Civil and Administrative Tribunal

New South Wales

Case Name:	Read v The Owners-Strata Plan No 2533
Medium Neutral Citation:	[2021] NSWCATAP 218
Hearing Date(s):	10 June 2021
Date of Orders:	20 July 2021
Decision Date:	20 July 2021
Jurisdiction:	Appeal Panel
Before:	A Bell SC, Senior Member D Robertson, Senior Member
Decision:	(1) Leave to appeal refused; (2) Appeal dismissed.
Catchwords:	LAND LAW – Strata title - Owners corporation — Meetings of owners corporation - Strata Schemes Management Act 2015 (NSW) - Application under section 24 to invalidate resolutions at general meeting - Relevant principles.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Interpretation Act 1987 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Management Regulation 2016 (NSW) Strata Schemes Management Act 1996 (NSW)
Cases Cited:	Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Collins v Urban [2014] NSWCATAP 17 The Owners – Strata Plan No 62022 v Sahade [2013] NSWSC 2002 The Owners Strata Plan No.51764 v Yau (2017) 96 NSWLR 587 Project Blue Sky v Australian Broadcasting Authority

	(1998) 194 CLR 355
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Marlene Noella Read (First Appellant) Mavis Patricia Read (Second Appellant) The Owners-Strata Plan No 2533 (Respondent)
Representation:	Solicitors: First Appellant (for Both Appellants) Respondent: Bannermans Lawyers
File Number(s):	2021/00089041
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	18 March 2021
Before:	S Corley, Tribunal Member
File Number(s):	SC 20/33852

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 18 March 2021.

2 The application to the Tribunal was brought by Dr Marlene Read (Dr Read) and Mavis Read (Ms Read) against The Owners - Strata Plan No. 2533 (Owners).

Background

3 Strata Plan No. 2533 is a 12 lot residential strata plan at Randwick. Ms Read is the owner and occupier of Lot 3. Dr Read is Ms Read's daughter and holds a proxy for Ms Read.

4 At an annual general meeting (AGM) of the Owners held on 4 March 2019 Dr Read was elected to the Strata Committee and at a meeting of the Strata Committee also held on 4 March 2019 Dr Read was elected as Chairperson, Treasurer and Secretary of the Strata Committee.

5 At an extraordinary general meeting (EGM) of the Owners held on 9 May 2019 MG Strata and BMC Management Pty Ltd (Strata Manager) was appointed as strata managing agent. The Strata Manager was appointed on the terms and conditions set out in a proposed strata management agency agreement (Agency Agreement). The Owners also resolved to delegate to the Strata Manager, among other things, the functions of chairperson, secretary and treasurer necessary to enable the Strata Manager to carry out the services required by the Agency Agreement.

6 The Agency Agreement was entered into on 7 June 2019. Pursuant to clause 2.1 of the Agency Agreement the Owners delegated certain functions to the Strata Manager. These included the function of arranging and undertaking administrative duties in relation to AGMs and other general meetings, attending AGMs and EGMs, and preparing and distributing notices and minutes of EGMs. In Clause 2.3 the parties acknowledged that the delegations to the Strata Manager did not prevent the Owners or the Strata committee from performing any of the services delegated.

7 The application in this matter concerns an AGM of the Owners held on 11 May 2020. Mr Gitman of the Strata Manager sent notices of meeting for the AGM by email to 11 of the 12 lot owners on 29 April 2019. On the same day he posted notices to these owners. He hand delivered the notice to the mailbox of the owner of Lot 8, for whom he did not have an email address.

8 The AGM was held on 11 May 2020 by video link. Mr Gitman hosted the video link and chaired the meeting. Four owners participated in the meeting, being the owners of Lots 4, 7 and 12 and Dr Read as proxy for Ms Read.

9 The minutes of the meeting on 11 May 2020 were adopted as a true record of the meeting at a subsequent EGM of the Owners held on 27 November 2020. The minutes of the AGM held on 11 May 2020 record that a number of motions were resolved unanimously and a number of motions were defeated unanimously. Among the motions passed unanimously was a motion that Dr Read and each of the owners of lots 4, 7 and 12 be elected to the Strata Committee. Dr Read proposed amendments to a number of motions, each of which was defeated by 3 votes to 1. These motions were all passed in their original form by 3 votes to 1.

