Civil and Administrative Tribunal

New South Wales

Case Name:	Newcastle Central Plaza Pty Ltd v The Owners - SP; No 80412
Medium Neutral Citation:	[2021] NSWCATAP 169
Hearing Date(s):	28 January 2021
Date of Orders:	9 June 2021
Decision Date:	9 June 2021
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President D Robertson, Senior Member
Decision:	1. Appeal dismissed. 2. Within 21 days of the publication of these orders the Respondent may file and serve evidence and submissions in support of an order for costs of the appeal. 3. Within 21 days thereafter the Appellant may file and serve submissions with evidence in opposition to the Respondent's application for an order for costs of the appeal. 4. The submissions of the parties shall include submissions as to whether the Appeal Panel may decide the question of costs of the appeal on the papers and dispense with a hearing on that question.
Catchwords:	LAND LAW- Strata title- reallocation of unit entitlements - unreasonable initial allocation - application by owners corporation - requirement for a certificate of valuation - hardship to lot owner - restitutio in integrum -.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW)

	Real Property Act 1900 (NSW)
Cases Cited:	Anderson Stuart v Treleaven (2000) 49 NSWLR 88 Clay v Clay (2001) 202 CLR 410 Connective Services Pty Ltd v Slea Pty Ltd (2019) 267 CLR 461; [2019] HCA 33 Joam v Minister for Immigration & Multicultural Affairs [2002] FCA 107 Kirsch v HP Brady Pty Ltd (1937) 58 CLR 36; [1937] HCA 20 Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 Minister for Natural Resources v New South Wales Aboriginal Land Council (1987) 9 NSWLR 154 Nibbs v Devonport City Council [2015] TASSC 34 Phosphate Resources Ltd v Minister for the Environment, Heritage & the Arts (No 2) (2008) 251 ALR 80 Sahade v Owners Strata Plan 62022 [2014] NSWCA 208 The Peoples Prudential Insurance Co Ltd v The Australian Federal & Life Assurance Co Ltd (1935) 35 SR (NSW) 253 Vadasz v Pioneer Concrete (SA) Pty Ltd (1985) 184 CLR 102 Zhu v Owners Strata Plan 519933 [2019] NSWCATCD 4
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Newcastle Central Plaza Pty Ltd (Appellant) The Owners - SP No 80412 (Respondent)
Representation:	Counsel: Dr R O'Hair (Appellant) D Knoll AM (Respondent) Solicitors: Grace Lawyers (Respondent)
File Number(s):	2020/00371082 (AP 20/42504)
Publication Restriction:	Nil

Decision under appeal:

Court or Tribunal:	New South Wales Civil & Administrative Tribunal
Jurisdiction:	Consumer & Commercial Division
Citation:	Not applicable
Date of Decision:	8 September 2020
Before:	G Ellis SC (Senior Member)
File Number(s):	SC 19/54861

REASONS FOR DECISION

Background

1 This appeal concerns a decision (the Decision) made in the Consumer & Commercial Division of the Tribunal, which was published on 8 September 2020. The Decision arose out of an application made by the Respondent (The Owners – Strata Plan No 80412) seeking orders under s 236 of the *Strata Schemes Management Act* 2015 (NSW) (the Strata Act) to reallocate unit entitlements in the strata scheme. The Tribunal made orders reallocating the unit entitlements. The Appellant is the owner of Lots 1 and 2 in the strata scheme (having purchased those lots in 2013 from the receivers of the original developers).

2 The effect of the orders made by the Tribunal was to re-allocate unit entitlements among the lots in the strata scheme in accordance with the schedule of unit entitlements contained in the valuation report of Mark Casemore of Clisdells Valuations dated 20 April 2020, a copy of which schedule was attached to the Decision. Further orders were made to require the Respondent to have the Tribunal's orders registered with the Registrar General of the Land and Property Management Authority and to inform each of the lot owners of the orders made by the Tribunal.

3 A Notice of Appeal was filed on 6 October 2020, after which directions were made for the preparation of the appeal. The Appellant seeks to have the reallocation set aside and the Respondent's application dismissed.

