



Civil and Administrative Tribunal
New South Wales

Case Name: The Owners Strata Plan No. 2000 v Bylinska

Medium Neutral Citation: [2019] NSWCATAP 116

Hearing Date(s): 17 April 2019

Date of Orders: 6 May 2019

Decision Date: 6 May 2019

Jurisdiction: Appeal Panel

Before: S Westgarth, Deputy President
J Currie, Senior Member

Decision: (1) Time for the lodgement of the Notice of Appeal is extended to 5 February 2019;
(2) The appeal is upheld;
(3) Orders 1 and 4 made in SC 18/27660 on 21 August 2018 are set aside;
(4) The application of the respondent to the appeal in respect of the 1997 Agreement is remitted to the Consumer and Commercial Division of the Tribunal for rehearing;
(5) Order (2) above is made on the condition that the appellant takes no action with respect to the existing usage of the storage room the subject of the 1997 Agreement pending further order of the Tribunal;
(6) If the appellant seeks costs of the appeal, the appellant must file and serve submissions in respect of costs within 14 days of the publication of these orders;
(7) The respondent must file and serve her submissions in response to the appellant's submissions concerning costs within 14 days after the receipt of the appellant's submissions on costs;
(8) The parties' submissions on costs should include a submission as to whether the Appeal Panel may dispense with a hearing and determine the question of

costs of the appeal on the papers without the necessity of a further hearing.

(9) Each party has liberty to apply to the Tribunal, on 7 days' notice to the other party, for any further directions concerning compliance with order (5).

Catchwords: Strata – consent orders – jurisdictional error – denial of procedural fairness – right to inspect documents protected by legal professional privilege – extending time under section 41 of the Civil and Administrative Tribunal Act 2013

Legislation Cited: Civil and Administrative Tribunal Act 2013
Civil and Administrative Tribunal Rules 2014
Strata Schemes Freehold Development Act 1973
Strata Schemes Management Act 2015
Strata Schemes Management Act NSW 1996

Cases Cited: Eastmark Holdings Pty Limited v Kabraji (No 3) [2012] NSWSC 1463
EB 9 & 10 Pty Ltd v The Owners SP 934 (No 2) [2018] NSWSC 546
Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22
Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22
The Owners - Strata Plan No. 74602 v Eastmark Holdings Pty Limited [2013] NSWCA 221

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners Strata Plan No. 2000 (Appellant)
Elizabeth Bylinska (Respondent)

Representation: Solicitors:
E Russell, Chambers Russell (Appellant)

File Number(s): AP 19/05878

Publication Restriction: Unrestricted

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division
Citation: Not applicable
Date of Decision: 21 August 2018
Before: G Towney, General Member
File Number(s): SC 18/27660

REASONS FOR DECISION

Background

- 1 This is an appeal from a decision published on 21 August 2018 in the Consumer and Commercial Division of the Tribunal. We will refer to this decision as the “Decision”. The Decision concerned an application by Mrs Bylinska (a lot owner in the strata scheme) for orders against the Owners Corporation. The Owners Corporation appeals the Decision only in respect of Orders 1 and 4.
- 2 The origin of the dispute between the parties lies in a letter dated 12 August 1997 to Mrs Bylinska signed by Mrs J Crook who is described as the secretary/chair of the strata plan. The letter contains the seal of “The Proprietors strata plan 2000”. The letter states that the Owners Corporation “agreed in accordance with the Strata Schemes Management Act 1996 s 110.6 (112) to a lease of the common property (the right hand side storeroom) to Mr Bylinska indefinitely as a payment to cover the costs and to pay for the work he has done in restoring the driveway in the amount of \$3,000.00”. The letter goes on to provide that in the event of a future Owners Corporation “reversing the decision and restoring the storeroom as common property”, Mr Bylinska has a right to be reimbursed the total amount of \$3,000.00 plus additional compound interest of 10% per annum. We will refer to this agreement as the “1997 Agreement”. Mr Bylinska is an occupier but not a lot owner.
- 3 In the Decision, the Tribunal made four orders. Order 1 and 4 were to the following effect:
 - (1) [Order 1] By consent, Mrs Bylinska’s husband will retain use of the common property, being the right hand side of the storage room;