10 **Tribunal proceedings and decision**

11 On 6 August 2020 Dr Read and Ms Read lodged an application to the Tribunal seeking orders under section 24 of the *Strata Schemes Management* Act 2015 (NSW) (Act) invalidating all resolutions made at the meeting on 11 May 2020 or alternatively orders under section 25 of the Act treating all resolutions at the meeting as a nullity.

12 Section 24 of the Act relevantly provides:

> (1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.
>
> …
>
> (3) The Tribunal may refuse to make an order under this section only if it considers —
>
> > (a) that the failure to comply with the provisions of this Act or the regulations … did not adversely affect any person, and
> >
> > (b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

13 The relevant regulations are the Strata Schemes Management Regulation 2016 (NSW) (Regulations).

14 Section 25 of the Act relevantly provides:

> (1) The Tribunal may, on application by a person entitled to vote on a motion for a resolution of an owners corporation at a general meeting,

order that a resolution passed at the general meeting be treated as a nullity on and from the date of the order.

(2) The Tribunal must not make the order unless the Tribunal is satisfied that the resolution would not have been passed but for the fact that the applicant for the order-

(a) was improperly denied a vote on the motion for the resolution, or

(b) was not given due notice of the item of business in relation to which the resolution was passed.

15 The Tribunal Member's reasons (Reasons) at [28] record the allegations made by the applicants regarding the AGM on 11 May 2020 as follows:

(1) The Strata Manager sent the notice of meeting to owners on 29 April 2020 in defiance of instructions given by Dr Read in her role as Chairperson, Secretary and Treasurer, as the Strata Committee had not been given adequate time to review the notice and attached papers. Dr Read had noticed discrepancies in the documents which required clarification prior to despatch.

(2) There were inaccuracies in the notice of meeting and accompanying documents sent out by the Strata Manager. In particular, the financial statements for the year 2019 were not correct in that two amounts due to be repaid to the owners in 2019 ($2,686.85 from Purple Plumber and $165 from the owner of Lot 7) did not appear as receivables for that year, and there was some confusion over an amount of $618. The applicants described these inaccuracies as a "fraudulent balance". Furthermore, the Strata Manager had placed motions on the agenda for the AGM stated to be submitted by Dr Read but which were actually motions that had been resolved at an earlier Strata Committee meeting.

(3) The AGM was provided with incorrect information regarding the plan's insurance and the owners had not been presented with three quotations for insurance as required by s166 of the Act.

(4) Adequate notice of the AGM was not provided as the notices sent by post did not allow 7 days' notice of the meeting and notices sent by email did not constitute proper service as email addresses were not the designated address for service on the strata roll.

(5) Dr Read was prevented from chairing the AGM although as the current Chairperson she was entitled to do so. Mr Gitman of the Strata Manager chaired the meeting despite Dr Read's insistence that she chair the meeting.

(6) The Strata Manager as the host of the video meeting had Dr Read muted for some 49% of the AGM which prevented her from contributing fully to the meeting.

(7) Dr Read, as Secretary stated that she would prepare the minutes for the meeting but was prevented from doing so. The minutes were prepared

by the Strata Manager but not sent to owners until 2 July 2020, in excess of the 14 days required.

16 The Tribunal relevantly found that:

(1) At the commencement of the AGM on 11 May 20, Dr Read stated that she would chair the meeting. Mr Gitman objected to this and said that as Strata Manager he should chair the meeting Mr Gitman asked those in attendance to vote on whether he should chair the meeting, although no such motion was on the agenda. The three other owners voted in favour of Mr Gitman chairing the meeting (Reasons at [37]-[38]).

(2) Dr Read was the elected chairperson and would remain so at least until the end of the AGM. Pursuant to section 42 and schedule 1, clause 12 of the Act, the chairperson is to preside at meetings of the owners corporation and the strata committee. Although the Strata Manager had been delegated general powers of the office bearers, section 54(2) of the Act provided that this delegation did not prevent the office bearers from exercising their roles. The failure to allow Dr Read to chair the meeting and the impromptu call for a vote on who should be chairman without prior notice did constitute a breach of the Act (Reasons at [39]-[41]).