4 It is helpful in the understanding of this Decision to set out s 236 of the Strata Act. Its terms are as follows:

> 236 ORDER FOR REALLOCATION OF UNIT ENTITLEMENTS
>
> (1) **Tribunal may make order allocating unit entitlements** The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots--
>
> > (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or
> >
> > (b) was unreasonable when a revised schedule of unit entitlement was lodged at the conclusion of a development scheme, or
> >
> > (c) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the whole or any part of the parcel could lawfully be used, whether with or without planning approval.
>
> (2) **Matters to be taken into consideration** In making a determination under this section, the Tribunal is to have regard to the respective values of the lots and to such other matters as the Tribunal considers relevant.
>
> (3) **Persons who may apply for order** An application for an order under this section may be made by any of the following--
>
> > (a) an owner of a lot (whether or not a development lot) within the parcel for the strata scheme,
> >
> > (b) the owners corporation,
> >
> > (c) the lessor, in the case of a leasehold strata scheme,
> >
> > (d) the local council, or by any other public authority or statutory body representing the Crown, being an authority or body that is empowered to impose a rate, tax or other charge by reference to a valuation of land.
>
> (4) **Application to be accompanied by valuation** An application for an order must be accompanied by a certificate specifying the valuation, at the relevant time of registration or immediately after the change in the permitted land use, of each of the lots to which the application relates.
>
> (5) **Qualifications of person making valuation** The certificate must have been given by a person who is a qualified valuer within the meaning of the Strata Schemes Development Act 2015 .
>
> (6) **Ancillary orders that may be made if original valuation unsatisfactory** The Tribunal may, if it makes an order allocating unit entitlements that were not allocated in accordance with a valuation of a qualified valuer and, in the opinion of the Tribunal, were allocated unreasonably by an original owner, also order--
>
> > (a) the payment by the original owner to the applicant for the order of the costs incurred by the applicant, including fees and expenses reasonably incurred in obtaining the valuation and the giving of evidence by a qualified valuer, and

(b) the payment by the original owner to any or all of the following people of the amounts (if any) assessed by the Tribunal to represent any overpayments (due to the unreasonable allocation) for which liability arose not earlier than 6 years before the date of the order--

(i) the lessor, in the case of a leasehold strata scheme,

(ii) the owners corporation,

(iii) the owners of lots.

(7) **Lodgment of order** The owners corporation must ensure that a copy of an order made by the Tribunal under this section is lodged with the Registrar-General no more than 6 months after the order is made. Nothing in this section prevents a person who is entitled to apply for an order under this section from lodging a copy of an order made under this section.

The Decision

5 In order to understand the basis for the appeal it is helpful to summarise the reasoning of the Tribunal as recorded in the Decision. That summary is as follows:

(1) The strata scheme in respect of which the Respondent is the owners corporation and in respect of which the Respondent brought application for an order for reallocation of unit entitlements under s 236 of the Strata Act is a development in Newcastle comprising two buildings with 109 lots. It was described as a 13 storey mixed commercial and residential building and a heritage listed terrace which has commercial tenants with two lots. The strata scheme was registered on 21 May 2008. The Appellant opposed the reallocation.

(2) The Respondent relied upon two valuations of Mr Casemore, one dated 26 March 2019 and the second dated 20 April 2020. The Tribunal found that Mr Casemore satisfied the definition of valuer contained in the *Strata Schemes Development Act* 2015 and that the valuations complied with s 236(5) of the Strata Act [7].

(3) The Appellant relied upon a valuation provided by Landmark White dated 24 November 2008. The Tribunal found that that valuation was prepared for the purposes of mortgage security lending [15].

(4) The Tribunal decided to exclude from consideration the Landmark White valuation. A number of reasons were given as recorded at [38] of the Decision.

(5) The Tribunal stated that it did not accept the Appellant's submission that the sale of lots 1 and 2 some five years after registration of the strata plan should be taken into consideration. The reasons for that conclusion are contained at [39].

(6) At [45] the Tribunal stated that it was satisfied that Mr Casemore's evidence should be accepted.

(7) The Appellant had made a submission that Mr Casemore's valuation did not comply with s 236(4) which requires an application for an order to be accompanied by certificate specifying the valuation at the time of registration of each of the lots. That submission was based upon the fact that, in Mr Casemore's valuation report under the heading "Certificate of Value", he had stated "The recommended values of each lot…" It was said by the Appellant that there was a requirement to certify as opposed to recommend. The Tribunal rejected that submission and at [49] the Tribunal stated that it accepted the valuation of each lot as suggested by Mr Casemore as establishing the respective values of each of the lots in the scheme at the date of registration.

