Civil and Administrative Tribunal

New South Wales

Case Name:	Foong v Scutella
Medium Neutral Citation:	[2021] NSWCATAP 225
Hearing Date(s):	8 April 2021
Date of Orders:	23 July 2021
Decision Date:	23 July 2021
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President J Currie, Senior Member
Decision:	(1) Appeal dismissed. (2) If any of the Respondents seeks an order for costs of the appeal they must within 21 days file and serve submissions in support of such an order. (3) If any of the Respondents complies with order 2 above, the Appellants must within 21 days thereafter file and serve submissions in opposition to the application for costs of the appeal. (4) The costs submissions must include a submission as to whether the Appeal Panel may determine costs "on the papers" and make an order that a hearing on costs be dispensed with.
Catchwords:	LANDLAW – strata title – appointment of compulsory manager to strata scheme, whether appointment possible in light of appointment of existing strata manager, whether appointment possible when no meeting has occurred under s 237(6)
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) Civil & Administrative Tribunal Rules Strata Schemes Management Act 1996 Public Health (COVID-19 Gatherings) Order 2020 Strata Schemes Management Regulation 2016

	Public Health Act 2010
Cases Cited:	Allen & Ors v TriCare (Hastings) Pty Ltd & Anor [2015] NSWSC 416 Bischoff v Sahade [2015] NSWCATAP 135 The Owners – Strata Plan 5709 v Andrews [2009] NSWCA 189 Mortlock v Owners Strata Plan 55434 (2006) NSWSC 363 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Zulka v Burbank; Mainwaring v Phillip (2018) 53475 2 Elizabeth Bay Road Pty Ltd v Owners – Strata Plan No 72943 [2014] NSWCA 409
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Joseph Foong, Chuk Ha Foo, Steven Lau, Williamto Hong, Ruly Ganardi (Appellants) Craig Scutella (First Respondent) Owners SP No 56443 (Second Respondent) Lloyd Wong, Ferdinand Bullo, Ricky Thoo, Silvia Inan, Erlyne Rusley, Thomas Anusic, Eng Seoh Ho, Howen Enterprise Pty Ltd, Victoria Lu, Hung Ying Fung Lu, Ping Heng Lee, Ruinan Luo, Siv Phan Tew, Rachel Yeung, Lini Lai, Juliano Lai, Edward Chow Yun Wah, Mike Ah-Koon (Third to Nineteenth Respondents)
Representation:	Counsel: N Newton (Appellants) Solicitors: J Moir of Madison Markus Law Firm (Appellants) Grace Lawyers (Respondent) J Bannerman of Bannerman Solicitors (First Respondent) B G Haines of Holding Redlich Solicitors (Second Respondent)
File Number(s):	2020/00371089 (AP 20/42909)
Publication Restriction:	Nil

Decision under appeal:

Court or Tribunal:	NSW Civil & Administrative Tribunal
Jurisdiction:	Consumer & Commercial Division
Citation:	Not applicable
Date of Decision:	9 September 2020
Before:	SA McDonald (Senior Member)
File Number(s):	SC 20/11026

REASONS FOR DECISION

Background

1 This is an appeal from a decision (the Decision) made in the Consumer & Commercial Division of the Tribunal published on 9 September 2020 appointing Strata Associates Pty Ltd trading as Strata Choice (Strata Choice) as a compulsory strata managing agent to exercise all the functions of the chairperson, secretary, treasurer and strata committee of the Owners Corporation (the Second Respondent to this appeal). In making those orders the Tribunal was exercising its powers under s 237 of the *Strata Schemes Management Act* 2015 (NSW) (the Strata Act). The appointment of Strata Choice was for a period of two years commencing 9 September 2020. The Appellants are lot owners in the Strata Scheme. The Third to Nineteenth Respondents are also lot owners who were respondents to the application made in the Consumer & Commercial Division but who are not active participants in this appeal. However, by virtue of the *Civil & Administrative Tribunal Rules* (the Rules) they are parties to this appeal. The Appellants seek from the Appeal Panel orders upholding the appeal, setting aside the orders under appeal to appoint a compulsory manager and an order dismissing the application for the appointment of a compulsory manager. The Appellants also seek an order for costs of the appeal.

2 As stated above, the Tribunal has power under s 237 of the Strata Act to appoint a compulsory manager to exercise the functions of an owners corporation. The text of s 237 is as follows:

ORDERS FOR APPOINTMENT OF STRATA MANAGING AGENT

(1) Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation

The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent--

(a) to exercise all the functions of an owners corporation, or

(b) to exercise specified functions of an owners corporation, or

(c) to exercise all the functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent

The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise--

(a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

(c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made

The Tribunal may make an order only if satisfied that--

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

(b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

(c) an owners corporation has failed to perform one or more of its duties, or

(d) an owners corporation owes a judgment debt.

(4) Qualifications of person appointed

A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must--

(a) hold a strata managing agent's licence issued under the Property and Stock Agents Act 2002, and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) Terms and conditions of appointment

A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

(6) **Return of documents and other records**

A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation to be held not later than 14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.

(7) **Revocation of certain appointments**

An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration of the period after its making (not exceeding 2 years) that is specified in the order.

(8) **Persons who may make an application**

The following persons may make an application under this section--

(a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt.

3 The Decision

4 It is helpful in understanding the background facts and in understanding the reasoning of the Tribunal as recorded in the Decision to summarise the Decision. That summary is as follows:

(1) The Second Respondent (the Owners Corporation) has three separate tower blocks in Pitt Street Sydney containing 653 lots. One tower comprises 38 floors, the next 32 floors and the third 32 floors. The buildings comprise 323 residential apartments as well as commercial and retail lots. There are two swimming pools, two spas, two squash courts, security parking and a 24-hour concierge [8] and [9].

(2) On 22 June 2014 the Tribunal made orders for the appointment of a compulsory manager for 12 months until 25 June 2015. On 12 August 2015 the Tribunal made orders for the appointment of a compulsory manager for a further 12 months until 11 August 2016. On 7 September 2016 Tribunal made orders for the appointment of a compulsory strata manager for a further 12 months until 5 September. 2017. On 8 September 2017 interim orders were made for the continuation of a compulsory manager. On 10 April 2018 the Tribunal made orders for the appointment of a compulsory manager (namely Strata Choice) until 9 April 2020 [11] to [15]. Interim orders were also made and as a result the Owners Corporation has been under compulsory strata

management since 2014. Since that time there have been no general meetings of the Owners Corporation and no functioning strata committee [17].