(3) As Mr Gitman had organised the AGM on a GoToMeeting app, he had a degree of control over the conduct of the meeting and was able to mute Dr Read from time to time. In relation to the amendments to motions proposed by Dr Read it did not appear that Dr Reid was given an opportunity to explain the reason for the proposed amendments prior to the vote, given the way in which the meeting was chaired by Mr Gitman. It appeared that Mr Gitman muted Dr Read, not in response to her talking for too long or acting in a manner which did not respect the other owners, but rather in anticipation of her doing so. This was not fair or impartial (Reasons at [37], [42] – [45]).

(4) The Strata Manager emailed the notice of meeting to 11 of the 12 owners on 29 April 2020 and on the same day posted the notice of meeting to those 11 owners. Schedule 1 clause 7 of the Act requires 7 days' notice of an AGM. The postal rule (*Interpretation Act* 1987 (NSW), s 76(1)(b)) allows seven working days for deemed receipt of a postal document and accordingly the posted notices of meeting would not have allowed sufficient notice of the AGM (Reasons at [46]).

(5) Section 263(3) of the Act provides that an owners corporation may serve notices or documents to an email address specified for the service of documents. Although the strata roll indicated that the 11 owners had provided an email address, the strata roll specified the postal address of these owners as their address for service, rather than their email address. The Owners did not provide any evidence showing the email addresses which were used for service of the notice of meeting, nor did it give an explanation regarding the way in which these email addresses were obtained. In these circumstances the Owners could not rely upon the emailed notices as constituting proper service.

On the basis of the evidence provided, proper notice of the AGM was not given in accordance with Schedule 1 clause 7 of the Act (Reasons at [47] – [50]).

(6) The conduct of the AGM in relation to the chairing of the meeting and the failure to give adequate notice of the meeting constituted breaches of the Act. These issues permitted the Tribunal to exercise its discretion to invalidate the resolutions of the AGM. (Reasons at [52]).

(7) Four of the 12 owners attended the AGM. None of the other owners had made a complaint regarding notice. It would be reasonable to assume that an owner who was prevented from attending the AGM as a result of inadequate notice would have come forward and complained (Reasons at [51]).

(8) Given the time which had elapsed since the AGM and the fact that an EGM was subsequently held which gave the Owners another opportunity to come together and potentially address matters of concern from the previous meeting, it seemed unnecessary to invalidate the resolutions of the AGM, particularly as a new Strata Committee was elected at the EGM and Dr Read was no longer a member of the committee (Reasons at [53])

(9) Several of the resolutions at the AGM were decided unanimously. Those which were not were generally motions that Dr Read had suggested be amended. The amendments were not necessarily of a substantive nature. Dr Read also sought to amend the financial statements and the insurance requirements. Discrepancies in the financial statements had been brought to the attention of the Owners and the Owners had resolved to obtain three quotations for insurance which were likely to be produced at the next AGM (Reasons at [54]-[55]).

(10) There were no issues arising from the AGM which would be decided differently should the resolutions be invalidated. Furthermore to order invalidation of resolutions now would be counter-productive and an unnecessary cost to the Owners. In these circumstances the Tribunal exercised its discretion not to invalidate any resolutions passed at the AGM (Reasons at [56] – [57]).

(11) The Owners had sought costs. Under section 60 of the NCAT Act the general position is that each party pays its own costs unless there are special circumstances. Although the Tribunal had exercised its discretion not to make the orders sought by Dr Read, it also had found that the Owners had breached the Act. In the circumstances the Tribunal refused the Owner's application for costs (Reasons at [58] – [59])

Scope and nature of internal appeals

17 Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80 (2) of the NCAT Act.