(8) At [53] the Tribunal noted that there was no evidence of any valuation used to base the existing unit entitlements.

(9) The Tribunal then considered whether the existing unit entitlements were unreasonable and compared the existing unit entitlements with the unit entitlements proposed by Mr Casemore on the basis of his valuations. At [56] the Tribunal referred to "significant changes" in the existing unit entitlements compared with Mr Casemore's proposed unit entitlements for a number of lots. Lot 2's unit entitlements moved from 0.1% of the total to 0.5% of the total. The Tribunal stated that this suggests that Lot 2 has been contributing far less than should have been the case by reference to its market value. Lot 1 had a unit entitlement representing 1.3% of the total and the proposed unit entitlement would be 2.5% of the total. Lot 24 had a unit entitlement of 0.6% of the total and the recommended unit entitlement would be 1.2% of the total. Like Lot 2, Lot 24 has been contributing to levies at about half that which would "be suggested by comparison, based on the market value of those lots at the date of registration" [56].

(10) At [57] the Tribunal found that there were 11 lots where the movement is "in the opposite direction with the percentage reduction ranging from just under 20% to just over 30%". The Tribunal also found that there were storage cages (Lots 79-109) which "have the greatest reductions in percentage terms". They would change from .14% of the total to 0.08% in some cases or from 0.48% to 0.16% in other cases. The Tribunal described these changes as "significant changes when considered individually" and observed that since May 2008 the owners of these lots have "shouldered more than their fair share of the burden by reference to market values revealed by the valuation of Mr Casemore".

(11) At [58] the Tribunal stated that a review of existing unit entitlements by reference to available evidence, such as the area of each lot, does not reveal any rational or reasonable basis for them, whereas the market value of the lots as at the date of registration of the strata scheme would provide a reasonable basis. The Tribunal concluded that in such circumstances, the Tribunal "is satisfied that the current unit entitlements are unreasonable".

(12) From [59] the Tribunal dealt with the question of whether the discretion, which is introduced into s 236 by use of the word "may", should be exercised such that the Tribunal should reallocate the unit entitlements. The Tribunal considered a number of evidentiary matters relevant to the exercise of discretion and determined at [65] that the proposed reallocation is "warranted".

The Notice of Appeal

6 The Notice of Appeal lists a number of grounds of appeal (all described as "points of law") which may be summarised as follows:

(1) Ground 1: the same party appeared on both sides of the record and accordingly the proceedings were improperly constituted.

(2) Ground 2: the Tribunal erred in rejecting the application of the "presumption of regularity" with reference to the initial determination of the allocation of unit entitlements.

(3) Ground 3: the Tribunal erred in holding that the requirements for the operation of s 236(4) were made out in that there was no certificate specifying the valuation as opposed to making a recommendation as to values.

(4) Ground 4: the Tribunal erred in failing to apply cases on the meaning of the word "unreasonable". The rejection of authorities as to the meaning of "unreasonable" was in error.

(5) Ground 5: the exclusion of the Landmark White valuation from consideration was an error of law as being a form of misdirection as to a relevant consideration.

(6) Ground 6: the Tribunal erred in holding that the Appellant did not raise issues of hardship as the Appellant raised the fact that the Appellant was not in a position to recover from the vendor the loss caused by the reallocation of unit entitlements as the vendor was in external administration at the time of purchase and was subsequently wound up.

(7) Ground 7: the Tribunal erred in not ruling on the first three questions of law raised in paragraph 66 of the Appellant's submissions at first instance which would have led to a different result. These were:

(a) whether in accordance with the decision in *Vadasz v Pioneer Concrete* (1985) 184 CLR 102, the Tribunal was bound, in exercising its statutory jurisdiction, to apply by analogy the principle "he who seeks equity, must do equity" and accordingly the application to the Tribunal should be dismissed as no restitutio in integrum is sought, or is possible;

(b) whether the provisions of s 236 of the Strata Act are confined by the same principle;

(c) whether a limitation period is to be applied to this application by analogy with the provisions of s 236(6) of the Strata Act.