- (2) [Order 4] All documents regarding legal advice obtained by the Owners Corporation in relation to the dispute regarding Mr Bylinska's use of common property should be released to Mrs Bylinska and the Owners Corporation.
- 4 At the hearing, Mr Ucchino, the strata managing agent appeared for the Owners Corporation. Prior to the hearing, there had been two directions hearings (on 29 June and 16 July 2018). At the second directions hearing the Tribunal gave leave for Mrs Bylinska to amend her application by 13 August 2018. The Tribunal then listed the application for a “Conciliation and Hearing (Group List)” on 21 August 2018.
- 5 The reverse side of the Notice of Conciliation and Hearing (Group List) published to the parties advising of the hearing on 21 August 2018 contains the following information (relevant to this matter):

Hearing (Group list)

This matter has been listed in a ‘group list’ where a number of cases are listed together before a Tribunal Member. The majority of NCAT applications are listed for a first hearing in a group list.

When both parties appear they are encouraged to resolve their dispute through conciliation. If conciliation is successful, the Tribunal Member will make consent orders. If conciliation is unsuccessful, or if only one party appears, the case proceeds to hearing.

As this is a first hearing you are not required to bring witnesses. However, you should bring with you all relevant documents or materials to support your case.

10. If you don’t reach an agreement

If you can’t reach agreement, the hearing will go ahead on the same day or at a later date. Think about whether your issues are important enough to come back on another day which may increase the time, cost and inconvenience to you.

- 6 The only directions made by the Tribunal on 16 July 2018 were:
1. By determination of member, on 16 July 2018 the hearing was adjourned to a date to be fixed by the Registrar.
 2. The Applicant has leave to amend the claim by 13-Aug-2018 by sending a copy of the amended claim to the Divisional Registrar and the other party, and including:
 - A list of each item claimed, specifying the monetary amount of each claim.
 - The orders sought to be made under the Strata Schemes Management Act 2015.
- 7 On 9 August 2018 Mrs Bylinska lodged with the Tribunal her fresh application seeking orders under s 232 of the Strata Act. One order sought was to restrain

the Owners Corporation, “any of their agents and tradespeople to change the locks to the utility room” subject to the 1997 Agreement. Another was an order to provide copies of all legal advice and other correspondence received from Chambers Russell Lawyers, and all correspondence between strata committee members and Whelan Property Group to the Owners Corporation.

- 8 At the hearing on 21 August 2018, Mrs Bylinska gave evidence to the effect that she had posted the amended application on 9 August 2018 to Mr Uchino’s firm. Mr Uchino gave evidence that he did not receive the letter posted by Mrs Bylinska.
- 9 The Owners Corporation lodged a Notice of Appeal on 5 February 2019, considerably outside the time allowed for the lodgement of an appeal: see *Civil and Administrative Tribunal Rules 2014* (the Rules) r 25(4)(c). The effect of that rule is to provide a period of 28 days for the lodgement of an appeal, which in this case would have required the Owners Corporation to file a Notice of Appeal on or about 21 September 2018. The Owners Corporation seeks leave to file the appeal out of time and therefore an order from the Appeal Panel extending time pursuant to the provisions of s 41 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act). We will deal with that aspect later in these reasons.