18 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

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

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

19 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

20 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

21 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must

still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

22 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) issues of principle;
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> (b) questions of public importance or matters of administration or policy which might have general application; or
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> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
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> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
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> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of Appeal and Submissions

23 The decision of the Tribunal was based on section 24 of the Act, rather than section 25, and Dr Read and Ms Read (the appellants) focussed exclusively on section 24 of the Act in their grounds of appeal. The appellants raised four grounds of appeal in the Notice of Appeal which were said to involve errors of law by the Tribunal in the way in which it interpreted s. 24 of the Act. These grounds were that the Tribunal made errors of law in:

> (a) treating a decision under section 24 of the Act as a discretionary decision whereas the Tribunal may only refuse to make an order under section 24 of the Act if it considers that both section 24(3)(a) and (b) apply;
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> (b) failing to make a decision under section 24 on each non-compliance with the Act alleged by the appellants;
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> (c) failing to decide whether any person was adversely affected by each non-compliance with the Act which was found to have taken place (s. 24(3)(a)); and
>
> (d) failing to decide whether compliance with the provisions of the Act would not have resulted in a failure to pass the resolution or affected the results of the election (s 24(3)(b)).

24 In support of these grounds of appeal the appellants submitted that the Tribunal incorrectly approached the task under section 24 of the Act as a discretionary decision whereas the Tribunal may only refuse to make an order under that section if it considers both section 24 (3) (a) and (b) apply. The appellants contended that, having found that there was non-compliance with the Act in two respects (failure to permit Dr Reid to chair the meeting and inadequate notice of the meeting) the Tribunal had not made a decision as required under section 24 (3) (a) that the non-compliance with the Act had not adversely affected any person. The appellants also contended that the Tribunal had not made a decision as required under section 24(3)(b) that compliance with the Act would not have resulted in a failure to pass a resolution. In these circumstances, the appellants contended that the Tribunal's decision under section 24 of the Act had miscarried.

25 The appellants submitted that the correct way to approach the task under section 24 was illustrated by the decision of the Supreme Court of NSW in *The Owners – Strata Plan No 62022 v Sahade* [2013] NSWSC 2002 (*Sahade*), a decision under the relevantly identical provisions of section 153 of the *Strata Schemes Management Act* 1996 (NSW*)* (1996 Act). The appellants submitted that the decision in Sahade was "determinative". In that case the Court noted that each of the elements now found in s 24 (3) (a) and (b) of the Act must be satisfied for an adjudicator to refuse to make an order invalidating a resolution. Moreover in relation to the issue of notice of the meeting the appellants referred to *Sahade* at [28] in which the Court stated that it was *"difficult, if not impossible, to imagine a circumstance where a person was provided no or inadequate notice of the meeting, yet it could be said that the failure 'did not adversely affect' that person, except in circumstances where the person attended the meeting notwithstanding and waved the notice provision."*

26 The appellants submitted that they had identified seven alleged breaches of the Act which were referred to at [28] of the Reasons, yet the Tribunal had only made findings in relation to two of those alleged breaches. The appellants submitted that procedural fairness required that the Tribunal determine whether each of the breaches alleged by the appellants constituted a failure to comply with the provisions of the Act. In oral argument the Appeal Panel referred Dr

Read to the terms of section 24(1) of the Act which focus on whether the provisions of the Act or the regulations have not been complied with "*in relation to the meeting*". Dr Read stated that the appellants were not submitting that a notice of meeting was invalid if it included material which was not objectively correct.

27 The Owners in their submissions supported the Tribunal's decision and contended that the Tribunal had correctly approached the exercise under section 24 of the Act. The Owners submitted that the Tribunal had correctly identified the questions for determination at [35] of the reasons and had correctly approached the task of answering those questions at [51] – [57] of the reasons.

28 The Owners also submitted that the Strata Manager did have delegated authority to chair the meeting under the terms of the Agency Agreement.