Reply to Appeal

7 The Respondent filed a Reply to Appeal, which may be summarised as follows:

(1) Ground 1: the proceedings below were contested between and the Owners - Strata Plan No 80412 as Applicant and the Appellant as Respondent. No point was taken below that the proceedings were improperly constituted. This ground should be rejected.

(2) Ground 2: the presumption of regularity has no application to determinations under s 236 of the Strata Act. Further, where there is evidence sufficient for the Tribunal to make orders under s 236, there is no scope for the presumption of regularity to operate. Further, this ground discloses no error as to a question of law.

(3) Ground 3: s 236(4) requires that an application for an order be accompanied by a certificate specifying the valuation. The Tribunal found that the application was accompanied by the necessary certificate. This ground therefore is a challenge to fact finding and as leave has not been sought it is incompetent. This ground also discloses no error as to a question of law.

(4) Ground 4: the Tribunal held that when the original unit entitlements were compared to the valuation evidence there was no rational or reasonable basis for the original unit entitlements. In doing so, the Tribunal did not err in determining the meaning of the word “unreasonable”.

(5) Ground 5: s 236(2) of the Strata Act provides that in making a determination under s 236 the Tribunal is to have regard to the respective values of the lots and to such other matters as the Tribunal considers relevant. The Tribunal was not required to take into account the Landmark White valuation.

(6) Ground 6: the Appellant adduced no evidence below as to hardship and did not submit below that the Tribunal should find as a fact that it could not recover a possible asserted loss from the vendor to it of its lots (Lots 1 and 2) or that it would suffer financial hardship by reason of any order under s 236. It should not now be permitted to do so. These are matters which the Tribunal is not required to take into account in making a determination under s 236 and so failure to take them into account cannot constitute an error as to a question of law. Further, and in the alternative, this ground alleges a failure to make a factual finding. It is therefore a challenge to fact finding and as leave has not been sought, it is incompetent.

(7) Ground 7: questions relating to restitutio in integrum do not arise in determinations under s 236. If such questions did arise, they depend on factual findings being made and so this ground of appeal alleges a failure to make a factual finding. It is therefore a challenge to fact finding and as leave has not been sought it is incompetent. No error as to a question of law has been disclosed.

Submissions of the Appellant

8 The following summarises the written and oral submissions of the Appellant:

(1) Ground 1: the proceedings were improperly constituted because the same party (the Respondent) appeared on both sides of the record. This is a fundamental common law rule. It has been approved in *Clay v Clay* (2001) 202 CLR 410 where at [51] the court said that no person can be at the same time plaintiff and defendant. The matter was raised with the Tribunal as a preliminary matter and was rejected. The rule is important. It is important that the Owners Corporation should sue everyone who is adversely affected by the proposed order, rather than adopting a faux dual character "representing interests to which it is opposed". To do what was done is to deny natural justice.

(2) Ground 2: the Tribunal erred in rejecting the presumption of regularity with reference to the initial determination of the allocation of unit entitlements. The rebuttable presumption *omnia praesumuntur rite esse acta* applies. The unit entitlement schedule is intended to have legal consequences and it is on the land register: see s 36(11) *Real Property Act* 1900 (NSW). A registered instrument has the effect of a deed and strangers to a deed are permitted to rely upon it. The presumption of regularity inured to the Appellant.

(3) Ground 3: the Tribunal erred in holding that the requirements for the operation of s 236(4) of the Strata Act were made out in that there was no certificate specifying the valuation as opposed to making a recommendation. The valuer did not attest in the words required by the Strata Act namely "certificate specifying valuation". Relying on a "recommendation" is impermissible. The Act's requirements must be clearly met because they involve a serious invasion of proprietary rights.

(4) Ground 4: the Tribunal erred in failing to apply cases on the meaning of the word "unreasonable". In *Sahade v Owners Strata Plan 62022* [2014] NSWCA 208 at [19] (which also involved the allocation of unit entitlements), the case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 is referred to. In that case Gibbs CJ referred to the concept of unreasonableness. The rejection of authorities as to the meaning of "unreasonable" was in error. The want of reasonableness is what justifies the extraordinary remedy of altering the real property register to the detriment of transferees who were not privy to any alleged want of reasonableness.