The Notice of Appeal and Grounds of Appeal

- 10 As stated above, the Owners Corporation appeals Orders 1 and 4 above.
- 11 The Grounds of Appeal may be summarised as follows:

Order concerning use of common property

- (1) Mrs Bylinska’s husband was not a party to the proceedings and therefore could not give consent;
- (2) The Tribunal failed to satisfy itself that the strata managing agent had the power or authority to consent on behalf of the Owners Corporation;
- (3) The strata managing agent was not vested with the power or authority on behalf of the Owners Corporation and could not give consent;
- (4) The order properly construed is a declaration in nature and the Tribunal does not have power to make such a declaration;
- (5) In the alternative to the above ground, the Tribunal does not have jurisdiction to make such an order other than under s 131 of the Strata Act or s 59 of the NCAT Act. If the order was made pursuant to the

power under s 131 of the Strata Act, the Tribunal miscarried in the exercise of its discretion because it failed to consider the mandatory considerations in s 131(2). If the order was made pursuant to s 59 of the NCAT Act, then the Tribunal did not have power to make such order because the purported agreement was not in writing or signed by the parties;

- (6) The Tribunal does not have jurisdiction to make an order in favour of a non-party and jurisdiction does not accrue by consent.

Service of amended application upon Owners Corporation

- (1) The Tribunal erred in finding that Mrs Bylinska had served the amended application upon the Owners Corporation and did so without evidence to support that finding. Such finding lead to the decision to refuse the Owners Corporation's adjournment application. As a consequence, the Tribunal denied procedural fairness to the Owners Corporation by not allowing it the proper opportunity to review and consider the amended application.

Denial of procedural fairness

- (1) The Tribunal erred by denying procedural fairness to the Owners Corporation in that it stated its intention to find that the agreement between the parties was valid and that the agreement either needed to be honoured or compensation paid before hearing the evidence;
- (2) The Tribunal did not make a ruling concerning the Owners Corporation's claim that the Owners Corporation had not seen the amended application;
- (3) The Tribunal made a finding of fact regarding the right to use the storeroom without hearing Mrs Bylinska's evidence;
- (4) The Tribunal failed to provide the Owners Corporation an adequate opportunity to articulate its request for leave to be legally represented;

Legal professional privilege

- (1) The Tribunal erred in holding that privilege did not subsist;

Error of fact

- (1) The Tribunal erred in refusing the Owners Corporation's application to be legally represented, in stating that the claim was for \$3,000.00 whereas it was for in excess of \$20,000.00; and

Inadequate reasons

- (1) The Tribunal erred in failing to give proper reasons in that it did not make findings on material questions of fact, explain the basis of the Tribunal's jurisdiction or applicable law, provide a basis for the Tribunal's understanding of the applicable law and explain the reasoning process that lead to the Tribunal to the conclusions it made.

- 12 The Owners Corporation contends that the Grounds of Appeal involve both errors of law and other errors which require leave.
- 13 The Owners Corporation seek to have Orders 1 and 4 set aside and for Mrs Bylinska to pay the costs of the appeal incurred by the Owners Corporation.

Extension of time

- 14 In support of its application for the Tribunal to extend the time for the lodgement of the appeal, the Owners Corporation says:
 - (1) The length of the delay is approximately 17 weeks and is not significant or disproportionate to the injustice faced by the Owners Corporation such that strict compliance with the rules should not be enforced;
 - (2) The Owners Corporation says that it did not appeal within 28 days because it did not properly appreciate the effect of the orders. The majority of the members of the Owners Corporation do not have knowledge or experience in legal disputes of this nature or of the significant errors of law and fact which have occurred. The Owners Corporation and its strata committee do not meet on a regular basis;
 - (3) The Owners Corporation did not obtain legal advice on the effect of the Decision or rights of appeal until 17 December 2018;
 - (4) The Owners Corporation submitted that there are significant and serious errors of law made by the Tribunal and failure to extend time would result in a serious injustice. This includes the inability to validly occupy and control the common property, the subject of Order 1. The Owners Corporation has lost the ability to deal with this common property in a different manner and this results in financial detriment. The disclosure of privileged advice in relation to the current dispute would abrogate common law rights and privileges incorporated in legal professional privilege;
 - (5) The injustice carries with it significant public policy implications. The Owners Corporation has substantial prospects of success and this should be a major factor in extending time; and
 - (6) There is no prejudice to Mrs Bylinska in extending time because she is not affected by Order 1 and in the meantime, her husband continues to occupy the common property provided for in Order 1.