29 In addition, the appellants sought leave to appeal asserting that they may have suffered a substantial miscarriage of justice because the decision of the Tribunal was not fair and equitable; was against the weight of the evidence; and because significant new evidence was now available that was not reasonably available at the time of hearing. The appellants raised 18 allegations which they said may have resulted in them suffering a substantial miscarriage of justice, which may be briefly summarised as follows:

(a) the Tribunal at [4] said that the applicant attended the hearing by telephone whereas in fact both applicants attended by telephone;

(b) there was "subterfuge" by Ms Lui, a lot owner and Mr Bannerman, solicitor, in purporting to represent the Owners at the hearing when they had not in fact been appointed and their conduct during the telephone hearing was intended to delay a decision by the Tribunal;

(c) the Tribunal made an error at [15] in stating that Dr Read lives at Lot 3 with Ms Read whereas in fact Ms Read lives there alone;

(d) certain facts found by the Tribunal at [19] concerning a meeting between Dr Read and Mr Gitman on 20 June 2019 were irrelevant;

(e) a finding by the Tribunal at [20] that Mr Gitman informed Dr Read on 20 June 2019 that the cash at bank was out by $618.28 was incorrect;

(f) a finding by the Tribunal at [21] that the Strata Committee agreed that the AGM would be held on 11 May 2020 was incorrect as only Dr Read and Ms Cruz of the Strata Committee had agreed that the AGM could be held on that date;

(g) a statement by the Tribunal at [25] that Mr Gitman had given evidence that he hand-delivered the notice of meeting to the owner of Lot 8 was incorrect as his evidence was that he hand-delivered the notice to the mailbox of Lot 8;

(h) a finding by the Tribunal at [23] that Dr Read asked Mr Gitman to refrain from sending out the notice of meeting because there were two issues with the balance sheet was incorrect;

(i) a finding by the Tribunal at [28(2)] that there was some confusion over the sum of $618.28 was incorrect;

(j) the appellants are concerned that submissions which they made that each of them and other members of the owners corporation suffered detriment because of non-compliance with the Act were not taken into account by the Tribunal;

(k) the appellants did not understand a statement by the Tribunal at [33] that the applicant had not been granted leave to amend her application;

(l) the findings by the Tribunal at [39]-[41] did not sufficiently deal with issues of fairness;

(m) the findings of the Tribunal at [44] were not entirely accurate;

(n) the findings by the Tribunal at [51] that four of the 12 lot owners attended the AGM and that none of the other lot owners had complained was incorrect because Ms Read had complained;

(o) the finding by the Tribunal at [53] that an EGM was subsequently held which gave the Owners another opportunity to address matters of concern did not sufficiently address the extent to which that opportunity occurred;

(p) the finding by the Tribunal at [54] was incorrect;

(q) the finding by the Tribunal at [56] – [57] that no issues arising from the AGM would be decided differently if the resolutions were invalidated did not take into account certain matters; and

(r) the first three pages of the agenda for the Strata Committee meeting held on 23 February 2021 were not available at the hearing on 17 December 2020 and constituted significant new evidence because they included the minutes of the immediately preceding Strata Committee meeting held on 26 October 2020 and therefore provided information about the decisions of the Owners during the period after 26 October 2020.

30 In relation to costs the Owners submitted that if the appeal was unsuccessful there were special circumstances justifying an order for costs of the appeal in

their favour. The Owners submitted that those circumstances included that the appellants' claims were misconceived and did not have a tenable basis in fact or law. The Owners also submitted that the proceedings were complex and pointed out that the appellants had served voluminous documents and submissions numbering approximately 600 pages in length. The order for costs was opposed by the appellants.

Consideration

31 There is a question whether Dr Read had standing to bring the application to the Tribunal under section 24 of the Act. Section 24 permits an owner or first mortgagee of a lot in a strata scheme to apply for an order. Dr Read is neither an owner nor a first mortgagee, but holds a proxy for Ms Read, the owner of Lot 3. However no objection was apparently taken by the Owners to Dr Read bringing the application in addition to Ms Read and the issue was not argued before us. In the circumstances we have not further considered this question.

32 Section 24 of the Act confers a discretion on the Tribunal to make an order invalidating any resolution of, or election held by, the persons present at a meeting of an owners corporation if the Tribunal considers that the provisions of the Act or the Regulations have not been complied with in relation to the meeting. However, the discretion is constrained by the terms of sub-section (3) of section 24. The Tribunal may refuse to make an order under section 24 only it considers two criteria have been met namely, first, that the failure to comply did not adversely affect any person and secondly, that compliance with the provisions would not have resulted in a failure to pass a resolution or affected the result of the election.