(3) The Applicant at first instance (Mr Scutella, now the First Respondent) relied upon the evidence of Kate MacLachlan, a licensed "senior strata manager" employed by Strata Choice who had been the compulsory managers since 10 April 2018. It is clear from the Decision that the Tribunal accepted the evidence of Ms MacLachlan. The Tribunal recorded that Strata Choice had retained Oaklight Consulting to review the state of the buildings, capital works in hand and to prepare a program for necessary future work. It was the opinion of Oaklight that after 20 years, many of the building's "elements and systems are approaching the end of their service life" [30]. Ms MacLachlan estimated that the capital works to be spent for the period 29 February 2020 to 28 February 2022 is just short of $5 million [31]. Her evidence was also that levy contributions in the order of approximately $6.5 million will have to be raised between 29 February 2020 to 28 February 2022 [32]. This will involve the need to increase levies significantly and "by a multiplier of approximately 2.5" in the year to 28 February 2021 [33]. The Tribunal also referred to the need to undertake repair work to deal with "crumbling and loose sandstone façade" in respect of which a notice had been issued by Sydney City Council for reasons of public safety [34].

(4) The Decision also referred to "urgent works" undertaken between November 2019 to January 2020 [36] to [38].

(5) Ms MacLachlan's evidence included evidence that an "Advisory Board" "consisting of eight representatives of lot owners" had been established. That board, although having no formal powers, meets with Ms MacLachlan to discuss "proposals problems and issues" [40]. The evidence of Ms MacLachlan was that in her observation there "are active factions within the scheme with differing agendas" [40] and from a "management point of view, it is hard to see how important but difficult matters vital to the maintenance of the [buildings] can be managed cogently without strong and decisive management power". In addition, the Decision records Ms MacLachlan's statement concerning the need to upgrade a range of matters given that they were installed approximately 20 years ago [41].

(6) The Decision records that Ms MacLachlan's evidence addressed "specific issues of the continuing hostility and dysfunction between lot owners" and that her evidence had included 90 pages of emails, correspondence and WhatsApp messages from lot owners about varying issues, including allegations of criminal activity and harassment of the building manager [43].

(7) The Tribunal found Ms MacLachlan to be a "competent witness with a professional demeanour and a significant background in strata management" [44].

(8) The Decision records that the Owners Corporation relied upon a supplementary statement from Ms MacLachlan providing evidence of the fact that Strata Choice had convened a general meeting due to be held on 25 March 2020 in accordance with s 237(6) of the Strata Act. However, that meeting had been cancelled or postponed as a result of the *Public Health (COVID-19 Gatherings G) Order* 2020 (NSW) which required gatherings to have available at least 4 m² of space for each person. It also prohibited mass gatherings of over 100 people in a single undivided indoor space [50]. Strata Choice considered that any general meeting was likely to contravene this order.

(9) It appears from the Decision that the active opposition to the reappointment of Strata Choice came from a group of lot owners represented by Mr Moir of Madison Marcus, solicitors. His submission was to the effect that the Tribunal may only make an order for the appointment of a compulsory manager if it was satisfied as to one of the four matters described in s 237(3)(a)-(d) but it was not possible to do so because the Owners Corporation had been in compulsory management since at least 2014. Any dysfunction or lack of satisfactory function in the management of the Owners Corporation was attributable to Strata Choice. Mr Moir submitted that the Owners Corporation would appoint its own strata committee which, in turn, would appoint a strata manager to continue to pursue the work foreshadowed by Strata Choice [64].

(10) The Tribunal found that the Owners Corporation operates "like a large corporation on a significant budget (currently about $3 million per annum) requiring almost full-time attention from a group of skilled professionals with a suitable strata manager to avoid falling back into the problems that it has had for much of the last decade" [65]. The Tribunal also found that "significant and material ground has been covered by the Owners Corporation in the last two years [66]. Further, the Tribunal found that "at long last a program has been put in place" that "might see the building integrity and value restored" to the common property [67].

(11) The Tribunal rejected Mr Moir's submission that any dysfunction can no longer be attributed to the internal management but from the various Tribunal appointments since 2014. The Tribunal found that the evidence of Ms MacLachlan, both in terms of attendance at Advisory Board meetings and communications with unit holders, contradicts the submissions and suggests a level of dysfunction exists [69]. At [70] the Tribunal accepted the evidence of Strata Choice concerning "issues with the Advisory Board" and the "communications of a small number of lot owners" as well as the "critical need to build a significant capital works fund for the future repair and maintenance work, which will be undoubtedly required in the three 20 year old tower blocks".

(12) At [71] the Tribunal found that the issues referred to above "require a further period of two years for the good work of Strata Choice which has reversed the fortunes" of the Owners Corporation to be completed. The Decision added that no evidence was led by the Owners Corporation or by the group represented by Mr Moir about what steps had been taken

within the management of the Owners Corporation to create, train or inform a group of lot owners with a variety of requisite skills sufficient to form a strata committee and work with Strata Choice going forward if the compulsory appointment of Strata Choice was not to be renewed."

(13) The Tribunal referred to evidence which suggested that if the appointment of Strata Choice was not renewed then steps would be taken for it to be replaced by one of the candidates in the Third to Nineteenth Respondents' evidence, that evidence appearing to favour the appointment of a different manager. The Tribunal found that if that occurred the "corporate memory gained by Strata Choice and its funding or building program may be lost or abandoned" [72].

(14) For the above reasons, the Tribunal ordered the appointment of Strata Choice as compulsory manager for a further period of two years from the date of the orders (ie. 9 September 2020). The wording of the order appointing Strata Choice is as follows:

> "…Strata Choice is to be appointed as a compulsory strata managing agent to exercise all of the functions of the chairperson, secretary, treasurer and strata committee of the Owners Corporation pursuant to s 237…".

(15) The second order stated that the appointment is to continue for a period of two years from the date of these orders (9 September 2020).

5 **Notice of Appeal**

6 On 8 October 2020, a Notice of Appeal was filed. The grounds of appeal may be summarised as follows:

(1) To the extent leave is required, leave should be granted because the Decision was not fair and equitable. This was because: the order was made without the owners having had the chance to manage the scheme themselves for around seven years; the order required the owners to prove that they had the requisite skills to manage the scheme before management would be passed to the owners; the Decision took into account that some owners at information sessions did not agree on all items.

(2) The Decision was against the weight of evidence which showed that: there had been no general meeting for around seven years; the owners had not had a chance to manage for around seven years; the owners have not appointed a committee or made a decision on levies or repairs for around seven years.

(3) The Tribunal erred in making an order under s 237 during the current s 237 appointment without a meeting being held under s 237(6) to test the owners' ability to manage themselves and where the Owners Corporation has not had the chance to manage itself.

(4) The Tribunal erred in stating that a lot of progress had been made (which suggests the scheme is functioning well) but making the compulsory appointment anyway.