Mrs Bylinska's submissions in opposition to the appeal

- 15 In respect of Order 1, Mrs Bylinska referred to the 1997 Agreement which the Owners Corporation purported to terminate by a notice dated 3 April 2018. That agreement forms the background to consent Order 1 and essentially provides that her husband will retain the use of the same portion of common property.

16 In respect of order 4, Mrs Bylinska submitted that there was no error in that order. Privilege would now have expired “due to the finality of the legal dispute and passage of time”. The Strata Act makes provision for a lot owner to view the records of the Owners Corporation: see s 182 of the Strata Act, the provisions of which state:

182 Requests for inspection of records of owners corporation

(1) Persons who may inspect An owner, mortgagee or covenant chargee of a lot in a strata scheme, or a person authorised by the owner, mortgagee or covenant chargee, may request the owners corporation to allow an inspection to be carried out under this section.

(2) Form of request The request must be made by written notice given to the owners corporation and be accompanied by the fee prescribed by the regulations.

(3) Items to be made available for inspection The owners corporation must make the following items available for inspection by the person who makes the request or the person’s agent:

- (a) the strata roll,
- (b) any other records or documents required to be kept under this Part,
- (c) the plans, specifications, certificates, diagrams and other documents required to be delivered to the owners corporation before its first annual general meeting by the original owner or the lessor of a leasehold strata scheme,
- (d) if in its custody or under its control, the certificate of title comprising the common property or, in the case of a leasehold strata scheme, the certificate of title for the lease of the common property,
- (e) any applicable 10-year capital works fund plan,
- (f) the last financial statements prepared,
- (g) every current policy of insurance taken out by the owners corporation and the receipt for the premium last paid for each such policy,
- (h) if a strata managing agent has been appointed, a copy of the instrument of appointment,
- (i) if a strata renewal plan has been given to owners for their consideration under Part 10 of the Strata Schemes Development Act 2015, a copy of the plan,
- (j) any other record or document in the custody or under the control of the owners corporation,
- (k) if the duties of the owners corporation under this subsection have been delegated to a strata managing agent, any other records (including records of the strata managing agent) relating to the strata scheme that are prescribed by the regulations,

(l) if a building manager agreement is in force or has been entered into but has not yet commenced, a copy of the building manager agreement,

(m) particulars of any service agreement entered into by the owners corporation,

(n) particulars of any agreement entered into with a local council for a strata parking area,

(o) if the request is made within 5 years after the end of the initial period, particulars of any orders made under section 27 and copies of any related contracts or other documents.

Maximum penalty: 5 penalty units.

(4) Meeting inspections For the purpose of complying with requirements for the giving of notice of a meeting of the owners corporation, the original owner (whether or not having ceased to be an owner) or an agent authorised in writing by the original owner is entitled to inspect the strata roll without payment on making a written application.

- 17 In respect of the submissions concerning procedural unfairness, Mrs Bylinska's submissions set out the circumstances by which she forwarded an amended application to the Owners Corporation's strata manager by a letter posted on 9 August 2018. The Owners Corporation did not suffer procedural unfairness.
- 18 Mrs Bylinska opposes the application by the Owners Corporation to extend time for the lodgement of the appeal. She submitted that the delay is excessive – approximately 24 weeks. She submitted that the strata committee includes legal practitioners who should be aware of the importance of complying with time limits and she disputes the assertion that they did not have the knowledge or experience to appreciate the need to consider the effect of the orders contained in the decision promptly.