33 The appellants in their submissions referred extensively to the decision in *Sahade*, submitting that it illustrated the correct approach to section 24 of the Act, particularly where the issue was the failure to give notice in accordance with the requirements of the Act and the Regulations. *Sahade* was not in fact a case involving an application under the then equivalent of section 24 of the Act (section 153 of the 1996 Act). In *Sahade,* the Local Court had dismissed a claim by the owners corporation for unpaid strata levies. It was held that the general meeting at which these levies were imposed was invalid, because less

than 7 days' notice had been given of the meeting as required by the equivalent of Schedule 1 clause 7 of the Act (Schedule 2 clause 32 of the 1996 Act).

34 Rothman J dismissed an appeal by the owners, holding at [30]-[31] that strict compliance with clause 32 was essential. At [20]-[29] Rothman J rejected an argument by the owners that, among other things, section 153 of the 1996 Act evidenced a legislative intention of practical flexibility, including that a breach of clause 32 would not, of itself, render invalid all resolutions of the meeting. Rothman J held that section 153 assumed a valid and properly convened meeting and did not qualify the notice requirements of clause 32.

35 The decision in *Sahade* in this regard does not reflect the current law in New South Wales in light of the decision of the Court of Appeal in *The Owners Strata Plan No.51764 v Yau* (2017) 96 NSWLR 587 *(Yau).* In *Yau* an issue was the validity of a resolution by the executive committee of the body corporate to instruct senior counsel to settle litigation. Notice of the meeting had not been given in accordance with Schedule 3 clause 6 of the 1996 Act. Section 21 of the 1996 Act provided that a decision of an executive committee was taken to be the decision of the owners corporation, subject to a presently irrelevant exception. This made the provisions of section 153 of the 1996 Act relevant to the decision by the executive committee.

36 The Court of Appeal in *Yau* upheld the decision of the primary judge that non-compliance with the notice requirements in relation to the meeting did not invalidate the meeting or the decisions made at it. The Court of Appeal referred to the decision of the High Court in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 in which it was observed that an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and that this depends on whether there is a legislative intention to invalidate any act that fails to comply with the condition. The Court of Appeal noted that Schedule 3 clause 6 did not expressly specify the consequences of non-compliance and held that section 153 of the 1996 Act confirmed that non-compliance with the notice requirements did not invalidate the meeting or the resolutions passed at it.

37 Beazley P (with whom Leeming JA and Emmett AJA agreed) stated at [111]):

> "I am also of the opinion that s153 is relevant to the construction of cl 6. Section 153 provided that a resolution of an owners corporation may be invalidated by order of an adjudicator. It thus provided a forum in which unit owners could seek relief in respect of resolutions where there had been non-compliance with the Act where the consequence of non-compliance was not otherwise specified in the Act. The purpose of a provision such as s153 confirms the construction given to cl 6 by the primary judge and with which I agree."

38 *Sahade* was not referred to by the Court of Appeal in *Yau*. Nevertheless the reasoning in *Yau* is determinative. Clause 7 of Schedule 1 of the Act provides that written notice of a general meeting must be given to each owner at least 7 days before the meeting. The consequence of non-compliance is not expressly specified. Failure to comply with the notice requirement does not invalidate the meeting or the resolutions made at the meeting but engages the provisions of section 24 of the Act, which confer a discretion on the Tribunal (constrained by sub-section 24(3)) to invalidate resolutions of, or elections held by, the persons present at the meeting.

39 The Tribunal in this case found that proper notice of the AGM was not given in accordance with Schedule 1 clause 7 of the Act. The Tribunal also found that the conduct of the AGM in relation to the chairing of the meeting, including the failure to allow Dr Read to chair the meeting and the impromptu call for a vote on who should be chairman, also constituted breaches of the Act. However, the appellants submitted the Tribunal erred in failing to make a decision under section 24 of the Act in relation to other non-compliances with the Act which they alleged and which were identified at [28] of the Reasons.

40 One complaint made by the appellants (identified at [28(1)] of the Reasons) was that the Strata Manager sent a notice of meeting to the Owners on 29 April 2020 in defiance of instructions given by Dr Read in her role as chairperson, secretary and treasurer. In oral submissions Dr Read stated that the Strata Manager's conduct in this regard was in breach of section 54(2) of the Act.