(5) Taking into account the lengthy and detailed history of disputation instead of determining the matter solely on its merits.

(6) Taking into account the Owners Corporation had been in compulsory management regularly since 2014 to justify further compulsory appointment.

(7) Taking into account the operating budget of the Owners Corporation.

(8) Finding it relevant that the Owners Corporation required almost full-time attention from a group of skilled professionals and finding that this could only be achieved through compulsory management when in fact the appropriate test is whether the scheme can manage itself satisfactorily.

(9) Finding that significant and material ground has been covered in the last two years but then finding the current management structure is not functioning satisfactorily and that the scheme has failed to perform one of its duties to the high level required, to justify a compulsory appointment.

(10) Finding it relevant that in making a compulsory appointment that Strata Choice had performed well and not taking into account that Strata Choice had conceded it had failed and had tried to justify its failure to comply with the statutory obligation to convene a meeting under s 237(6).

(11) Finding the dysfunction exists in the scheme because of the Advisory Board meetings and communications with unit holders when the only relevant dysfunction in determining whether or not to make a compulsory appointment is whether the management structure of the scheme is functioning satisfactorily. The owners who attend Advisory Board meetings and correspondence with Strata Choice are not part of the management structure.

(12) Finding the justification under s 237(3)(c) is an allegedly inadequate capital works fund despite it being allegedly inadequate two years ago but now sufficient and the size of the capital works fund two years ago being solely as a result of the actions of the former compulsory strata manager and not a result of the actions of the owners.

(13) Finding it relevant that if the strata scheme was not returned to compulsory management, a new manager would run the building and Strata Choice's "corporate memory" would be lost or abandoned.

(14) Subverting or bypassing the legislation which has a maximum two-year appointment.

(15) Relying on the critical need to build a significant capital works fund for future repair and maintenance work without giving the lot owners the chance to do this satisfactorily.

(16) Reversing the onus of proof in finding that the Respondents (at first instance) needed to lead evidence in relation to what steps had been taken to correct, train or inform a group of lot owners with a variety of requisite skills sufficient to form a strata committee.

(17) Suggesting that the new strata committee would have to work with Strata Choice when Strata Choice had not put forward a proposal to manage the scheme under ss 49-51 of the Strata Act.

(18) Being concerned about the appointment of one of the three candidates put forward by the additional Respondents when their ability had not been questioned.

(19) **Reply to Appeal**

7 A Reply to Appeal was filed by the Owners Corporation in which it stated that it did not intend to take an active role in the appeal. However, the Reply stated that the Owners Corporation disagreed with the Appellants' submission that an order under s 237 cannot be made when the effect is to make "back-to-back appointments". The Owners Corporation states that the Strata Act is not so limited and does not prevent "back-to-back orders".

8 The Owners Corporation disagrees with the Appellants' submission that the Tribunal does not have power to make an order under s 237, unless there has first been a meeting under s 237(6). The Owners Corporation also submits that the Strata Act does not preclude a further appointment of a compulsory manager after the initial period of two years has expired. It is open to the Tribunal to find from the evidence that the Owners Corporation would be dysfunctional if given the opportunity to self-manage and therefore it would be appropriate to order the reappointment of the compulsory manager or make a fresh appointment.

9 The Reply also addresses the leave grounds put forward by the Appellants and sets out submissions to the effect that leave should not be granted.

10 **Appellants' Submissions**

11 The submissions of the Appellants may be summarised as follows:

(1) The Tribunal erred in construing s 237 as applying in circumstances where a compulsory manager was appointed and no meeting pursuant to s 237(6) had been held.

(2) Even if s 237 was applicable, the Tribunal erred in finding that the jurisdictional grounds for the making of an order pursuant to s 237 were satisfied. In circumstances where Strata Choice had been exercising the functions of the Owners Corporation for the maximum period of two years and the Tribunal clearly considered that they were doing a good job in complying with their obligations there was no jurisdictional basis for the order.

(3) The Tribunal erred in the exercise of its discretion to make a compulsory appointment because it was based upon material factual errors and irrelevant considerations.

(4) The limited circumstances in which an order to appoint a compulsory manager under s 237 can be made out are set out in s 237(3). Satisfaction of one of those requirements is a jurisdictional fact which must be established as a precondition before the Tribunal can make an order appointing a strata managing agent: *Allen & Ors v TriCare (Hastings) Pty Ltd & Anor* [2015] NSWSC 416 at [49]; *Bischoff v Sahade* [2015] NSWCATAP 135 at [110]. Of these preconditions, the references to "management" and "Owners Corporation" do not extend to circumstances where there was a compulsory appointment in existence at the time of the application. That is because of the distinction between an Owners Corporation exercising its management functions through the normal channels of the general meeting, an elected strata committee, and the officers of that committee on the one hand and by a compulsory strata manager on the other.

(5) The reference to "management" in s 237(3)(a) is not apt to refer to the actions of the compulsory manager appointed under s 237. Rather the reference to "management" is directed towards the management of an owners corporation as provided for under Parts 2 to 4 of the Strata Act. That includes provisions constituting and specifying the functions of an Owners Corporation (ss 8-13), provisions concerning how an Owners Corporation makes decisions in general meeting (ss 14 to 23), provisions relating to the election, functions and meetings of the strata committee (ss 29-40), provisions relating to the election and function of office holders, namely the chairperson, secretary and treasurer (ss 41-44) and detailed provisions for strata managing agents appointed by an owners corporation (ss 49-55).

(6) In *Bischoff v Sahade* the Appeal Panel summarised the equivalent provisions of the *Strata Schemes Management Act* 1996 (the 1996 Act) describing the "management structure" as consisting of three levels of management. They are the owners corporation, the executive committee and the appointed strata managing agents who make decisions and manage the affairs of the strata scheme in respect of matters delegated to them. It can be seen that that structure does not extend to a strata manager exercising powers pursuant to an appointment under s 237 of the Strata Act.

(7) The references to an "Owners Corporation" failing to perform one or more of its duties in s 237(3)(c) has no application to a strata manager carrying out his or her duties pursuant to an appointment under s 237. As was made clear by Hodgson JA (with the concurrence of Tobias and Young JJA) in *The Owners – Strata Plan 5709 v Andrews* [2009] NSWCA 189 at [69]-[70] where the function of an owners corporation was exercised by a strata managing agent pursuant to s 162(1)(a) of the 1996 Act (the predecessor to s 237) the "function is not exercised by the Owners Corporation".