Oral submissions provided at the hearing of the appeal

The Owners Corporation's Submissions

- 19 At the hearing of the appeal, Mr Russell for the Owners Corporation made submissions which may be summarised as follows:
- (1) In considering whether time should be extended the Appeal Panel should give consideration to the principles identified in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 to the effect that one of the considerations should be the appellant's prospects of success and, further, whether the appellant has more substantial merit than merely a fairly arguable case (see paragraph 22 of that decision). In addition, Mrs Bylinska will not suffer any prejudice in the

sense that her husband continues to use the space which is the subject of the dispute;

- (2) In relation to Order 1, the errors made by the Tribunal were jurisdictional in nature. The Tribunal cannot accrue jurisdiction because the parties consented to the order. There is still a need to identify the power of the Tribunal to make an order;
- (3) Order 1 was made in circumstances lacking procedural fairness and the appropriate order to be made by the Appeal Panel is to remit the application for a rehearing. Questions arise as to whether the 1997 agreement is enforceable. That depends upon the factual circumstances giving rise to the issue by the Owners Corporation of the letter recording the 1997 Agreement. In any event, the Tribunal does not have power to make a declaratory order (see: *EB 9 & 10 Pty Ltd v The Owners SP 934 (No 2)* [2018] NSWSC 546).

Mrs Bylinska's Submissions

20 Mrs Bylinska made oral submissions which may be summarised as follows:

- (1) The factual circumstances giving rise to her application were that Mr Ucchino (the strata managing agent) changed the locks to the store room. She responded to that action by commencing her application for an order requiring the removal of locks; and
- (2) There was no denial of procedural fairness on 21 August 2018 because her amended claim was posted to Mr Ucchino on 9 August 2018. The letter has not been returned.

Decision

21 The proceedings leading to this appeal were commenced by an application seeking an order under s 187(1)(a) of the Residential Tenancies Act, 2010 (RT Act) to restrain the Owners Corporation from changing, altering or removing the locks to the store room the subject of the 1997 Agreement. The application included a narrative explaining the background to the agreement, the fact that a notice of termination had been sent and an assertion that the 1997 Agreement should prevail unless and until the sum of money calculated by reference to the provisions of the agreement is paid by the Owners Corporation to Mrs Bylinska. The application did not explain the relevance of the RT Act.

22 The proceedings came before the Tribunal on more than one occasion for directions and on 16 July 2018 the Tribunal made a direction that Mrs Bylinska has leave to amend the claim by 13 August 2018 by sending a copy of the amended claim to the Tribunal and to the Owners Corporation. At those directions hearings (occurring on 29 June 2018 and 16 July 2018) the Owners

Corporation's managing agent, Mr Ucchino appeared for the Owners Corporation.

- 23 The proceedings came before the Tribunal for hearing on 21 August 2018 at which Mrs Bylinska and Mr Ucchino both appeared.
- 24 More than one version of the transcript has been provided. But the versions are consistent in revealing that Mr Ucchino sought an adjournment because he had not received the amended application. The transcript reveals that the Member made a ruling which effectively deemed service of the amended application to have been provided by reason of it having been posted on 9 August 2018.
- 25 In substance, the difference between the amended application and the original application is that the original application only sought orders with respect to the continuing usage of the common property pursuant to the 1997 Agreement. However, the amended application sought additional orders including an order for production of privileged documents (i.e. protected from disclosure by legal professional privilege). The transcript reveals that although Mr Ucchino appeared to have requested an adjournment (which the Tribunal Member indicated she intended to refuse) later Mr Ucchino only sought an adjournment in respect of the "additional matters" (see page 156 of the folder provided by the Owners Corporation) which we take to refer to the request for privileged documents.
- 26 In our view, two significant questions arise with respect to each of Order 1 and Order 4.
- 27 So far as Order 1 is concerned, the question is did the Tribunal have power to make the order? Simply because the order was made by consent does not of itself give the Tribunal power to make such an order.
- 28 So far as Order 4 is concerned, the question is whether the Tribunal's reasons disclose an error of law. This order was not made by consent.
- 29 Order 1 involves an order that Mr Bylinska have a right to use common property. By its nature, as a consensual order, it also records an agreement between the parties that Mr Bylinska may use a portion of common property. Where parties reach an agreement and the terms of the agreement concern

matters beyond the jurisdiction of the Tribunal, the appropriate course for the Tribunal is to note the agreement between the parties. It is not appropriate to make an order even if by consent if the order is outside the order making power of the Tribunal.

