VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2808/2019

CATCHWORDS

Application for recusal; the test for identifying apprehended bias; no basis for recusal; application dismissed.

APPLICANT	Owners Corporation 1 Plan No. RP 2044
RESPONDENT	Jo-Anne Laura Finch
WHERE HELD	Videoconference
BEFORE	Senior Member C. Price
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2021
DATE OF FINAL SUBMISSIONS	26 April 2021
DATE OF ORDER	11 June 2021
CITATION	Owners Corporation 1 Plan No. RP 2044 v Finch (Owners Corporations) [2021] VCAT 624

ORDER

1 The application for recusal made on 21 October 2020 is dismissed.

2 Costs reserved.

3 **I direct the Principal Registrar to list the proceeding for a directions hearing on a date and time to be fixed to be conducted by video-conferencing facility. Two hours is to be allocated for the directions hearing.**

C. Price
Senior Member

APPEARANCES:

For Applicant	Mr L. Crofton, legal representative
For Respondents	Ms J. Finch, in person
For Proposed Interested Party	Mr B. Ndiege, in person

REASONS

1 The substantive application in this proceeding is an application by Owners Corporation RP 2004 (**the OC**) under the *Owners Corporations Act 2006* (**OC Act**) against Jo-Anne Finch (**Ms Finch**) for the recovery of owners corporation fees and interest in respect of Lots 2 and 5, 3 Hutchison Avenue, Beaumaris. There has, as yet, been no hearing of the issues in the OC's substantive application.

2 This decision relates only to Ms Finch's application for recusal, which she made during a directions hearing before me on 21 October 2020. For the reasons which follow, that application is refused.

3 It will be helpful to provide a brief procedural history in relation to this proceeding.

4 On 4 November 2019 the OC filed its application to recover $13,836.36 in owners corporation fees and interest which it claims are unpaid by Ms Finch.

5 The proceeding was initially listed for hearing on 16 January 2020. On the application of Ms Finch, made on 13 January 2020, the hearing was adjourned to 10 February 2020. Unusually, the order granting the adjournment included the following note:

> The Tribunal records that this adjournment has been granted on the merits of this application and **not** as a result of the outcome of any adjournment applications in other unrelated proceedings before the Tribunal and not as a result of the threat contained in the respondent's email dated 14 January 2020 that she would report the matter to the President of the Tribunal and the Judicial Commission of Victoria if the adjournment were not granted.

6 Member Buchanan presided over the hearing on 10 February 2020. It appears that during the hearing Ms Finch produced an application for joinder of Mr Bush Ndiege (**Mr Ndiege**) as an Interested Party to the proceeding, and an application for:

> strike out/dismissal of application dated 14 November 2019, or in the very least temporarily stayed. Reasons laid out in the attached document. I take it no fees are due for an application made in defence and in these circumstances.

7 I make the assumption that these applications were produced in the hearing because there is a copy of each application on the file, but no record of the applications being filed, either by email or at the Tribunal's customer services counter. I make the assumption also on the basis of the orders made by Member Buchanan at the hearing on 10 February 2020.

8 The orders made on 10 February 2020 were to adjourn the hearing to 1 April 2020, and to order that Ms Finch file and serve Points of Defence by 9 March 2020. The orders further directed the Principal Registrar to list for hearing on

1 April 2020, both the OC's application, and 'any proceeding commenced by Ms Finch against the OC prior to 1 April 2020'.

9 The orders made on 10 February 2020 noted that the OC had provided Ms Finch with copies of its ledger, and copies of the affidavits and exhibits in relation to its claim. The orders also recorded that 'the application by Bush Ndiege to be joined to the proceeding as an interested party is adjourned to be heard together with the hearing of this proceeding on 1 April 2020'.

10 On 4 March 2020 Ms Finch emailed the Tribunal, seeking an extension of time to file Points of Defence, on the grounds that 9 March 2020 was a public holiday, and the recusal of Member Buchanan from any further hearings in this proceeding.

11 On 10 March 2020 Ms Finch filed and served an application dated 9 March 2020, seeking the recusal of Member Buchanan, and dismissal of the OC's application. The application was accompanied by an affidavit in support deposed to by Ms Finch on 10 February 2020. The affidavit alleged that the OC's legal representative was conducting himself improperly, and alleges that there have been contraventions of:

(a) the *Corporations Act 2001*;

(b) the Australian Consumer Law and *Fair Trading Act 2012*;

(c) the *Trade Practices Act 1974*;

(d) contract, common and taxation law;

(e) the Criminal Code;

(f) the *Owners Corporations Act 2006*;

(g) the *Owners Corporations Regulations 2018*; and

(h) the Owners Corporations Rules.