41 Section 54 of the Act relevantly provides as follows:

> (1) The instrument of appointment of a strata managing agent may provide that the strata managing agent has and may exercise all the functions of the chairperson, secretary, treasurer or strata committee of

an owners corporation or the functions of those officers or the strata committee specified in the instrument.

(2) However, the chairperson, secretary, treasurer and strata committee of an owners corporation may continue to exercise all or any of the functions that the strata managing agent is authorised to exercise.

(3) Any act or thing done or suffered by a strata managing agent in the exercise of any function of the chairperson, secretary, treasurer or strata committee conferred on the strata managing agent in accordance with this section –

(a) has the same effect as if it had been done or suffered by the chairperson, secretary, treasurer or strata committee, and

(b) is taken to have been done or suffered by the chairperson, secretary-treasurer or strata committee.

42 In this case the Strata Manager did have authority to act as chairperson and secretary of the owners corporation under the terms on which it had been appointed. Section 54(2) does not have the effect of invalidating the act of the Strata Manager in issuing the notice of meeting. On the contrary, section 54(3) makes it clear that the conduct of the Strata Manager in this regard was valid.

43 Some of the other complaints made by the appellants (identified at [28(2) and (3)] of the Reasons) concerned the factual accuracy of information provided to owners with the notice of meeting concerning the financial position and insurance of the strata plan.

44 Division 3 of Part 2 of the Act (which includes section 24) sets out the statutory regime for meetings of owners corporations. Section 23 of the Act provides that procedures for general meetings and voting which are not otherwise specified in Division 3 are contained in Schedule 1 to the Act. Schedule 1 includes provisions identifying the matters which are required to be included in the notice for general meetings and additional matters required to be included in the notice for AGMs. The matters to be included in the notice for an AGM include a copy of the last statements of key financial information and particulars of each insurance policy taken out by the owners corporation.

45 In oral submissions Dr Read stated that she was not submitting that a notice of meeting is invalid if it includes material which is not objectively correct. We consider that this concession was correctly made. In our view if the notice of meeting or accompanying documents for the AGM included the relevant

information and documents required by Schedule 1 but it is assumed that there were factual inaccuracies in that information, this did not invalidate the notice of meeting, nor was it a breach of the Act or Regulations *in relation to the meeting*.

46 A complaint made by the appellants and identified at [28(6)] of the Reasons was that the Strata Manager as the host of the video meeting had Dr Read muted for some 49% of the AGM which prevented her from contributing fully to the meeting. In oral submissions Dr Read was asked to identify to which sections of the Act or Regulations this complaint related. Dr Read nominated section 42 of the Act. Section 42 merely provides that the functions of the chairperson include presiding at meetings of the owners corporation and the strata committee and making determinations as to quorums and procedural matters.

47 The Tribunal member found at [41] that the failure to allow Dr Read to chair the meeting did constitute a breach of the Act. The Tribunal member stated at [42] that it did not appear that Dr Read was given an opportunity to explain the reason for amendments which she proposed prior to voting given the way in which the meeting was chaired by Mr Gitman. The Tribunal member noted at [43] that the process of the meeting seemed somewhat confused but that the meeting format was different to usual in-person meetings. The Tribunal member observed that during a time of adaptation to a COVID- 19 safe environment, difficulties of this nature could be expected. At [45] the Tribunal member stated that from the transcript of the meeting it appeared that Mr Gitman muted Dr Read not in response to her talking for too long or acting in a manner which did not respect the other owners, but rather in anticipation of her doing so and that this was not fair or impartial.

48 It seems to us therefore that this complaint by the appellants about the conduct of the meeting was carefully considered and dealt with by the Tribunal as part of, and consequential to its finding that the failure to allow Dr Read to chair the meeting was a breach of the Act. We see no error in this approach.

