Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 76317 v Ho
Medium Neutral Citation:	[2020] NSWCATAP 205
Hearing Date(s):	17 September 2020
Date of Orders:	06 October 2020
Decision Date:	6 October 2020
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President D Robertson, Senior Member
Decision:	(1) The Owners Corporation has leave to be legally represented on the condition that the Owners Corporation makes no claim for costs of the appeal against the other parties to this appeal. (2) The time for lodgement of the appeal is extended to 29 June 2020. (3) Leave to appeal granted. (4) Appeal dismissed.
Catchwords:	ADMINISTRATIVE LAW – Civil & Administrative Tribunal (NSW) – appeal on a question of law, substantial miscarriage of justice, appointment of a compulsory strata manager, orders disproportionate to alleged failings of Owners Corporation
Legislation Cited:	None cited
Cases Cited:	Bischoff v Sahade [2015] NSWCATAP 135 Collins v Urban [2014] NSWCATAP 17 Hoare & Ors v The Owners Strata Plan No 73905 [2018] NSWCATCD 455 Prendergast and Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 [13(7)]

Texts Cited:	None cited
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 76317 (First Appellant) Professional Strata Management Group (Second Appellant) Ching-Wen Ho (First Respondent) Peter Groves (Second Respondent) Jeffrey Temple (Third Respondent) Whelan Property Group Pty Ltd (Fourth Respondent)
Representation:	Solicitors: D Residovic (for First Appellant) R Res, (Strata Manager) (Second Appellant)
File Number(s):	AP 20/28134
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil & Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	28 May 2020
Before:	M Tibbey, Senior Member
File Number(s):	SC 19/36188

REASONS FOR DECISION

Background

1 This decision concerns an appeal from a decision made in the Consumer & Commercial Division of the Tribunal published on 28 May 2020 in which orders to the following effect (expressed in summary form) were made:

(1) Whelan Property Group Pty Ltd (Whelan) is appointed pursuant to s 237(1) of the Strata Schemes Management Act (the SSM Act) to exercise all the functions of an owners corporation for a period of 12 months on the terms and conditions set out in their letter dated 8 August 2019.

(2) Pursuant to s 237(2), Whelan shall exercise all of the functions of the Owners Corporation, including the functions of the chairperson, treasurer, secretary and the strata committee.

(3) Professional Strata Management Group Pty Ltd (PSMG), the Owners Corporation and any lot owner shall deliver any books, records or other property of the Owners Corporation held by them to Whelan.

2 We will refer to the decision under appeal as the Decision

3 The Applicants at first instance (who are lot owners) are now the First, Second and Third Respondents in the appeal. The two Appellants were the Respondents at first instance. The Second Appellant (PSMG) was the strata managing agent until the orders were made on 28 May 2020.

4 The Notice of Appeal was lodged on 30 June 2020 and a call-over occurred on 9 July 2020 at which directions were made. Those directions included a direction that Whelan be added as a Respondent to the appeal. In addition, an application for a stay was heard and refused, but in the course of refusing that application, orders were made as follows:

(1) the Owners Corporation may prosecute the appeal and for this purpose the strata committee's functions remain in place for the limited purpose of making decisions on behalf of the Owners Corporation to prosecute the appeal.

(2) Whelan are directed to keep the Owners Corporation and the members of the strata committee punctually informed of its decisions.

Summary of the Decision

5 In order to understand the issues raised in the appeal we summarise the effect of the Decision in the following paragraphs. The Applicants sought a number of orders under the SSM Act which may be summarised as follows:

(1) An order under s 20 by which the Tribunal may appoint a person to hold a meeting of the Owners Corporation.

(2) An order under s 24 by which the Tribunal may make an order invalidating any resolution or election.

(3) An order under s 25, which gives to the Tribunal a power to order that a resolution passed at a general meeting be treated as a nullity.

(4) An order under s 188 by which the Tribunal may order the supply of information.

(5) An order under s 232 by which the Tribunal may make an order to settle a complaint or dispute.

(6) An order under s 237 by which the Tribunal may appoint a strata managing agent.

6 The Tribunal made an order pursuant to s 237 and held that it was not necessary to make orders pursuant to ss 20, 24 or 25 (see [98]). The Tribunal also determined that the strata management agreement approved at the AGM of 22 May 2019 be terminated pursuant to s 72 of the SSM Act.