(5) Ground 5: the exclusion of the Landmark White valuation from consideration was an error of law in that the Tribunal misdirected itself as to a relevant consideration. Exclusion from consideration on the basis of the date of a valuation which is not long after the date for determination of the value, particularly in a case founded on a retrospective valuation made years after the events in issue, was an error of law.

(6) Ground 6: the Tribunal erred in law in holding that the Appellant did not raise issues concerning hardship. In fact, the Appellant raised the fact

that the Appellant was not in a position to recover from the vendor the loss caused by the reallocation of unit entitlements as the vendor was in external administration at the time of purchase and was subsequently wound up.

(7) Ground 7: the Tribunal erred in not ruling on the Appellant's submission concerning three questions of law raised by the Appellant. These were referred to earlier under the heading "The Notice of Appeal".

The Respondent's Submissions

9 The Respondent's submissions may be summarised as follows:

(1) Ground 1: this ground should be rejected because the proceedings were in fact properly constituted. The Respondent brought the application and named each lot owner as a respondent. The only active contradictor was the First Respondent (now the Appellant). In addition, the point was not taken at first instance. This ground discloses no error as to a question of law.

(2) Ground 2: the presumption of regularity assumes the formalities of the required action to have been observed and is merely a principle of expediency whereby it falls upon the impugning party to assert and justify the grounds of their attack (*Phosphate Resources Ltd v Minister for the Environment, Heritage & the Arts (No 2)* (2008) 251 ALR 80 at 123 [159] per Buchanan J). The presumption of regularity has no application to determinations under s 236 of the Strata Act. Even if it did, it is a rebuttable presumption. With respect to an application for reallocation of unit entitlements under s 236 the Applicant must satisfy the Tribunal that the original allocation of unit entitlements was relevantly unreasonable. When this strata scheme was registered, the *Strata Schemes Development Act* did not require lodgement of a certificate by a valuer. Given the statutory language, the Tribunal's conclusion (at [52]) that the existing unit entitlements apply unless or until they are shown to be unreasonable is correct. This ground discloses no error as to question of law by the Tribunal.

(3) Ground 3: the Tribunal found, at [48], that Mr Casemore had determined and specified the valuation of each lot on the page of his report which he had headed "Certificate of Value". The Tribunal dealt with and rejected the Appellant's submissions to the effect that Mr Casemore had merely provided recommendations. It is necessary to consider what constitutes a "Certificate". In *Joam v Minister for Immigration & Multicultural Affairs* [2002] FCA 107 at [14], Drummond J cited with approval a decision of the Hong Kong Court of Appeal in which it was said that a certificate is "basically a document which speaks to the truth of some existing fact". In addition, that Court said that often the "fact will be that a person other than the certifier has done something, but it may equally be that the certifier has done something or has come to some opinion". Here, Mr Casemore set out what he had done and the opinion he derived therefrom. In any event, this ground is a challenge to a fact

finding and as leave has not been sought it is incompetent. In addition, this ground discloses no error as to a question of law.

(4) Ground 4: orders for reallocation of unit entitlements are generally made when the unit entitlements do not reflect the respective values of the lots and by "respective values" the Strata Act is taken to refer to market values. This principle has been applied in many cases in which the Tribunal has accepted that its task begins with determining whether it is satisfied that a valuer has properly undertaken a market valuation of each of the lots in the scheme and has identified disparities between the aggregation of those valuations in the unit entitlements based on it as compared to the original allocation of unit entitlements: see *Zhu v Owners Strata Plan 519933* [2019] NSWCATCD 4 at [38] and [45]. The Tribunal followed the three-step process described by Sackville JA in *Sahade v Owners SP 2022* [2014] 87 NSWLR 261 at [62]. The Tribunal held (at [58]) that on the available evidence there was no reasonable basis for the original unit entitlements. The finding discloses no error as to question of law and the ground should be rejected.

(5) Ground 5: the Tribunal was justified in rejecting the Landmark White valuation. At [38] of the Decision the Tribunal gave a number of reasons for rejection. These included that: the valuation post-dated the date of registration of the strata scheme by approximately six months; it was prepared for mortgage security purposes; it did not seek to value each of the lots in the scheme; it used incorrect dimensions in valuing lot 1; it placed no value on lot 2; and it was prepared following instructions to disregard special privileges granted by way of special by-laws which benefited lot 1 in particular. Ground 5 discloses no error as to a question of law. In addition, it is a challenge to fact finding and, as leave has not been sought, it is incompetent.