(8) The only circumstance where s 237 of the Strata Act may be relevant during the period of a compulsory appointment is at the general meeting required by s 237(6) which must occur more than 14 days before the expiration of the compulsory manager's appointment and which is the mechanism by which control of the owners corporation reverts back to the lot owners. It is only at that meeting that an owners corporation can show dysfunction or exercise a function or duty in the relevant sense. In this case Strata Choice cancelled the s 237(6) meeting and it has never been rescheduled. Accordingly, there has never been an opportunity for the management of the Owners Corporation to revert to the lot owners and for dysfunction in the relevant sense to have occurred.

(9) Section 237(7) of the Strata Act provides that an order may be revoked or varied on application and unless sooner revoked ceases to have effect at the expiration of the period after its making (not exceeding two years) that is specified in the order. The clear statutory intention is that after a maximum of two years the management of an owners corporation should revert to the lot owners. The attempt to have a further compulsory appointment without giving the scheme a chance to self-manage itself subverts the purpose of the legislation.

(10) The Tribunal appears to have relied on two situations as creating jurisdiction to make the order. The first was attendance at Advisory Board meetings and communications with and among a small group of unit holders suggesting a level of dysfunction still exists. The second was the alleged failure of the Owners Corporation to create an adequate capital works fund to maintain the common property with appropriate levies which have resulted in Strata Choice's previous appointment in 2018 as well as the critical need to build a significant capital works fund for future maintenance and repair work. Neither of those two situations obtained so as to provide the Tribunal with a jurisdictional basis for the decision made. The Appeal Panel made it clear in *Bischoff v Sahade* (supra) at [113] that the manner in which lot owners deal with each other is generally not relevant to the decision to appoint a strata manager. That is because lot owners, whether as part of an advisory body or in general communications, are not part of the management of the Owners Corporation. The Tribunal erred in considering those matters as giving jurisdiction to make the order.

(11) As to the alleged failure to create an adequate capital works fund the Tribunal found that that had been addressed by Strata Choices "good work" over the two-year period of its appointment. The Tribunal's finding that Strata Choice had created a 15 year funding model (see [67] of the Decision) was effectively a finding that there had been compliance with its obligations to prepare a 10 year estimate of capital works pursuant to s 79 of the Strata Act. Accordingly, there was no existing breach of any duty of the Owners Corporation so as to provide a jurisdictional basis for the Decision. Rather, the real reason for the Decision was concern that in the future the Owners Corporation might undo the good work of Strata Choice and that the Tribunal considered that the lot owners had not demonstrated that they were sufficiently prepared to run the

scheme, and that Strata Choice would be replaced by another strata manager so that corporate memory might be lost and the funding, or building program, abandoned.

(12) The essence of the Decision was that given the strata scheme's size and complexity it required the expertise of a compulsory manager. However, the problem with that proposition is that the legislature has not created a separate regime for large complex organisations. Rather, the fundamental democratic nature of strata schemes applies to all corporations irrespective of their size or complexity.

(13) The matters identified by the Tribunal did not provide a jurisdictional basis for the Decision in circumstances where the Tribunal approved of Strata Choice's management. The Tribunal could not rely upon dysfunction remote in time and prior to previous compulsory appointments to provide jurisdiction. Nor could the Tribunal's concern to keep Strata Choice as a compulsory manager, given the size and complexity of the scheme, provide a jurisdictional basis for the order.

12 The Appellants' submissions go on to deal with the proposition that even if the Tribunal did have jurisdiction to make an appointment under s 237, the exercise of the discretion miscarried in the circumstances. In summary, those submissions were to the following effect:

(1) In this case the lot owners have not managed themselves for seven years and Strata Choice did not call a meeting pursuant to s 237(6) to allow the lot owners to select a strata committee and new strata agent.

(2) In the absence of the statutorily required general meeting the Tribunal require the lot owners to prove that they could manage themselves and the Tribunal made factual errors in making the Decision, taking into account irrelevant considerations.

(3) Appointment of a compulsory strata managing agent is an extreme measure not to be made lightly. It has rightly been described as "draconian" because it circumvents the lot owners' control over the Owners Corporation's exercise of its powers vesting that control in a third-party: *Bischoff v Sahade; Mortlock v Owners Strata Plan 55434* (2006) NSWSC 363 at [18], [19].

(4) The Tribunal took into account a number of irrelevant considerations or made significant factual errors. The Tribunal described the buildings the subject of the strata scheme as "unique" in that it operates like a large corporation requiring almost full-time attention from a skilled professional. The Tribunal appears to have considered that the Owners Corporation was more appropriately managed by a compulsory manager rather than the normal management structure.

(5) The Tribunal held that there was management "dysfunction" since 2014 relying upon the Advisory Board meetings and communications. These were not matters concerning the management of the Owners Corporation by lot owners. Rather those matters were irrelevant given

neither can be attributable to the management of the scheme. In a scheme with 653 lots, it is unsurprising that there will be a diversity of views and in an unidentified Advisory Board which presumably was picked to represent the diversity of views.

(6) The Tribunal took into account what was said to be a lack of evidence concerning the skills and training of lot owners to manage the scheme going forward sufficient to allow them to work with Strata Choice if the compulsory appointment was not renewed. That was a further irrelevant consideration for three reasons. First, there is no requirement in the Strata Act for lot owners to have training or particular skills. Secondly, given Strata Choice cancelled the meeting under s 237(6), no strata committee had been elected so as to enable an assessment of their skills. Thirdly Strata Choice was not going to be elected without a compulsory appointment given it had indicated it was not prepared to act other than as a compulsory appointee, so there was never a prospect lot owners might have to work with them.

(7) The Tribunal took into account a further irrelevant consideration, namely that without a compulsory appointment Strata Choice would not continue as managing agent. It is self-evident that after a compulsory appointment the owners may choose a different strata agent which is their democratic right. Given Strata Choice indicated that it was not prepared to act other than as a compulsory appointee, the Tribunal appears to have considered it had no choice but to make a compulsory appointment given the Tribunal's desire to keep Strata Choice involved. Effectively the Tribunal acquiesced in Strata Choice's wish that it be appointed for a further two years without allowing the lot owners to have a say in that process.

(8) The Tribunal's taking into account of irrelevant considerations and factual errors in the absence of evidence constitute errors of law: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13]. Further, in circumstances where the strata scheme had been under compulsory management for seven years, the Decision was so unreasonable that no reasonable decision-maker would make it which was also an error of law.

(9) To the extent leave is required it should be granted having regard to the Tribunal's errors. The lot owners have suffered a substantial miscarriage of justice and the Tribunal's Decision was against the weight of evidence such that the Decision was not fair and equitable.

13 The Appellants' submissions conclude by submitting that the Tribunal's orders should be varied so as to order Strata Choice to hold a general meeting under s 237(6) so as to enable the Owners Corporation to elect a strata committee and appoint a strata managing agent to assist with their management of the scheme and also to terminate Strata Choice's compulsory management following the holding of the general meeting.