7 At [92], the Tribunal stated that it was satisfied for the reasons set out at [93] and [94] that an order is required to be made under s 237(1) for the appointment of a strata managing agent to exercise the functions of the Owners Corporation. The Tribunal found that the management of the strata scheme was not functioning satisfactorily for the purpose of s 237(3)(a) of the SSM Act. At [93] the Tribunal held that the requirement in s 237(3)(c) has also been satisfied in that the Owners Corporation has failed to perform one or more of its duties. At [94] the Tribunal found that the requirements of s 237 were satisfied for the following reasons:

(1) Due notice of the AGM of 22 May 2019 was not provided to all lot owners.

(2) There was no quorum at the AGM of 22 May 2019.

(3) The strata manager (PSMG) failed to prepare a 10 year capital works plan in advance of the AGM or at all so that there is presently no capital works plan in place.

(4) The strata manager failed to provide a copy of the proposed renewed strata management agency agreement in advance of the AGM so that lot owners could study and consider it before the AGM.

(5) The strata manager incorrectly minuted the resolution of the AGM that there would be no increase in strata levies and stated in the minutes that the AGM had agreed that levies would be raised. That was not the case.

(6) Lot owners whose levies were not paid up to date at the time of the AGM (and were therefore “unfinancial”) were appointed to the strata committee when they were ineligible to so serve.

(7) After the AGM the strata manager sent levy notices for increased levies when no increase of levies was agreed.

(8) The strata manager was slow to act on noise complaints made by Ms Ho in May 2019, only sending a notice to the premises involved on 27 June 2019.

(9) Publicity was given within the strata plan to a proposed strata committee meeting that was misguided in that an EGM was to be held to deal with

the issues raised. The strata manager stood by when this notice was posted. The Tribunal found that posting the notice was intimidatory and inappropriate and that the strata manager took insufficient steps to have the notice removed from the noticeboard.

(10) The failure by the Respondents to mediate did not reflect well on the strata manager, particularly as the Tribunal has not found that the preponderance of the submissions of the Applicants were not "groundless, misconstrued, malicious and self-interested" as claimed by the Respondents to the application.

8 Other or similar findings of the Tribunal relevant to this appeal are as follows:

(1) One lot owner (Mr Temple) had not received the notice of the AGM [13]. Another lot owner (Ms Ho) received her notice by email rather than by the method which had been nominated by her (namely post). Other lot owners (Messrs Groves and Docherty) had not been provided with "proper notice of the AGM" and the Tribunal found that due notice was not provided to all lot owners [49].

(2) A quorum was not present at the AGM [52]. Unfinancial lot owners had been accepted as members of the strata committee at the AGM and the managers had made a mistake in not pointing out that they were ineligible for election [57]-[58].

(3) The proposed managing agency agreement for the coming year ought to have been provided to all lot owners prior to the AGM so that they could make an informed decision at the AGM as to the entity they chose to engage as strata manager and as to the terms upon which that manager was engaged [63].

(4) In relation to the noise complaints made by Ms Ho, the Tribunal found that the strata manager had provided a "slow and inadequate response" [65].

Notice of Appeal

9 A Notice of Appeal was lodged on 29 June 2020. All orders were challenged in the Notice of Appeal. The grounds of appeal may be summarised as follows:

(1) The orders were excessive. Administrative failings can be rectified with an appropriate general meeting.

(2) Appointment of Whelan is not in the best interests of the Appellant.

(3) The decision was not fair and equitable. Non-compliance by the Owners Corporation in relation to management could have been resolved at a general meeting and the non-compliance did not damage or disadvantage the Owners Corporation. Over 25% of lot owners do not agree with the Decision. The errors were technical and were errors of the managing agent.

10 A document headed “Additional Points of Appeal” was attached to the Notice of Appeal. The submissions made in that document may be summarised as follows:

(1) The Applicants say they were disadvantaged because they lost their right to vote at the AGM but the Decision conflicts with that right because it removes the right of all lot owners to vote through the appointment of a compulsory manager.

(2) Although lot owners may not have received notice of the AGM by the preferred method, they nevertheless did receive notice by email.

(3) The overwhelming majority of those lot owners who attended the AGM supported the resolutions passed.

(4) Insofar as the AGM did not have a quorum, the meeting closed at 7 pm and there was ample time for additional owners to arrive but none did. The lack of a quorum was an administrative misstep that resulted in no adverse effects and is a miscarriage of justice for 112 owners who have now lost their right to self-govern.

(5) The fact that some lot owners were unfinancial and ineligible to be elected to the strata committee was a “momentary aberration” which did not adversely affect the Owners Corporation.