12 The affidavit also alleges that the OC has failed to serve material in support of the application and that 'the above events also deem the application in any event, defective/incompetent, specious, vexatious, frivolous, misconceived and not tenable in fact or law' and that the application should be dismissed/struck out or stayed until those matters are dealt with and resolved.

13 In that application Ms Finch set out orders alternative to the order sought for dismissal of the OC's claim. The alternative orders sought were:

a orders that the OC's application be 'stayed' pending resolution of complaints she had made to regulators about the OC's manager; or

b transfer of the OC's application and her application dated 9 March 2020 to a judicial member for a directions hearing and the setting down of a time table for material to be filed and served and a hearing to take

place, pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**);[1] or

c that VCAT temporarily stand the matter down and allow [Ms Finch] time to obtain legal advice.

14 By order dated 17 March 2020 Senior Member Warren granted Ms Finch the extension of time sought in her application of 4 March 2020, extending the time for filing Points of Defence to 25 March 2020. Senior Member Warren refused the application for recusal of Member Buchanan contained in the application dated 4 March 2020. The order made by Senior Member Warren included the following paragraph:

> An order seeking the recusal of a member must be made to the presiding member during the hearing. Such an application cannot be made on the papers seeking an order to be made outside of a hearing, and certainly not after the relevant hearing has concluded.

15 By order dated 24 March 2020 Senior Member Warren made the following orders:

> By Application for Directions Hearing dated 9 March 2020 the respondent has, inter alia, applied for an order pursuant to section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.
>
> The principal registrar is directed to list the hearing of the respondent's Application dated 9 March 2020 to a dated and time to be fixed to be heard by any judicial member of the Tribunal.

16 Before the hearing of the s 77 application could be listed for hearing before a judicial member, it was necessary to list a directions hearing to enable procedural orders and directions to be made in order to facilitate the hearing. Ms Finch had requested in her application that the directions hearing be conducted by the judicial member. That is not the Tribunal's usual practice, and accordingly the directions hearing was listed for 21 October 2020 before any member.

17 On 20 October 2020 Ms Finch sent email correspondence to the Tribunal seeking that the proposed interested party Mr Ndiege be permitted to attend the directions hearing on 21 October 2020, and have his application to be joined as an interested party to the proceedings heard and determined.

The Directions Hearing on 21 October 2020

18 I presided over the Directions Hearing on 21 October 2020. At the start of the directions hearing I explained that the purpose of the directions hearing was to set down the actions to be taken by the parties prior to the hearing of

---

1 Section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) gives the Tribunal power, when constituted by a judicial member, to make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if the Tribunal considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than VCAT), a court or any other person or body. Such orders may be made on the application of a party or on the Tribunal's own initiative.

the s 77 application, in order to ensure that the proceeding was ready to run on the day of the hearing before the judicial member.

19 Ms Finch then submitted that the directions hearing should be conducted by a judicial member pursuant to s 77 of the VCAT Act, or in the alternative a different member, and asked me to recuse myself from the directions hearing.

20 As a consequence of the application for my recusal, the directions hearing had to be adjourned to enable a separate hearing to be conducted in relation to the recusal application. With the recusal application on foot, I was unable to determine any of the other applications made by Ms Finch and Mr Ndiege, including the application for Mr Ndiege to be joined as an interested party, and an application seeking orders that the OC's legal representative Mr Crofton be restrained from representing the OC in the proceedings. The requirement to hear and determine the application for recusal first, was made clear to the parties during the directions hearing.

21 I made orders for an adjournment of the proceeding, listing the hearing in relation to the recusal application for 1 February 2021. I also made orders for Ms Finch to file and serve, by 11 November 2020, written submissions, of no more than four A4 pages at 12 pitch, in support of her application, together with all documents upon which she relied. Orders were made for the OC to file and serve its written submissions, similarly limited in length, by 3 December 2020.

22 Ms Finch's written submissions were received by the Tribunal on 11 November 2020. An amended version followed on 12 November 2020. Ms Finch appended seven pages of commentary on the relevant legal principles and cases and other authorities supporting her application to her four-page submission. The OC's written submissions were received by the Tribunal on 2 December 2020.

23 On 27 January 2021, Ms Finch made an application for adjournment of the hearing listed for 1 February 2021 on the grounds of family commitments relating to her child's secondary school commencement. The request was granted by order dated 28 January 2021, and the proceeding was adjourned to 1 March 2021, before me.

24 On 25 February 2021 Ms Finch forwarded email correspondence to the Tribunal submitting that the proceeding be struck out or dismissed pursuant to s 75 or s 76 of the VCAT Act.