30 In this case, the question of whether Order 1 was within the order making power of the Tribunal was not examined. However, there are reasons to doubt whether the Tribunal had such a power. They are:

- (1) The Strata Act does not appear to contain a specific power to make an order requiring the Owners Corporation to lease or license common property except by s 131. That section permits such an order, but only if the mandatory considerations referred to are addressed. Section 232 provides that the Tribunal may make an order to settle a dispute about matters listed in the subsection. However, the Decision does not record whether s 232 has application to the circumstances of this matter;
- (2) Questions arise as to whether the 1997 Agreement itself is enforceable. That may involve a consideration of the legislation applicable in 1997, namely the Strata Schemes Management Act 1996 (the 1996 Act) which is the Act referred to in the 1997 Agreement;
- (3) The 1997 Agreement states that the Owners Corporation have agreed to grant a lease of common property in accordance with “section 110.6(112)” to Mr Bylinska “indefinitely”. It is not clear what “section 110.6(112)” actually refers to because there was no such section. Sections 110 and 112 appear irrelevant. Section 110 is in these terms:

110 What powers does an owners corporation have to borrow money and otherwise deal with property?

(1) An owners corporation may borrow money and secure the repayment of the money and of any interest in such manner as may be agreed on by the owners corporation and the lender, otherwise than by charging the repayment on the common property.

(2) An owners corporation may dispose of or otherwise deal with any lot vested in the owners corporation as a result of a subdivision effected under section 9 of the Strata Schemes (Freehold Development) Act 1973 or section 11 of the Strata Schemes (Leasehold Development) Act 1986.

(3) Section 50 (1) (d) of the Interpretation Act 1987 does not apply to an owners corporation.

Note. Section 50 (1) (d) of the Interpretation Act 1987 provides that a statutory corporation may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property, and

Section 112 of the 1996 Act is in the following terms:

112 Agreement for payment to owner of consideration on transfer or lease of common property

An owners corporation may, in accordance with a special resolution, make an agreement with an owner for the payment to the owner of:

(a) the whole or any part of the consideration under any transaction proposed to be entered into by the owners corporation under Division 2 of Part 2 of the *Strata Schemes (Freehold Development) Act 1973* or of the *Strata Schemes (Leasehold Development) Act 1986*, or

(b) any money payable to the owners corporation under a by-law to which Division 4 of Part 5 of Chapter 2 applies.

(4) Mr Russell submitted that his enquiries reveal that when the 1997 Agreement was entered into, the *Strata Schemes Freehold Development Act NSW 1973* regulated the licensing of common property and it provided that a special resolution of the Owners Corporation was required.

- 31 In the circumstances of this case, the consent order proposed by the parties, required the Tribunal to consider whether the 1997 Agreement was lawfully entered into and was enforceable. That in turn may have involved a consideration of whether appropriate approvals had been given to the Owners Corporation's entry into the 1997 Agreement; for example approval in the form, of a special resolution of the Owners Corporation.
- 32 If we do not set aside Order 1, it is possible for a significant injustice to ensue by reason of there being an order binding the Owners Corporation in circumstances where the necessary enquiry into the efficacy of the 1997 Agreement has not taken place.
- 33 Subject to extending time for the lodgement of the appeal, in our view, Order 1 should be set aside. Mrs Bylinska's application should be remitted to the Consumer and Commercial Division for a rehearing.
- 34 In respect of Order 4, it is our view that there is a clear error of law made by the Tribunal in its analysis of the entitlement of Mrs Bylinska to documents claimed by the Owners Corporation to be documents protected from disclosure by legal professional privilege. The Owners Corporation is a separate entity from the lot owners and as a separate entity it is entitled to the protection provided by the common law concerning legal professional privilege. This means that documents or communications recording a request for legal advice and the documents recording that advice may be the subject of claims for legal professional privilege. In our view, the only individuals entitled to such

documents are those individuals authorised by the Owners Corporation. Generally, that would be limited to members of the strata committee.