(6) The fact that the AGM approved the reappointment of PSMG without the agency agreement being attached to the notice of meeting demonstrates the trust placed in PSMG by the Owners Corporation.

(7) The response to the breach of by law (described by the Tribunal as inadequate) ignores the fact that the strata manager represented the Owners Corporation and if the Applicant was dissatisfied with the response in relation to the breach, the Applicant had the right to make her own application against the party responsible for the noise. The slow response to the alleged breach of by law does not justify suspension of the Owners Corporation’s right to self-management.

(8) The failure of the Owners Corporation to produce a capital works fund forecast did not materially disadvantage the Owners Corporation. The oversight can be rectified by a further general meeting.

(9) The decision of the Owners Corporation to decline mediation was justified given the aggressive and premature actions of the Respondents.

(10) The findings made by the member concerned matters which were not sufficiently serious to justify the compulsory appointment of a manager. The Decision may be described as judicial overreach.

11 Attached to the Notice of Appeal were a number of statements from lot owners (all dated in June 2020) to the effect that they did not agree with the appointment of a compulsory manager.

Reply to Appeal

12 The Respondents filed a Reply to Appeal to which were attached lengthy submissions. The effect of those submissions was to support the Decision and the orders made. In the reply the Respondents stated that the appeal had been filed out of time. The submission was made that the appeal should have been filed by 25 June 2020 whereas it had been filed on 30 June 2020. The Respondents opposed extending the time for lodgement of the appeal.

Appellants' Submissions

13 The Appellants' submissions may be summarised as follows:

(1) The Owners Corporation is in a very good financial position. The Owners Corporation and the building are, and at all material times were, in an excellent position and condition. This came about through very good and prudent management of the Owners Corporation and the building.

(2) It is a "cardinally flawed argument" to suggest that a poorly managed and dysfunctional strata scheme could be in such a strong and extraordinarily good position.

(3) The application to the Tribunal was brought by three lot owners who represent 2.68% of the owners (there being 112 lot owners).

(4) Where there are breaches of the SSM Act any remedy imposed by the Tribunal ought to be proportionate to the seriousness of the breaches and the magnitude of any consequences.

(5) Here the breaches of the SSM Act by PSMG had no actual or provable adverse consequences for the Owners Corporation, the building or the lot owners.

(6) The compulsory appointment of a strata manager is grossly disproportionate in the circumstances of this case. The Tribunal could have made orders requiring the Owners Corporation to call and conduct a fresh AGM.

(7) The Appeal Panel should order that the existing order be set aside and in its place, make less serious orders. Preferably this would involve an order to call a fresh AGM or an order prohibiting the appointment of PSMG for a period (eg. six months).

(8) If the Appeal Panel is on the view that it was appropriate to appoint a compulsory manager, then Whelan should not be appointed.

14 At the hearing Mr Residovic submitted that the Tribunal had only paid lip service to the principles articulated in the two decisions referred to in the Decision, namely *Bischoff v Sahade* [2015] NSWCATAP 135 and *Hoare & Ors*

v The Owners Strata Plan No 73905 [2018] NSWCATCD 455. In those cases, it was said that the appointment of a compulsory manager is a serious measure not to be taken lightly. Mr Residovic also submitted that the Tribunal had failed to consider alternative measures such as an order under s 24 of the SSM Act.

15 Mr Res (for PSMG) made submissions which may be summarised as follows:

(1) The Tribunal's order appointing a compulsory manager constituted a gross miscarriage of justice. The rights of lot owners are not preserved by removing those rights by the appointment of a compulsory manager.

(2) The Tribunal's findings that some lot owners did not have notice of the AGM is disputed and, in any event, even if the Applicants had voted, their votes would not have affected the outcome of the meeting.

(3) The lack of a quorum at the AGM was an "administrative misstep".

(4) The fact that some lot owners elected to the strata committee were unfinancial was a "momentary aberration" which did not adversely affect the Owners Corporation.

(5) In other respects the submissions are critical of the various findings of the Tribunal, which in some cases were described as "faulty". The submissions concede that the AGM was "invalid".

Submissions in Reply

16 In reply, Mr Residovic sought to rely upon a number of statements headed "petition to appeal" from various lot owners. These statements were to the effect that the lot owners supported the resolutions passed at the AGM and were opposed to the appointment of a compulsory strata manager.