(6) Ground 6: the Appellant did not provide evidence of the purchaser's financial position at first instance and nor did the Appellants submit that the Tribunal should find as a fact that it could not recover a possible asserted loss from the vendor to it. In any event, that situation is not relevant. The Tribunal did not consider hardship to the Appellant because there was no evidence of loss other than the potential loss that arises by the fact that future levies might be higher than they would be without the reallocation. In addition, no order was sought under s 236(6).

(7) Ground 7: questions concerning restitutio in integrum do not arise in determinations under s 236. Restitutionary remedies are granted to plaintiffs who have been induced by fraud, duress or mistake to enter into a contract which is then to be rescinded (*Vadasz v Pioneer Concrete (SA) Pty Ltd* 184 CLR 102). Further, the Appellant did not adduce evidence to suggest that the original allocation of unit entitlements was a factor that weighed in their decision to purchase into the scheme or that the reallocation would visit an injustice on them (see *Zhu v Owners Strata Plan 519933* [2019] NSWCATCD 4 at [50]). Nor is the passage of time since registration of the strata plan a reason not to order the reallocation of unit entitlements when the other factors point in

favour of making the order that is sought. In *Anderson Stuart v Treleaven* (2000) 49 NSWLR 88 at [190]-[192] the Court rejected a submission that it was an error of law for the Tribunal not to have considered whether a delay in bring the application estopped the Court or tribunal from varying the unit entitlements. The fact of delay was held not to preclude the variation of the unit entitlements. Ground 7 discloses no error as to a question of law.

Appellant's Submissions in Reply

10 The following is a summary of the Appellant's reply submissions:

(1) Ground 1: the title to the proceedings under appeal, as seen from the Decision, names The Owners – Strata Plan No 80412 as both Applicant and Respondent. The objection to the constitution of the proceedings was raised in interlocutory proceedings before the Tribunal and was overruled. Whilst an application by the Owners Corporation is expressly permitted by the legislation, considerations identified by the High Court most recently in *Connective Services Pty Ltd v Slea Pty Ltd* (2019) 267 CLR 461; [2019] HCA 33 at [1], cannot be overlooked. That case stands for the principle that a corporate common fund cannot purposefully be used to advance the interests of some members of the corporation qua members of the corporation, over those other members qua members. The principle cannot be displaced by a statutory side wind – see *Connective Services* at [38] and [39]. The principle would be satisfied only where there was the potentiality for an order under s 236(6) so that the common fund was augmented by a stranger responsible for the misallocation of unit entitlements. There is no potentiality for that here as the limitation period in s 236(6) has long since expired and the original owner has passed beyond the reach of the Tribunal.

(2) Ground 2: the legislation does not authorise a person making a unit allocation to make an unreasonable allocation, subject to review at any time. There is a process identified and this is borne out by the liability for damages for making an unreasonable allocation – see s 236(6). The allocation has not only to be unreasonable but also not made in accordance with the valuation of a qualified valuer to expose a person to a monetary order. There was never any evidence that the unit allocation was not made in accordance with the valuation of a qualified valuer. The original unit allocation is entitled to the presumption of regularity. As Porter J said in *Nibbs v Devonport City Council* [2015] TASSC 34 at [26]:

> The principle commonly known as the "presumption of regularity" is that where the exercise of a power or the performance of an act by a public officer or public authority is proved, it will be presumed that the preconditions to the lawful exercise of that power or performance of that act have been met."

Since the unit allocation was provided to the Registrar General and was registered, the presumption of regularity means that it is to be presumed to be supported by valuation of a qualified valuer and was not unreasonable. It was

for the Respondent to convince the Tribunal by cogent evidence that, in substance, a wrong or serious error had been committed and that the unit allocation was unreasonable.

(3) Ground 3: the valuer could have easily expressed himself so that there was a certificate within the terms of the legislation, but did not do so, despite being given the opportunity. The Appellants relied upon comments made by Evatt J in *Kirsch v HP Brady Pty Ltd* [1937] HCA 20; (1937) 58 CLR 36. Here, the intention to certify is not clearly expressed.