- 35 Legal professional privilege is a fundamental common law right, and because, the Decision is in error, an injustice would ensue were we not to extend time for lodgement of the appeal in relation to Order 4. Furthermore, we reject the argument put by Mrs Bylinska that the right of a lot owner to access documents of the Owners Corporation provided by s 182 of the Strata Act has the effect of giving to a lot owner the right to inspect documents protected by legal professional privilege. This issue was dealt with in *Eastmark Holdings Pty Limited v Kabraji (No 3)* [2012] NSWSC 1463. That case in part concerned s 108 of the 1996 Act (which is similar to s 182 of the Strata Act). At paragraph 92, the Court said:

As stated, the third Defendant responds that "it is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect": *Daniels Corporation v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [11]. It says that what follows from this is that s 108 cannot be read as authorising the inspection of legal advice.

- 36 At [94] the Court accepted the above reasoning.
- 37 The Owners Corporation sought to rely upon the decision in *The Owners - Strata Plan No. 74602 v Eastmark Holdings Pty Limited* [2013] NSWCA 221. That concerned a dispute between the Owners Corporation and a lot owner. In that case, the Court of Appeal appeared to agree with the primary Judge. (see [21]) when it is stated that where the Owners Corporation was purporting to act on behalf of the lot owners in obtaining legal advice concerning the entry into a contract that affected the interest of all lot owners, such advice was not confidential between the lot owners and the Owners Corporation once it was obtained. However, in paragraph 23, the Court of Appeal dealt with aspects of the dispute between Eastmark and the Owners Corporation where their interests were "quite divergent". In that context, the Court said that there is "every reason why the Owners Corporation should be entitled to assert its legal professional privilege as against Eastmark in respect of documents relating to those disputes." At [26] the Court of Appeal held that Eastmark in its capacity as a potential defendant in adversarial proceedings brought against it by the

Owners Corporation is not entitled to access documents that relate to those disputes.

- 38 In our view, Mrs Bylinska and the Owners Corporation are in dispute over the enforceability and terms of the 1997 Agreement and to the extent that she seeks documents consisting of legal advice provided to the Owners Corporation in respect of that dispute, the Court of Appeal decision is authority for the proposition that she is not entitled to access those documents.
- 39 We refer to the submission that the Owners Corporation was denied procedural fairness. We agree with this submission for these reasons:
- (1) As a result of the Tribunal's directions on 16 July 2018 for the amended application to be filed and served by 13 August 2018, it was reasonable for the Owners Corporation to assume when it received notification of the next hearing on 21 August 2018 that that hearing would not be a final hearing. No direction had been made for the Owners Corporation to file and serve evidence in opposition to the amended application and very little time would have been available. The period from 13 August to 21 August was inadequate; and
 - (2) The representative of the Owners Corporation requested an adjournment which was refused. In the circumstances, the refusal had the effect of denying the Owners Corporation procedural fairness.

Extension of time

- 40 The principles which we must consider in determining whether time should be extended for the lodgement of the appeal were set out in the Appeal Panel decision reported as *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22. In that decision, the Appeal Panel referred to four matters to consider:
- (1) The length of the delay;
 - (2) The reason for the delay;
 - (3) The appellant's prospects of success, that is usually whether the applicant for the extension has a fairly arguable case; and
 - (4) The extent of any prejudice suffered by the respondent to the appeal.
- 41 In addition, the Appeal Panel said that in some cases it may be appropriate to go further into the merits of the appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of

time can show that his or her case has more substantial merit than merely being fairly arguable (see [22]).