17 At the hearing of the appeal, we refused to accept this evidence for two reasons. First, the opinion of lot owners was not in our view relevant to the question of whether the Decision (and the reasons contained in it in support of the orders made) displayed error or other ground justifying the upholding of the appeal. Secondly, it was evidence that could have been, in substance, tendered at the hearing at first instance but was only made available in support of the appeal. By allowing such evidence on appeal an unfairness to the Respondents would have resulted because they may have wanted to cross-examine some of the authors of the statements or put forward other evidence in response.

18 In submissions in reply, Mr Residovic submitted that there was no evidence that the strata scheme was dysfunctional and that that submission involved the raising of a question of law. We will address that submission later in these reasons. Otherwise, Mr Residovic's submissions did not raise a question of law but were to the effect that the Decision was not fair and equitable because the orders made were disproportionate to the findings of fact concerning the functioning of the Owners Corporation.

Consideration

19 We are of the opinion that the appeal should be dismissed for reasons which are set out below. Accordingly, we see no need to record the Respondents' submissions.

20 Appeals from decisions made in the Consumer & Commercial Division of the Tribunal are regulated by s 80 of the *Civil & Administrative Tribunal Act* 2013 (NSW) (the NCAT Act). In this case, s 80 provides that an appeal lies as of right on any question of law or with the leave of the Appeal Panel on any other grounds. Section 80 is modified by cl 12 of schedule 4 of the NCAT Act. Cl 12 provides:

> **Limitations on internal appeals against Division decisions**
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> (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—
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> (a) the decision of the Tribunal under appeal was not fair and equitable, or
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> (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).
>
> Note—
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> Under section 80 of this Act, a party to proceedings in which a Division decision that is an internally appealable decision is made may appeal against the decision on a question of law as of right. The leave of the Appeal Panel is required for an internal appeal on any other grounds.

> (2) Despite section 80(2)(b) of this Act, an internal appeal against a Division decision may only be made on a question of law (as of right) and not on any other grounds (even with leave) if—
>
> > (a) the appellant is a corporation and the appeal relates to a dispute in respect of which the Tribunal at first instance had jurisdiction because of the operation of Schedule 3 to the Credit (Commonwealth Powers) Act 2010, or
> >
> > (b) the appeal is an appeal against an order of the Tribunal for the termination of a tenancy under the Residential Tenancies Act 2010 and a warrant of possession has been executed in relation to that order.

21 The Tribunal's decision in *Collins v Urban* [2014] NSWCATAP 17 deals with the principles relevant to the operation of cl 12. Insofar as this appeal is concerned, those principles may be summarised as follows:

(1) The concept 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 ([71] *Collins v Urban*);

(2) A decision can be said to be "against the weight of evidence" 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 ([77] *Collins v Urban*).

(3) 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 because one of the circumstances referred to in cl 12(1)(a), (b) or (c) it will be generally necessary for the party to explain what its case would have been and show that it was fairly arguable ([79] *Collins v Urban*).

(4) If the Appeal Panel is satisfied that the Appellants seeking leave to appeal may have suffered a substantial miscarriage of justice then the Appeal Panel "may" grant leave. In other words, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal ([81] *Collins v Urban*).

22 The principles which govern the granting of leave were summarised in [84] *Collins v Urban* and involve these considerations:

(1) 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 bone fide challenge to an issue of fact.

(2) It is ordinarily appropriate to grant leave to appeal only in matters that involve issues of principle, questions of public importance or matters of administration or policy which might have general application or 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. Other considerations include whether the Tribunal made a factual error that was unreasonably arrived at and clearly mistaken or whether the Tribunal has 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.

23 In our view the grounds of appeal in this case may be reduced to two points. The first is the submission made by Mr Residovic in reply, namely that there was no evidence to support the findings of fact made by the member and thus a question of law arises. The second is that a substantial miscarriage of justice has occurred because the decision was not fair and equitable in the sense that the orders made were disproportionate to the findings of fact made by the Tribunal concerning the functioning of the Owners Corporation.

24 Mr Residovic is correct in his submission that a question of law arises if it can be established that there was no evidence to support a finding of fact (see *John Prendergast and Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 [13(7)]. Nevertheless, in our view, this submission has no merit as the Decision discloses a number of findings of fact in support of the conclusion that the Owners Corporation was not functioning satisfactorily. These findings of fact are listed in paragraph [94] of the Decision under 10 subparagraphs. We are of the opinion that this ground of appeal should be refused because there was clearly evidence to support the Tribunal's finding in paragraph [96] that the Owners Corporation had engaged in breaches of duty and failures to function satisfactorily. The findings in paragraph [96] follow from the findings of fact. Those findings were that the breaches of duty and failures to function were serious and affect the proper functioning of the management of the strata scheme in a way that is deleterious to the interests of all lot owners.