(4) Ground 4: context in terms of property rights and the purchase of properties by intervening purchasers and the need to rely on the Torrens Register all point strongly to the construction of the word "unreasonable" proffered by the Appellant being the correct one. The Tribunal specifically rejected the construction of "unreasonable" advanced by the Appellant and in doing so erred.

(5) Ground 5: the Respondent has sought to attack ground 5 on the basis that it is a challenge to evidence ground. That is mistaken. The error identified is an error as to relevant considerations – not weight to be given to evidence. The significance as a relevant consideration of a valuation report that a was much nearer in time to the making of the unit allocation, than the retrospective valuation relied upon, and broadly confirmatory of the unit entitlement allocation, cannot properly be "excluded from consideration".

(6) Ground 6: the Appellant's loss follows from the circumstances of insolvency of its vendor and the increases in expenses as a result of the unit reallocation.

(7) Ground 7: the legislation, is not inequitable or unjust as s 236(6) provides for the relevant monetary adjustment.

(8) The Appellant seeks to have the appeal upheld and that the Appeal Panel invite the parties to make submissions on costs of the appeal in writing with a view to the Appeal Panel deciding costs on the papers by dispensing with a hearing.

Consideration

11 Ground 1: s 236(3) of the Strata Act expressly provides that an application for an order under that section for reallocation of unit entitlements may be made by the Owners Corporation. Applications may also be made by the owner of a lot, the lessor (in the case of leasehold strata schemes) or the local council or other public authority as referred to in s 236(3)(d). The Appellant relied upon authority for the proposition that at common law no person can be at the same time plaintiff and defendant (see *Clay v Clay*). That case addressed the question of a sale by the trustee of trust property to himself. The High Court

referred to the judgment in *The Peoples Prudential Insurance Co Ltd v The Australian Federal & Life Assurance Co Ltd* (1935) 35 SR (NSW) 253 at 265 as authority for the view that no man can be at the same time plaintiff and defendant. The High Court went on to discuss examples of jurisdictions where the common law has been altered by statute. In our view that is the case here. The Strata Act gives express power to the Owners Corporation to make application for reallocation of unit entitlements. Each lot owner was named as a respondent to the application at first instance and the appellant became the active contradictor. In our view, this ground must be rejected.

12 Ground 2: we are in agreement with the Respondent's submissions referred to earlier and in particular the statements taken from *Phosphate Resources v Minister for the Environment*. The presumption of regularity has no application to applications for orders under s 236 of the Strata Act. In *Phosphate Resources*, Buchanan J referred to the decision of McHugh JA in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154. At [164], McHugh JA said that where a public official or authority purports to exercise a power or do an act in the course of their duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Here, the question is whether the unit entitlements made on registration of the strata scheme were unreasonable. The applicant for the order must demonstrate by evidence that the allocation was unreasonable. The Tribunal must assess that evidence and, if the evidence so establishes, make a finding to the effect that the allocation was unreasonable. There is no scope for the allocation to be presumed to be reasonable in the face of cogent evidence to the contrary. This ground is rejected.

13 Ground 3: we are in agreement with the submissions of the Respondent. The requirement for a valuer's certificate contained in s 236 constitutes a requirement for the valuer to state his or her opinion as to the value of each lot in the scheme. We are in agreement that the use of the word "certificate" in s 236 requires the valuer to speak to the truth (to use the language approved by Drummond J in *Joam v Minister for Immigration & Multicultural Affairs* [2002] FCA 107 at [14]) of the valuation. In this context, the valuer is expressing an

opinion as to what the value of each unit was at the time of the registration of the strata scheme. Based upon the language used by the valuer (recorded at [46] of the Decision) it was open to the Tribunal to find that the valuer had determined and specified the valuation of each lot and that the provisions of s 236 in that regard had been complied with. This ground is rejected.

14 Ground 4: the Tribunal held that there was no rational or reasonable basis for the original allocation of unit entitlements and concluded that the unit entitlements were unreasonable. The Tribunal's reasoning was consistent with the principles described by Sackville J in *Sahade v Owners SP 62022* at [86] where his Honour said that in considering whether the original allocation of unit entitlements was unreasonable the valuation of lots is a fundamental consideration but not the only matter to be taken into account in determining whether the original allocation was unreasonable. As the Respondent's submissions say, there is no error displayed by the Tribunal in its reasoning leading to the conclusion that the original allocation of unit entitlements was unreasonable. Ground 4 is rejected.