49 Another complaint made by the appellants and identified at [28 (7)] of the Reasons, was that Dr Read was prevented from preparing the minutes of the

meeting which were prepared by the Strata Manager and not sent to the Owners until 2 July 2020, later than the 14 days required by clause 22(2) of Schedule 1. This issue was not subsequently referred to by the Tribunal member other than to find at [32] that at an EGM of the Owners held on 27 November 2020, the minutes of the AGM held on 11 May 2020 were adopted as a true record of the meeting.

50 Whilst the late provision of the minutes was a breach of the Act, it was not a breach which affected the conduct or outcome of the meeting. The intention of section 24 is to confer a discretion on the Tribunal to invalidate resolutions where there has been non-compliance with the Act or Regulations in relation to the meeting. In our view the late provision of the minutes after the meeting did not affect the resolutions passed at the meeting and is not a breach of the Act in relation to the meeting within the meaning and intent of section 24. If we are wrong in this view, then we consider that it is clear that the late provision of the minutes did not adversely affect any person or have any bearing on the resolutions passed at the meeting and could not have resulted in an order invalidating any resolution under section 24.

51 In these circumstances, we see no error in the Tribunal focusing on the breaches of the Act which it identified and considered, namely the failure to allow Dr Read to chair the meeting and the failure to comply with the notice provisions of the Act.

52 The appellants submit that the Tribunal made further errors of law in the way in which it interpreted section 24 of the Act, by failing to decide the issues raised by section 24(3)(a) and (b), namely whether any person was adversely affected by each non-compliance with the Act which was found to have taken place and whether compliance with the provisions of the Act would have resulted in a failure to pass the relevant resolution.

53 We consider that this submission is incorrect. The Tribunal correctly identified the questions which it was required to consider at [35(a) and (b)] of the Reasons. The Tribunal then proceeded to answer those questions in substance at [51] – [57] of the Reasons. The Tribunal identified a number of

matters which had a bearing on the question of whether any person was adversely affected by the breaches of the Act, principally that:

(a) Four of the 12 lot owners attended the AGM. There had been no complaint from any other owner regarding notice and it was reasonable in the circumstances to assume that an owner who was prevented from attending the AGM as a result of inadequate notice would have come forward and complained.

(b) A considerable period of time had elapsed since the AGM and an EGM had subsequently been held which gave the Owners another opportunity to come together and potentially address matters of concern from the previous meeting;

(c) Even though the appellants sought to overturn all of the resolutions made at the AGM, several of those resolutions were decided unanimously. Those which were not decided unanimously were generally amendments proposed by Dr Read which were not of a substantive nature. These amendments were defeated.

54 The Tribunal expressly held at [56] that there were no issues arising from the AGM which would be decided differently should resolutions be invalidated.

55 The Tribunal identified other considerations which also emphasised a conclusion that the resolutions should not be invalidated, such as that invalidation of the resolutions now would be counter-productive and an unnecessary cost to the Owners. We see no error in the Tribunal taking into account additional considerations which justified a conclusion that the resolutions should not be invalidated, provided that the Tribunal had found the matters required to be established by sub-section 24 (3) (a) and (b) of the Act. We are satisfied that the Tribunal did address those matters and found both of those matters established, justifying the refusal of orders under section 24.

56 It follows that we are satisfied that the Tribunal made no error of law in the manner in which it interpreted section 24 of the Act.

57 We have reviewed each of the 18 matters raised by the appellants in support of their application for leave to appeal. None of these matters were addressed by the appellants in their oral submissions but they were dealt with in detail in the notice of appeal and the appellants' written submissions, which we have reviewed. We consider that none of the matters raised which are said to make the decision of the Tribunal not fair and equitable or against the weight of

evidence either individually or collectively give rise to a prospect that the appellants may have suffered a substantial miscarriage of justice in relation to the decision of the Tribunal. In relation to the agenda for the strata committee meeting held on 23 February 2021, we do not consider that this is significant new evidence because it has no significant bearing on whether the resolutions at the AGM on 11 May 2020 should be invalidated. We refuse leave to appeal.

58 Although the appeal has been unsuccessful, we do not consider that there are any special circumstances justifying an order for costs of the appeal in favour of the Owners.

Conclusion

59 Accordingly our orders will be:

(1) Leave to appeal refused;

(2) 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