14 **Submissions of the First Respondent**

15 The submissions of First Respondent can be summarised as follows:

(1) Compliance with s 237(6) has no impact on the Tribunal's power to make an order for the appointment of a compulsory manager. The Tribunal was satisfied that while the Owners Corporation is in the process of complying with its duty to repair and maintain common property, that duty was far from being complied with. There existed a level of dysfunction in the Owners Corporation that justified the making of the orders. The fact that the Owners Corporation is so dysfunctional that it has been under compulsory management for an extended period does not justify the dismissal of an application for compulsory management.

(2) Under s 237 the Tribunal has a discretion available to it to make orders for the appointment of a compulsory strata manager. There was overwhelming evidence of the severity of the Owners Corporation's breaches of s 106 of the Strata Act. There was undisputed evidence that many breaches are continuing and shall continue until such time as the compulsory strata manager attends to such outstanding repairs. This evidence alone is a clear and unequivocal justification for the appointment of a compulsory manager.

(3) There was also evidence that was accepted by the Tribunal that if the management were to be passed back to the Owners Corporation the efforts made by the compulsory manager to achieve compliance would be abandoned. There is nothing in s 237 that prohibits the Owners Corporation from making orders for the compulsory appointment of a manager where there is an existing appointment for a compulsory strata manager in place.

(4) The Appellants' submissions do not dispute the fact that the Owners Corporation continues to breach its duty to repair and maintain common property.

(5) Strata Choice has been "tirelessly working" to ensure the Owners Corporation's compliance with its duties since being appointed in September 2020. The Appellants now ask the Tribunal to disrupt the efforts and processes which have delicately been put in place by Strata Choice. The appeal should be dismissed.

(6) It was said for the Appellant that there could have been a virtual meeting of the Owners Corporation but no evidence to that effect has been put to the Tribunal.

16 **The Second Respondent's Submissions**

17 The submissions of the Second Respondent (the Owners Corporation) were to the following effect:

(1) The Second Respondent disputes the contention made by the Appellant that the Tribunal has no jurisdiction to order a further period of compulsory management prior to any existing compulsory management ending. Section 237 imposes no such restriction.

(2) The Appellants also submitted that even if s 237 allows the Tribunal to order a further period of compulsory appointment, before an already existing compulsory appointment ends, the Tribunal cannot do so until a general meeting of owners under s 237(6) occurs. That submission is disputed. Subject to the Tribunal factually being satisfied under s 237(3), the Tribunal's power is not otherwise constrained.

(3) If the Tribunal's jurisdiction was limited as the Appellants suggest but based on evidence the Tribunal had concerns about returning a scheme to the Owners Corporation's management, the Tribunal could not do so. Instead, the strata scheme would first need to be returned to dysfunctionality and new proceedings commenced. This would prejudice lot owners' property interests in the scheme and create unnecessary risk, particularly where safety risks were involved.

(4) In response to the Appellants' submissions that dysfunctionality cannot be found in the circumstances of this matter, the Second Respondent submits that s 237(3) is not limited to time. Matters previously considered under that section which continue can remain relevant to further appointments of a compulsory manager. For example, if an owners corporation fails to maintain and repair common property, a compulsory manager may be appointed. If towards the end of a two-year appointment relevant maintenance and repair works remain in progress nothing prevents a lot owner applying for a further period of compulsory management. The lot owner is entitled to rely on the facts which founded the initial or previous appointment if still relevant. This approach flows directly from the language of s 237 and stands to reason. The alternative would be ending the compulsory management essentially in the hope that the Owners Corporation will act functionally and remedy the failure which led to the appointment.

(5) The Second Respondent referred to evidence recorded in the Decision which had been given by Ms MacLachlan. That evidence included that capital works to be spent between February 2020 and February 2022 is estimated at $4,919,005. The Tribunal also recorded there was evidence that sandstone façade works are now required as a result of a council works order and that there was ongoing management of public safety issues relating to building work. Further, the Tribunal referred to evidence that aluminium cladding may require replacement if they are found to be combustible cladding. There was nothing objectionable in the Tribunal's approach in making reference to this evidence.

(6) The Second Respondent submits that the Appellants have misconstrued s 237(6) in relation to the facts of this matter. A meeting under that section only needs to occur 14 days before the appointment comes to an end. In this case that time never arrived since the First Respondents' application was made prior to that time and prior to that

time the appointment was extended on two occasions. It follows that the 9 September 2020 appointment occurred without the need for there to have been a s 237(6) meeting.

18 In addition, the Second Respondent made a submission to the effect that events since the appointment of Strata Choice in September 2020 demonstrate continuing dysfunctionality. These events include the fact that the Appellants have not requested a stay on the operation of the orders under appeal pending the outcome of the appeal. The Second Respondent says that the appeal was not filed until 6 October 2020 and then stood over on 23 October 2020, 19 November 2020 and 11 December 2020, without the Appellants seeking any procedural steps to progress the matter substantively. The Second Respondent submits that by the time the appeal is heard seven months out of a two-year term will have passed. The Appellants besides lacking a legal basis for objecting to the appointment have proposed nothing about the ongoing issues which Strata Choice are dealing with. The Second Respondent tendered a statement by Ms MacLachlan outlining work undertaken since 9 September 2020. It was submitted not as "new evidence" but rather as evidence to demonstrate compliance with the Tribunal's order.

19 **Appellants' Submissions in Reply**

20 With respect to the submissions made by the Owners Corporation the Appellants made submissions to the following effect in reply:

(1) Despite Strata Choice claiming to neither oppose nor support its reappointment its position both on appeal and below has been to actively support its reappointment on a compulsory basis including now seeking to rely on further evidence.

(2) It is self-evident that any dysfunction during the period of compulsory appointment since 2014 is not a function of the lot owners in any relevant management sense. The evidence accepted by the Tribunal (see Decision at [55(a)]) was that until December 2012 the Owners Corporation managed the scheme adequately and it was only during an 18 month period where there was no strata manager appointed by majority at a general meeting that the management was dysfunctional and a compulsory appointment became necessary (see Decision at [55(d)]).

(3) The basic scheme of the Strata Act is to provide for management of the Owners Corporation by lot owners as provided for under Parts 2 to 4 of the Strata Act. While an existing compulsory appointment may be varied, two years is the maximum period of appointment, including any

varied appointment. At the expiration of the compulsory appointment control is to revert to lot owners by the mechanism of the meeting provided for by s 237(6).