The Directions Hearing on 1 March 2021

25 The directions hearing listed for 1 March 2021 proceeded before me. I made the following orders:

1. By 29 March 2021, the respondent is to file and serve closing written submissions.
2. By 26 April 2021, the applicant is to file and serve closing written submissions.

3. Following the receipt of submissions by the dates stated in the above orders the decision of the Tribunal is reserved. Written reasons will be provided.

26 On 29 March 2021 the Tribunal received the closing written submissions of Ms Finch.

27 On 26 April 2021 the Tribunal received the OC's closing submissions.

28 On 27 April 2021 the Tribunal received a document from Ms Finch, with the heading 'Final Right of Reply', making further submissions in response to those filed by the OC. The Tribunal had not given leave, and had not been asked to give leave for such further submissions to be made.

29 In accordance with the Tribunal's usual practice, and following the decision of the Court of Appeal of the Supreme Court in *Frugtniet v Law Institute of Victoria Ltd*,[2] I have not had regard to the document received from Ms Finch headed 'Final Right of Reply'.

30 I also note that submissions have been filed by Ms Finch addressing the substantive issue of the OC's application and her application for it to be struck out. Those submissions are properly a matter for the Tribunal's consideration if and when the substantive application is listed for hearing.

The Law

31 The Tribunal is bound by the rules of natural justice.[3] The rules of natural justice require (amongst other things), that the Tribunal be, and be seen to be, impartial or unbiased (the bias rule). Bias may be actual, such as having a vested interest in the dispute, or apprehended. The test of apprehended bias is whether a fair-minded lay observer, having knowledge of the material objective facts, might reasonably apprehend that the Tribunal might not bring an impartial and unprejudiced mind to determining the application before it.[4]

32 What is 'reasonable' is to be considered from the perspective of a reasonable or fair-minded observer with a 'fair understanding of all of the relevant circumstances'.[5] As Croft J observed in *QBH Commercial Enterprises Pty Ltd v Dalle Projects Pty Ltd (No 2)*,[6] 'the relevant test in an application such as this requires that it is the Court's view of the public's view, and not the Court's own view, that is determinative'.

33 The Court of Appeal in *AJH Lawyers Pty Ltd v Careri & Ors* [2011] VSCA 425 (***AJH Lawyers***) has set out eight principles to assist in deciding whether a proper basis for recusal is established.

34 In summary the eight principles are:

---

2 [2012] VSCA 178.
3 VCAT Act s 98(1)(a).
4 *Johnson v Johnson* [2000] HCA 48; *Nikjoo v Minister for Immigration and Border Protection* [2013] AATA 921, [21].
5 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 113, [4].
6 [2018] VSC 231, [9], referring to *Webb v The Queen* (1994) 181 CLR 41, 51–2.

a Actual or apprehended bias should be dealt with first.

b Members should not accept recusal simply because a party has asked for it.

c Where the proceeding has been decided, the test is one which requires no conclusion about what factors actually influenced the outcome.

d Apprehension refers to a member not deciding a case impartially, as opposed to an apprehension that a case will be decided adversely to one party.

e Identifying apprehended bias involves two steps:

i the identification of what might lead a member to decide a case other than on its legal and factual merits, and

ii an articulation of the logical connection between the matter and the feared deviation.

f The perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer.

g A line is drawn between robust indications of a member's tentative views on a point of importance in a proceeding, and an impermissible indication of prejudgement.

h Members do not have to devote unlimited time to listening to unmeritorious arguments.

35 The High Court endorsed this approach in *Ebner v The Official Trustee in Bankruptcy*[7] (***Ebner***). The High Court confirmed that a judge, (or a tribunal member) is not compelled to accept recusal simply because a party has requested it. The threshold for a decision to recuse is high:

> Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. … If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.[8]

36 As can be seen from their Honours' reference to 'hearing and deciding' the case, an application for recusal is an application that the judge, or tribunal member, not preside over a hearing in a proceeding.

37 It is relevant to state here that, on 21 October 2020, I was presiding at a directions hearing. It was not my role, at the hearing on 21 October 2020 to decide the substantive application made by the OC. Further, as the Tribunal's order made on 24 March 2020 made clear, Ms Finch's application under s 77 of the VCAT Act, is to be heard and decided by a judicial member. Both the

---

7 (2001) 205 CLR 337.

8 Ibid 348 [19] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (emphasis added).

application under s 77 of the VCAT Act, and the OC's substantive application for fee recovery, pending the determination of the application under s 77 of the VCAT Act, remain on foot.

38 The recusal application is heard by the Tribunal constituted to conduct the hearing.[9] A member must decide to recuse if a proper basis for recusal is established. If the application for recusal is successful, the Tribunal will be reconstituted.

