [13] is on the basis of his acceptance of the Respondents’ evidence, and that it was open to him to do so. The same applies to the findings in [20] – [25].
- 60 The Appeal Panel accepts the Respondents’ submissions. There was sufficient material before the Tribunal for the Senior Member to make the findings he made. The reasons make plain how and why the Senior Member made the findings that he did. Ms McGinn has not established any error on the part of the Tribunal.
- 61 It is not clear whether Ms McGinn’s challenge to the Tribunal’s decision also involves an allegation of insufficiency in the reasons. In the event that it does, the Appeal Panel rejects any suggestion that the Tribunal’s decision does not sufficiently expose the reasoning for the findings made.
- 62 The principles as to the sufficiency of reasons are well established. A failure to provide reasons or adequate reasons is an error of law. However, the nature and extent of the reasons required are variable, depending on the circumstances of the particular case: *Mifsud v Campbell* (1990) 21 NSWLR 725 at 728; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430; *Collins v Urban* [2014] NSWCATAP 17 at [57]; *TAG Aviation Pty Ltd v Kirk* [2017] NSWCATAP 41 at [28].
- 63 A decision maker is obliged “*to state generally and briefly the grounds which have led him or her to the conclusions reached concerning disputed factual questions and to list the findings on the principal contested issues*”: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 per Kirby P at 259.
- 64 The duty to give reasons is confined to the “*essential ground or grounds upon which the decision rests*”: *Segal v Waverley Council* (2005) 64 NSWLR 177 at 201.

- 65 A “failure to refer to some of the evidence” is not necessarily fatal, but “*for a judge to ignore evidence which is critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge*” may be an error of law: *Mifsud v Campbell* (1991) 21 NSWLR 725 (per Samuels JA at 728).
- 66 While the Senior Member did not refer to the detail of the evidence, the Senior Member explains that he regarded the evidence he accepted as clear and there is no lack of clarity in the Senior Member’s reasoning process.

Sixth ground of appeal – [the Senior Member] accepted Mr Shoebridge’s statements knowing he failed to provide evidence, is an error of law (para 17)

- 67 This ground of appeal requires the Appeal Panel to consider what the Senior Member said at [17] of the Reasons:

I also accept Mr Shoebridge's evidence that he acted appropriately in respect of the issue with the faulty pressure valve. The maintenance works were the responsibility of the Building Management Committee and there was no need for the works to be approved by a special resolution of the strata scheme. To the extent the applicant complains about water pressure issues in her lot, any such issues are her responsibility.

- 68 Ms McGinn’s written submissions to the Appeal Panel relevantly say:

22 ...during cross-examination the appellant asked Mr Shoebridge where is the evidence to support his actions, he tried a few excuses and Senior Member Charles also helped to object the questions, but Mr Shoebridge finally conceded that there is no evidence attached to it (audio at 1:18:20) ...

23 Accordingly, Senior Member Charles erred in accepting Mr Shoebridge’s statement knowing there is no evidence attached, it is an error of law.”

- 69 This issue arises from Ms McGinn’s argument that the work on common property to repair a faulty pressure valve, by replacing the pressure valve with a tempering valve required approval by a special resolution of the Owners Corporation. Ms McGinn’s contention is that the absence of the such a resolution supports her submission for orders under ss 237 and 238 of the SSMA.
- 70 The Respondents submit that Ms McGinn has targeted a passage of cross-examination concerning one particular paragraph of Mr Shoebridge’s witness statement (being para [19]). It is said that Mr Shoebridge properly conceded that the relevant paragraph of the witness statement did not refer to a corresponding annexure. The Respondents go on to say that such a

concession does not mean that the witness statement and oral evidence were of no probative value as suggested by the appellant, or that Mr Shoebridge provided no evidence in relation to the issue.

- 71 We have listened to the relevant part of the audio recording. Mr Shoebridge did make the concession alleged by the Respondents, however the Appeal Panel accepts the Respondents' submission that such a concession does not mean there was no evidence on the issue before the Tribunal. Paragraphs [17] to [23] of Mr Shoebridge's witness statement outlines the steps taken in relation to the repair of the faulty valve. This is evidence which the Senior Member was entitled to accept. Indeed, in cross-examination, Mr Shoebridge's initial answers were to the effect that paragraph [19] of his statement should not be read in isolation but in conjunction with the surrounding paragraphs.
- 72 The Appeal Panel finds that there is no error of law and dismisses this ground of appeal.

Grounds of Appeal – application for leave to appeal

- 73 For the reasons given above, the Appeal Panel does not find any error of law on the part of the Tribunal. Ms McGinn seeks leave to appeal on the ground that the Tribunal's decision was against the weight of the evidence.
- 74 There is no ground of appeal that the Tribunal's decision was not fair and equitable. There is no ground of appeal based on alleged new evidence. The application for leave to appeal is limited to the submission that the Tribunal should have given more weight to the matters set out in paragraphs [33] to [36] of Ms McGinn's written submissions to the Appeal Panel.
- 75 A decision under appeal can be said to be "*against the weight of evidence*" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach. The Appeal Panel finds that Ms McGinn has not made out this ground.

- 76 Ms McGinn’s submission as to the Tribunal’s decision being contrary to the weight of the evidence, essentially amounts to a contention that the Senior Member should have decided the factual issues relating to the “*private poll*”, the proxies’ issue, the authorisation of contributions and payments from the administrative fund, in a manner more favourable to Ms McGinn.
- 77 Ms McGinn did not provide a detailed analysis of the particular evidence available to the Tribunal, and by reference to that evidence a reasoned submission as to why insufficient weight was given to it. The Appeal Panel does not propose to repeat the factual issues which it has considered when dealing with Ms McGinn’s other challenges to the Tribunal’s decision. The Appeal Panel’s own reading of the Tribunal’s decision and reasons indicate no error in the Senior Member’s approach to the material before him. The reasons indicate that the Tribunal had proper regard to all of the evidence before it and gave it appropriate weight.
- 78 The Appeal Panel rejects the submission that the Tribunal’s decision was against the weight of the evidence. The Tribunal rejects that Ms McGinn may have suffered a substantial miscarriage of justice. Each of the relevant findings by the Senior Member were open to him and in the view of the Appeal Panel, the Senior Member’s findings were not made against the weight of the evidence. There was no substantial miscarriage of justice in the sense that Ms McGinn was not deprived of a chance that was fairly open of achieving a better outcome than occurred – see *Collins v Urban* [2014] NSWCATAP 17 at [71] and [79].
- 79 Accordingly, the Appeal Panel dismisses the application for leave to appeal on this basis alone. Further, the Appeal Panel is not satisfied that Ms McGinn has raised any issue of principle, any question of public importance, or has established an injustice which is reasonably clear or that if the Tribunal went about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result.

Orders

- 80 For these reasons, the Appeal Panel makes the following orders:
- (1) Appeal dismissed.

(2) Leave to appeal refused.

81 Ms McGinn has been unsuccessful. The Appeal Panel makes the following directions on the determination of any application for costs:

- (1) If the Respondents wish to seek an order for costs of this appeal in their favour, they are to file and serve a short outline of submissions as to why the Appeal Panel should make such an order and as to whether the question of costs should be determined on the papers within 14 days;
- (2) If the Appellant opposes any costs order being made, the appellant is to file and serve a short outline of submissions as to why such an order should not be made and dealing with whether the issue of costs should be determined by the Appeal Panel on the papers 14 days after receipt of the Respondents' submissions on costs; and
- (3) The Respondents are to file and serve any reply submissions on costs within 14 days after service of the Appellant's submissions.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.