(4) The underlying premise behind Strata Choice's submissions and the Decision is that where there is a large and complex scheme, it is undesirable for control to revert to lot owners after the expiration of the compulsory appointment where the Tribunal has concerns about future dysfunction. However, such an outcome is dictated by the legislation, irrespective of the size of the strata scheme. Democracy is the default model in preference to potential management advantages provided by the dictatorship of a compulsory appointment. Unless the lot owners are given the chance to manage themselves it is speculation to say there would be dysfunction or a failure to comply with statutory duties in the future.

(5) It is clear from s 237(3)(a) that the dysfunction must be in the management of the strata scheme and disputes among lot owners outside management cannot be evidence of relevant dysfunction.

(6) Past breaches of an owners corporation's duties may be relevant in certain situations but cannot be relied upon to circumvent the clear legislative intention that appointments are to be for a maximum of two years.

(7) Strata Choice lists evidence which it asserts was sufficient to satisfy s 237(3)(a) and (c). However, the only matters actually relied upon by the Tribunal were the alleged dysfunction of lot owners said to have been demonstrated by advisory meetings and in correspondence and in the alleged failure to create a capital works fund prior to Strata Choice's appointment. The fundamental reason for the decision in appointing Strata Choice was the Tribunal's desire that there be a further period of two years for the "good work of Strata Choice", notwithstanding that such an approach was contrary to the basic scheme of the Strata Act.

(8) Although the 1996 Act referred to "management structure" whereas the Strata Act (which came into effect in 2015) only refers to "management", nothing turns on that difference. Both terms are references to management of the Owners Corporation by the hierarchical regime referred to in *Bischoff v Sahade* [2015] NSWCATAP 135 and *2 Elizabeth Bay Road Pty Ltd v Owners – Strata Plan No 72943* [2014] NSWCA 409.

(9) Strata Choice's reliance on events following the appointment isnot relevant to whether or not the Tribunal erred or whether the Decision should be overturned. The Appellants filed their appeal in time and were justified in awaiting the outcome of the costs determination before proceeding with the appeal so as to avoid unnecessary duplication of costs.

21 In response to the submissions of the First Respondent, the Appellants' submissions in reply may be summarised as follows:

(1) The Tribunal did not rely upon ongoing failures by the Owners Corporation to comply with its duties to repair common property, keep residents safe, raise levies or to have a capital works fund. Rather, the Tribunal relied upon alleged present dysfunction between lot owners and a previous failure to have an adequate capital works fund which had been rectified by Strata Choice's "good work". These considerations do not provide jurisdiction for an order under s 237.

(2) Both the First Respondent's submissions and the Decision reflect a preference for what they see as the managerial competence of a compulsory manager over their perception that the lot owners are not qualified to run such a large scheme. However, such an approach is an error which infected the Decision.

(3) An order under s 237 is an extreme measure and an exception to the fundamental democratic nature of management of an owners corporation. The legislature has emphasised the limited nature of the exception through its prescription of a maximum period of two years. The Decision and the First Respondent's submissions are inconsistent with the legislative intention.

22 With respect to the issue of whether a meeting under s 237(6) was required, Mr Newton for the Appellants made submissions to the following effect:

(1) On 27 March 2020 the Tribunal ordered an extension of the appointment of Strata Choice on an interim basis until 26 June 2020. The hearing at first instance occurred on 20 May 2020 and the decision was reserved. At the request of the Applicant (now the First Respondent) the Tribunal made an order in chambers on 26 June 2020 extending the appointment until 25 September 2020.

(2) Strata Choice breached its obligations in that it did not hold a meeting prior to 23 June 2020 or in organising a meeting in late August or early September. There was evidence before the Tribunal from strata managers that a meeting could have been organised to take place electronically.

23 **Directions made at the appeal hearing on 8 April 2021**

24 At the conclusion of the hearing of the appeal, directions were made to the effect that the Respondents may file and serve submissions and evidence concerning the need for or difficulties associated with calling a meeting of the Owners Corporation in June 2020, and for the Appellants to file and serve submissions and evidence in reply thereafter.

25 Both Respondents made submissions responsive to the above directions and they may be summarised as follows:

(1) Prior to the lodgement of the Initiating Application on 4 March 2020 the appointment of Strata Choice as compulsory strata manager was to cease on 9 April 2020. On 27 March 2020 the Tribunal made an interim order extending the compulsory appointment until the earlier of a final determination or 26 June 2020. On 26 June 2020 the Tribunal made a further interim order continuing the compulsory management until the earlier of the Tribunal's determination or 25 September 2020. On 9 September 2021 the Tribunal appointed Strata Choice as compulsory strata manager for two years from that date.

(2) The obligation of a compulsory strata manager to convene a s 237(6) meeting does not affect the jurisdiction of the Tribunal to make the appointment.

(3) The interim orders were made under s 231 and s 237(6) did not apply in the periods when the Second Respondent was subject to compulsory management under an interim order. Therefore, the compulsory manager was not required to hold a meeting under s 237(6). The obligation to do so only arose where an appointment is made "as a consequence of an order" under s 237.

(4) It was not possible to convene a general meeting of the Owners Corporation in June 2020 due to the *Public Health (COVID-19 Gatherings) Order* 2020.

(5) On 5 June 2020 when the Decision was reserved the Strata Act and its Regulations were amended by allowing electronic voting – see clauses 69-73 of the *Strata Schemes Management Regulation* 2016 (the Strata Regulation). By an email communication to the Tribunal dated 16 June 2020 the Owners Corporation's legal representative submitted that there were "logistical difficulties" in organising a meeting to take place electronically. On 26 June 2020 the Tribunal made an interim order extending the appointment of Strata Choice.

(6) The 5 June 2020 changes to the Strata Regulations allowed electronic voting even where an Owners Corporation had not adopted that method of voting. However, there was still a requirement to give notice for general meetings including by post where no email address had been provided by a lot owner. The evidence of Ms MacLachlan was that the majority of lot owners had not provided an email address for the purpose of notices. Given that at least clear seven days' notice of a meeting must be given and seven working days allowed for postal delivery, the earliest date the meeting could have been convened was 23 June 2020. The appointment of Strata Choice expired on 26 June 2020. It was not possible to comply with s 237(6).

(7) Compliance with s 237(6) is not a precondition of the Tribunal's powers under s 237(1). Strata Choice cannot be criticised for not convening a meeting.

26 The submissions of the Appellants concerning the directions made on 8 April 2021 may be summarised as follows:

(1) On 6 March 2020 Strata Choice sent out an agenda for the statutory extraordinary general meeting to be held on 25 March 2020 and on 16 March 2020 sent a letter to lot owners cancelling that meeting.

(2) The decision to cancel the meeting was made before the public health order was made on 16 March 2020. On 27 March 2020 the Tribunal made an order extending the appointment of Strata Choice to 26 June 2020.