42 In this case, the length of the delay is excessive and in most cases an Appeal Panel would be most reluctant to extend time. In addition, in this case, the reason for the delay is inadequate and reflects poorly on the members of the strata committee in undertaking their obligations to comply with Tribunal orders. However, in this case the merits of the appeal are so strongly in favour of the Owners Corporation that, in our view, an injustice would ensue were we not to extend time. The injustice arises for the following reasons:

- (1) On 21 August 2018 the proceedings were listed for the purposes earlier described. The accompanying information made it clear that there was no requirement to bring witnesses. In addition, there had been no prior order or direction made for the Owners Corporation to file and serve its evidence. It was not unreasonable in our view for Mr Uchino to request an adjournment. Furthermore, whilst the subject matter of Order 1 had been substantially foreshadowed in the original application, the subject matter referred to in Order 4 had only been in Mr Uchino's hands for a short period after 9 August 2018 (assuming that, contrary to his assertions, the letter posted by Mrs Bylinska had been received by him). The fact that the hearing on 21 August 2018 might have resulted in a third directions hearing and therefore was arguably moving slowly towards finality, was a situation largely arising because of Ms Bylinska's own conduct. That conduct was her reliance on the RT Act in the original application, which was abandoned in favour of reliance on the Strata Act. In addition, in the amended application a fresh order was included (for the production of privileged documents);
- (2) For the reasons earlier indicated, there are reservations about the efficacy of the 1997 Agreement; and
- (3) For the reasons earlier indicated, the reasons given in support of the order concerning documents protected by legal professional privilege are, in our respectful view, mistaken. Those reasons state that the strata manager is engaged to work on behalf of the strata, including the Owners Corporation and should not withhold information allegedly obtained on their behalf by claiming privilege. That was misconceived. The managing agent was not claiming privilege, rather the Owners Corporation was. The Tribunal stated that Ms Bylinska is a member of the Owners Corporation and it is "entitled to seek legal advice obtain on her behalf". In the circumstances of this matter, and for the reasons referred to earlier (see the Court of Appeal in the *Eastmark* case) this analysis displays an error of law.

43 Accordingly, in the circumstances of this case, the appropriate order in the interests of justice is to set aside Orders 1 and 4.

44 At the hearing, we raised with Mr Russell for the Owners Corporation the possibility that if we were to order a remittal, as he proposed, it would be appropriate, in the circumstances, for a condition to be imposed, namely that no action would be taken by the Owners Corporation with respect to the rights and obligations of both parties under the 1997 Agreement pending the outcome of the Tribunal hearing following the remittal. Mr Russell did not oppose the imposition of such a condition.

Orders

45 As a consequence of the views expressed above, we make the following orders:

- (1) Time for the lodgement of the Notice of Appeal is extended to 5 February 2019;
- (2) The appeal is upheld;
- (3) Orders 1 and 4 made in SC 18/27660 on 21 August 2018 are set aside;
- (4) The application of the respondent to the appeal in respect of the 1997 Agreement is remitted to the Consumer and Commercial Division of the Tribunal for rehearing;
- (5) Order 2 above is made on the condition that the appellant takes no action with respect to the existing usage of the storage room the subject of the 1997 Agreement pending further order of the Tribunal;
- (6) If the appellant seeks costs of the appeal, the appellant must file and serve submissions in respect of costs within 14 days of the publication of these orders;
- (7) The respondent must file and serve her submissions in response to the appellant's submissions concerning costs within 14 days after the receipt of the appellant's submissions on costs;
- (8) The parties' submissions on costs should include a submission as to whether the Appeal Panel may dispense with a hearing and determine the question of costs of the appeal on the papers without the necessity of a further hearing.
- (9) Each party has liberty to apply to the Tribunal, on 7 days' notice to the other party, for any further directions concerning compliance with order (5)

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.