15 Ground 5: the reasons advanced by the Tribunal for rejecting the Landmark White valuation were appropriate having regard to the issue the Tribunal was required to determine. In particular, the fact that the valuation did not value each lot meant that the relative value of lots to each other in the scheme could not be ascertained. Further, the fact that the valuation used incorrect dimensions for one lot was also an appropriate reason for excluding it in favour of the valuation of Mr Casemore. The Tribunal noted other reasons for excluding the Landmark White valuation, all of which appear to have been relevant in the decision to exclude that valuation. There is no error in the Tribunal's reasoning or conclusion to reject the Landmark White valuation. Ground 5 is rejected.

16 Ground 6: s 236 of the Strata Act provides that the Tribunal "may" make an order reallocating unit entitlements if it considers that the original allocation was unreasonable. The Tribunal therefore has a discretion as to whether it will make an order. Section 263(6) provides that the Tribunal may also order payment by the original owner to any or all lot owners (inter alia) for the amount

of “overpayments” due to the unreasonable allocation. Here, the Appellant submits that the order for reallocation should not have been made because there was evidence before the Tribunal that the vendor who sold the units owned by the Appellant was in external administration and later wound up thereby precluding the Appellant from seeking recovery from the vendor of the loss caused by the reallocation. In our view the Respondent’s submissions are correct in stating that the Appellant could not have suffered prior loss (because the unreasonable unit allocation resulted in an under-contribution to levies by the Appellant) and that the only loss relevant is the potential loss arising by the fact that future levies might be higher than they would be without the reallocation. In any event there was no evidence of prior loss. In our view, s 236 does not expressly require the Tribunal to consider whether an order for reallocation should be not made simply because the effect of reallocation would be to require a lot owner or lot owners to pay future levies in sums greater than they would be required to pay if the unit allocations were unaltered. Section 236(6) makes provision for a limited adjustment for prior “overpayment”. The adjustment is limited to liabilities arising not earlier than six years before the date of the Tribunal’s order for reallocation. In our view the structure of s 236 obviously contemplates that following a reallocation some lot owners will in the future pay levies proportionately higher than the levies they otherwise would have paid had there been no reallocation. In our view this ground must be rejected.

17 Ground 7: We agree with the Respondent’s submission that questions concerning restitutio in integrum do not arise in determinations under s 236. Arguments of a similar nature were referred to in *Anderson Stuart & Ors v Treleaven & Ors* [2000] NSWSC 283. At [188] to [190], Santow J considered a submission by a plaintiff that the party seeking reallocation should be estopped based on the long existence of the existing unit entitlements and the fact that the other party’s acquisition of their lot occurred with knowledge of those entitlements. His Honour held in the absence of unconscionable behaviour or in the absence of a representation sufficient to raise an estoppel it would be difficult to see how the estoppel argument could proceed in the context of that case. His Honour also held that there is no right in the plaintiff to maintain the

original unit entitlements and stated that such a right could clearly not exist given the presence of s119 in the *Strata Titles Act* 1973, that section having been the same in substance as s 236. We are in agreement with the Respondent that ground 7 does not disclose any error as to a question of law. This ground is also rejected.

18 To the extent that any of the grounds of appeal may be characterised as leave grounds to which the provisions of cl12 sch 4 of the Civil and Administrative Tribunal Act 2013 NSW apply we are of the view that the Appellant has not demonstrated any injustice arising from the orders under appeal of the kind that would warrant granting leave.

Conclusion

19 Given our reasons recorded above, the appeal must be dismissed. Accordingly, we make the following orders:

(1) Appeal dismissed.

(2) Within 21 days of the publication of these orders the Respondent may file and serve evidence and submissions in support of an order for costs of the appeal.

(3) Within 21 days thereafter the Appellant may file and serve submissions with evidence in opposition to the Respondent's application for an order for costs of the appeal.

(4) The submissions of the parties shall include submissions as to whether the Appeal Panel may decide the question of costs of the appeal on the papers and dispense with a hearing on that question.

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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