(3) Strata Choice should have held a statutory extraordinary general meeting no later than 12 June 2020. Such meeting could have been organised by sending out an agenda to lot owners on or before 27 May 2020.

(4) The Tribunal's second interim appointment of Strata Choice (made on 26 June 2020) was due to expire on 25 September 2020. A statutory extraordinary general meeting was required to be held by 11 September 2020. Strata Choice did not take any steps to convene such a meeting.

(5) An interim appointment under s 231 cannot circumvent s 237(6). Section 231 permits the Tribunal to make an order in the form of any order that it could otherwise be made by the Tribunal. The first interim order stated that Strata Choice was appointed under s 237 and the second interim order stated that the first interim order was renewed. Accordingly, the provisions of s 237(6) applied to both orders.

(6) In response to the submissions of Strata Choice that holding an electronic meeting was not a "real alternative", the Appellants submit that clause 14 of the Strata Regulations 2016 provide that an Owners Corporation may by resolution adopt electronic voting. Strata Choice could have passed such a resolution itself.

(7) Notwithstanding the logistical difficulties asserted by Strata Choice to the holding of an electronic meeting, Strata Choice still had an obligation to comply with 237(6).

27 **Consideration**

28 The jurisdiction of the Tribunal under s 237(1) of the Strata Act to appoint a strata managing agent is conditioned on the Tribunal being satisfied of one or more of the matters described in s 237(3)(a), (b), (c) or (d). Relevantly to this appeal, the relevant matters concern whether the management of the strata scheme is not functioning satisfactorily and whether the Owners Corporation has failed to perform one or more of its duties.

29 The findings of fact recorded in the Decision relevant to s 237(3)(a) constituted evidence of dysfunctionality existing prior to the appointment of Strata Choice together with findings relevant to s237(3)(c) that the remedial program being performed by Strata Choice was not yet complete, meaning that the

consequences of dysfunctionality continued. The Tribunal accepted the evidence of Ms MacLachlan and in particular accepted:

(1) Her evidence that there had been inadequate capital works funding and inadequate budgeting for proper maintenance and planning in previous years [28].

(2) That the estimated "capital works spend" for the period 29 February 2020 to 28 February 2022 is $4,919,005 [31].

(3) That allowing for the shortfall in capital works funding over the years prior to the appointment of Strata Choice, levy contributions in the order of $6,529,351 will have to be raised between February 2020 to February 2022 [32].

(4) Levy contributions will need to increase by a multiplier of 2.5 between 2020 and 2021 and then later increase by approximately 3% per annum [33].

(5) Certain repair works were urgent for public safety reasons [34].

(6) Amongst lot owners there are "active factions" with "differing agendas" and that "strong and decisive management" is required [40] given the lack of consensus [42].

(7) A number of matters which are identified in [41] are required to be upgraded.

(8) As between unit owners a level of dysfunctionality exists [69] and [70].

(9) There is a critical need to build a significant capital works fund for future repair and maintenance [70]. These issues require a further period of two years for Strata Choice to complete the work to address them [71].

(10) If Strata Choice was not reappointed by the Tribunal then it would not be reappointed resulting in a loss of corporate memory [72].

30 In our view the Tribunal did what s 237 required it to do, namely to form a view as to whether the strata scheme was functioning satisfactorily and whether it had failed to perform one or more of its duties. It found that it had not been functioning satisfactorily in the past requiring the appointment of a compulsory strata manager and that the current state of affairs was such that it was still not performing its duties. But, through the work of Strata Choice, it was on course towards remedying the consequences of the functional deficiencies and that the remedial work required more time to be completed.

31 In the course of its deliberations, the Tribunal considered the alternative, namely self-management with or without the assistance of the strata manager appointed by the Owners Corporation or by a strata committee. The Tribunal

found that there was evidence that that alternative was not likely to result in either effective management or completion of the works Strata Choice had in train.

32 In our view, the scope of the Tribunal's findings of fact were relevant to its statutory obligation to consider and decide whether management of the strata scheme was functioning satisfactorily and/or whether the Owners Corporation was complying with its duties.

33 The Appellants submitted that because Strata Choice had been exercising the functions of the Owners Corporation there was no jurisdictional basis to appoint a compulsory strata manager. We do not agree. The factual basis for the appointment of Strata Choice obviously predated its appointment but the consequences of dysfunctionality (being the steps taken and to be taken to raise levies and to conduct a repair and maintenance program to the common property) continued throughout the initial appointment of Strata Choice requiring, in the opinion of the Tribunal, its reappointment because the Owners Corporation was on the path to restoring the capital works fund and completing necessary repairs and maintenance, but had not yet completed that program.

34 In particular, it is not necessary, as the Appellants submit, for the Tribunal to find that the Owners Corporation has been responsible for management of the scheme failing to function satisfactorily in the period leading to the appointment of Strata Choice in 2020. The Owners Corporation last managed itself in 2014 and since then various appointments of compulsory strata managers have occurred up until the current appointment. None of the earlier orders have been set aside and we are therefore entitled to accept that the Tribunal (differently constituted) found on those earlier occasions (being in 2014, 2015, 2016 and 2018) that the management of the Owners Corporation was not functioning satisfactorily. There was also a number of interim appointments made by the Tribunal under s 231 of the Strata Act. Section 231 provides that the Tribunal may make an interim order if the Tribunal is satisfied, on reasonable grounds, that urgent considerations justify the making of the order. The interim orders are of limited duration – up to six months – see s 231(6). None of the interim orders have been set aside.

35 We see no error in the Tribunal's finding that the Owners Corporation was not functioning satisfactorily by reason of the deficiencies earlier recorded arising out of the evidence of Ms MacLachlan, or in its finding that it was relevant that the road to achieving compliance with its duties required the Owners Corporation to be managed for a further period by Strata Choice.

36 We do not agree with the Appellants that the reference to management in s 237 is not apt to refer to the actions of a compulsory strata manager. We are of the view that there may be cases where an Owners Corporation under compulsory strata management could be the subject of an order by the Tribunal by which one compulsory strata manager is replaced by a new compulsory strata manager. The reference to management in s 237 is, in our view, a reference to the way in which a strata scheme is managed either by the owners corporation, the strata committee or a compulsory strata manager. However, in respect of the management by Strata Choice the Tribunal did not find that its management was not satisfactory. On the contrary, its re-appointment arose out of the lingering consequences of prior unsatisfactory management.