25 We now turn to the ground under cl 12, namely that the Decision was not fair and equitable for the reasons explained in the Appellants' submissions.

26 It is clear from the Decision that the Tribunal considered the individual failings of the Owners Corporation and of PSMG in the aggregate and concluded that, when taken together, the breaches were of the kind which justified the finding

that they were serious and affected the proper functioning of management of the strata scheme in a way that was deleterious to the interests of all lot owners. Some of the findings taken on their own would not, in our view, have justified the appointment of the compulsory manager but the Tribunal correctly, in our view, considered the failures together.

27 The essential findings made by the Tribunal were contained in paragraph [92] of the Decision, namely that the management of the strata scheme was "not functioning satisfactorily" and in paragraph [93], that the Owners Corporation has failed to perform one or more of its duties. It is clear that these conclusions follow from the findings of fact summarised in paragraph [94] of the Decision.

28 The Appellants submitted that the Respondents (ie. the Applicants at first instance) represented only a very small minority and that the vast majority of lot owners were content with the outcome of the AGM. In our view each lot owner is entitled to expect that the provisions of the SSM Act will be complied with, particularly those terms which require the Owners Corporation to ensure that each lot owner has notice of an AGM and that the AGM is conducted with a quorum being present. The fact that it may have been reasonably likely that had the calling of the meeting and its conduct fully complied with obligations under the SSM Act, the resolutions passed would have been identical to those which were allegedly passed in this case does not excuse the Owners Corporation. Each lot owner is entitled to expect reasonable compliance by the Owners Corporation, the strata committee and the strata manager.

29 We refer to the submissions that were made to the effect that the order was disproportionate to the order made for the appointment of a compulsory manager. We note that the Decision records that the representative for the Owners Corporation submitted that the previous failures did not justify the appointment of a compulsory manager because an AGM was due in a couple of months (see [97]). The Tribunal took a different view. In our opinion, the Tribunal was entitled to take a different view, particularly having regard to the fact that there appears to have been no explanation as to why corrective measures had not been taken in the period between the AGM (May 2019) and the hearing in March 2020. The Tribunal was critical of the failure of the

Appellants to participate in mediation. Such criticism, in our view, is understandable as a mediation could have resulted in some agreement for the conduct of an extraordinary general meeting to attempt to overcome previous failings arising out of the conduct of the 2019 AGM.

30 We refer to the Appellants' submissions that the appointment of a compulsory strata manager is a serious step not to be taken lightly. On the other hand, s 237 of the SSM Act is clear in its language. It requires the Tribunal to be satisfied that the management of a strata scheme "is not functioning or is not functioning satisfactorily". There is no error in the Decision insofar as the Decision clearly recognises the need to achieve the level of satisfaction that s 237 prescribes. In addition, the severity of the appointment of a compulsory manager is tempered by the length of the appointment – in this case until May next year when the lot owners will have an opportunity to restore democracy and decide who is to be appointed the strata manager thereafter.

31 In our view, there is no basis for concluding that the Decision has resulted in a substantial miscarriage of justice. Further, in our view, the other criteria identified in *Collins v Urban* have not been satisfied. In particular, there is no issue of principle, question of public importance or an injustice which is reasonably clear.

32 Our conclusion is that the Appellants have not satisfied us that leave to appeal should be granted. Accordingly, the appeal must be dismissed.

33 At the hearing of the appeal Mr Residovic sought leave to appear for the Owners Corporation. This was opposed. We determined that the Owners Corporation should have leave to be legally represented on the condition that the Owners Corporation makes no claim for costs of the appeal against the other parties to the appeal. Reasons were given orally for that order.

34 The Appellants' application for time to be extended for lodgement of the appeal was opposed by the Respondent. The Respondents were not able to demonstrate any prejudice and accordingly we are of the opinion that the appropriate order is to extend time. The period of delay in filing the appeal was relatively short.

35 In conclusion, we make the following orders:

(1) The Owners Corporation has leave to be legally represented on the condition that the Owners Corporation makes no claim for costs of the appeal against the other parties to this appeal.

(2) The time for lodgement of the appeal is extended to 29 June 2020.

(3) Leave to appeal granted.

(4) Appeal dismissed.

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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