37 The Appellants sought to rely upon the judgment in *The Owners – Strata Plan no 5709 v Andrews* [2009] NSWCA 189. In that case, the Court of Appeal held that a strata scheme where all the functions of the Owners Corporation were being exercised by an appointed strata managing agent, the functions of the Owners Corporation are not being exercised by the Owners Corporation but rather by the compulsory strata manager. In our view, that judgment does not assist the Appellants. Here, the Decision was not concerned with prior unsatisfactory management by Strata Choice but rather (as stated above) with the fact that the affairs of the Owners Corporation had been unsatisfactorily managed requiring remedial action in respect of which Strata Choice was well on the way to restoring the affairs of the Owners Corporation to a satisfactory state.

38 When considering the alternative of self-management, the Tribunal considered evidence from Ms MacLachlan concerning the conduct of lot owners generally and, as participants on the Advisory Board. The Tribunal found that that

evidence suggested a “level of dysfunction still exists” [69]. Although, as the Appellants submit, the lot owners were not part of “management”, the evidence of conduct by and between lot owners was a matter which, in our view, the Tribunal was not precluded from taking into account in determining whether it would be appropriate to exercise its discretion available under s 237(1) to appoint a compulsory strata manager.

39 We now turn to the issue concerning the need for a general meeting under s237(6). In the circumstances of this matter, we are of the view that it was not practicable for Strata Choice to comply with the requirement of s 237(6) to cause a general meeting of the Owners Corporation to be held not later than 14 days before the end of the term of appointment of Strata Choice. When the proceedings began, the term of appointment of Strata Choice was to expire on 9 April 2020. Before a meeting under s 237(6) had been convened the uncontested evidence was that two events occurred. First, orders were made under the *Public Health Act* 2010 rendering it unlawful for the Owners Corporation to have a meeting in person. Secondly, the Tribunal extended the appointment of Strata Choice on 27 March 2020 to 27 June 2020. In that period the Strata Regulations were amended to permit the holding of a “virtual” meeting by electronic means. However, as the Respondents’ submissions point out those amendments did not take effect until 5 June 2020 and there was barely sufficient time to issue notices to lot owners to call a meeting as required by s 237(6) before 27 June 2020.Even if a meeting had taken place it would have been the case that the Tribunal may still have made the interim appointment that it made on 26th June when the Tribunal extended the appointment again until 25 September 2020 or “until the Tribunal determines the application for substantive orders”, whichever was the earlier. The failure to call a meeting was understandable given the circumstances. If Strata Choice had an obligation to call a meeting under s 237(6) before 11 September 2020 (being 14 days before 25 September 2020) such meeting (had it been called on or after 9th September) could not have proceeded because on 9 September 2020, the Tribunal appointed Strata Choice again, this time for two years. Had such meeting been convened before 9th September a resolution passed at that meeting inconsistent with the orders made on 9th September may not have

been efficacious. However, for the reasons set out in the following paragraph we are of the view that Strata Choice was not obliged to call such a meeting during the period of the two interim appointments.

40 The obligation on Strata Choice under 237(6) to call a meeting arises when Strata Choice is "appointed as a consequence of an order under this section". The only order made under 237 was the order made in 2018. As explained above, Strata Choice was not able to lawfully call a meeting before 9 April 2020. The orders made in March 2020 and in June 2020 were interim orders made under s 231. That section permits an interim order to be made "in the form of any order that could otherwise be made". Thus, s 231 permits an order to be made in the form of an order appointing a compulsory strata manager (because that is the order authorised by s 237), but the agent appointed is appointed under s 231 and not appointed "as a consequence of an order under 237". In our view from 23 March 2020 Strata Choice did not have an obligation to call a meeting under s 237(6) during the period of the two interim appointments. This is so notwithstanding that the wording of the first interim order may have stated (incorrectly in our view) that the appointment was made under s237.

41 The Appellants submitted that the statutory intention of s 237(7) is that after a maximum of two years the management of an Owners Corporation should revert to the lot owners. In our view, s 237(7) is not capable of being so construed. Section 237 provides that an appointment of a strata manager "ceases to have effect" at the expiration of a maximum of two years. That language does not preclude the Tribunal for making a further appointment after an initial appointment where the period of both appointments taken together exceeds two years.

42 The Appellants submitted that the Tribunal took into account a number of irrelevant considerations. One of these was that the Tribunal described the strata scheme as unique operating like a large corporation. In our view, the size, nature and complexity of the strata scheme was relevant to the question of whether the Tribunal should appoint Strata Choice again. Those characteristics of the strata scheme explained the nature and extent of the

issues which Strata Choice was required to address and the fact that Strata Choice needed further time to complete the remedial program.

43 Another consideration said to be irrelevant was the evidence of conduct of lot owners, particularly amongst those on the Advisory Board. The Strata Act does not preclude the Tribunal from taking into account matters which are relevant to whether, in the opinion of the Tribunal, reverting to self-management is reasonably likely to result in the remedial program being undertaken by Strata Choice being continued. Similarly, the Tribunal's findings of a lack of skills and training of lot owners was not a matter precluded from consideration by the Strata Act and was relevant for the same reason (ie. whether, in the opinion of the Tribunal, it was reasonably likely to result in the remedial program of Strata Choice being continued).

44 A further consideration said to be irrelevant was the suggestion that without being compulsorily appointed Strata Choice would not continue as managing agent. At [72] the Tribunal expressed concern that if Strata Choice was not reappointed it would be replaced by another agent and that the "corporate memory" gained by Strata Choice and its "funding or building program may be lost or abandoned". In our view, a relevant consideration in this case was that the remedial work being undertaken by Strata Choice was incomplete and that the strata scheme would achieve compliance with its statutory duties by allowing the remedial program to continue rather than risk either the introduction of a new manager (with no relevant corporate memory concerning the remedial program) or the loss or abandonment of the program.

45 In our view, there is no error displayed by the Tribunal in taking these matters into account.

46 In our view, the Decision does not display any error concerning a question of law or a ground of the kind requiring leave as described in clause 12 schedule 4 of the *Civil & Administrative Tribunal Act* (the NCAT Act).In particular the Appellants submissions that the orders made were not just or equitable or that the Decision was against the weight of evidence are , for the reasons set out earlier, rejected. Accordingly, it is unnecessary for us to consider other matters

usually requiring consideration when deciding whether to grant leave under cl12.

47 It follows that the appeal must be dismissed.

48 Accordingly, the following orders are made:

(1) Appeal dismissed.

(2) If any of the Respondents seeks an order for costs of the appeal they must within 21 days file and serve submissions in support of such an order.

(3) If any of the Respondents complies with order 2 above, the Appellants must within 21 days thereafter file and serve submissions in opposition to the application for costs of the appeal.

(4) The costs submissions must include a submission as to whether the Appeal Panel may determine costs "on the papers" and make an order that a hearing on costs be dispensed with.

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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