39 Apprehended bias may be found if 'a fair-minded lay observer might reasonably apprehend that the [member] might not bring an impartial and unprejudiced mind to the resolution of the question the [member] is required to decide'.[10] The question that I had to decide, at the directions hearing on 21 October 2020, was the directions that ought to be made to facilitate the orderly conduct of the hearing of Ms Finch's application under s 77 of the VCAT Act, by a judicial member.

40 I turn now to the two-step process for identifying apprehended bias, the fifth principle above, which was enunciated by the High Court in *Ebner*. The first step is to identify what might lead a member to decide a case other than on its legal and factual merits. The second step is to articulate the logical connection between what has been identified, and the feared deviation from deciding the case on its merits.

41 I note that this Tribunal has consistently adopted this approach in the past, most recently in *Taylor & Ors v Owners Corporation RP2044*,[11] a proceeding in which Ms Finch, as an interested party in the proceeding, made an application for recusal of another member. I too adopt that approach.

42 To use the language of the Court of Appeal in *AJH Lawyers*, what are the issues that Ms Finch has identified as likely to lead me to decide a case other than on its legal and factual merits? And, is there a logical connection between those issues and a feared deviation from deciding the case on its merits?

Ms Finch's Submissions

Preliminary Submissions

43 In paragraph 1 of Ms Finch's submissions she has set out the basis and background to her submissions as:

(a) Numerous recusal applications upon Senior Member Price, that were not heard or determined.

(b) The respondent's application dated 9 March 2020, which included, inter alia, vitally important applications:

---

9 *Jinshan Investment Group Pty Ltd v Melbourne CC* [2015] VCAT 635, [20]; see also *QBH Commercial Enterprises Pty Ltd v Dalle Projects Pty Ltd (No 2)* [2018] VSC 231; *Hoskin v Greater Bendigo CC & Anor* [2015] VCAT 1125.

10 *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

11 [2019] VCAT 2011.

(i) A Transfer of the Proceedings Application pursuant to section 77 of the VCAT Act;

(ii) A Strike Out Application.

(iii) A Restraint Application (Mr Crofton of Berrigan Doube Lawyers).

(iv) A directions hearing.

(c) Orders given on 24 March 2020 the proceedings be transferred to a judicial member and a directions hearing.

(d) A Notice of Hearing dated 24 September 2020, setting down a directions hearing on 21 October 2020 at [9.30 am].

(e) Senior Member Price then presiding upon the directions hearing without any notice being given of such.

(f) Upon the respondent discovering the above, with reliance upon the matters raised herein, seeking the member remove herself from the proceedings and refer the matter to a judicial member, or in the least an alternate member.

(g) Senior Member Price refusing to remove herself and handing down the above orders dated 21 October 2020.

44 In paragraph 2 of her submissions, Ms Finch refers to 'applicable laws, public declarations and case law' set out in a schedule to her submission.

45 In paragraph 3 Ms Finch submits that the recusal application could have been determined without a hearing, and that this would have avoided delay.

46 In paragraph 4 Ms Finch submits that the recusal application 'may, and should, be transferred to an alternate member to be heard and determined'. These are submissions as to the manner in which Ms Finch says the Tribunal should address her application for my recusal. They are not submissions as to the grounds for my recusal. Nevertheless, it is convenient to address those submissions here. In support of her submissions, Ms Finch refers to observations of the England and Wales Court of Appeal (**EWCA**) in *El-Faragy v El-Faragy & Ors*,[12] and of the High Court of Australia in *Livesey v NSW Bar Association*.[13] Of course, the observations of the EWCA reflect the established procedure and practice of that court and are not binding in Victoria. The passage in *Livesey* referred to by Ms Finch is:

> If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting.[14]

47 Relevantly, immediately after those comments, the court went on to say:

> On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach

---

12 [2007] EWCA 1149.
13 (1983) 151 CLR 288 (***Livesey***).
14 Ibid 294 [8].

> that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court.[15]

48 Ms Finch also refers, in her submissions to two authorities from New South Wales: *Barton v Walker*[16] and *Bainton v Rajski*.[17] Both of these cases are authority for the proposition that when a litigant seeks the disqualification of a judge from hearing a proceeding on grounds of bias, the judge in question must decide whether he or she should continue to sit, and this may be done without formalities.

49 The established practice and procedure in this Tribunal, and in Victorian courts, is that, where an application for recusal is made, it is the member about whom the application is made who hears and determines that application.[18] I will follow the Tribunal's established practice and procedure.

Conduct Identified by Ms Finch

50 In paragraphs 6 and 7 of her submissions, Ms Finch asserts that the Tribunal orders made on 24 March 2020 required that a judicial member preside over any directions hearing in relation to Ms Finch's application for an order pursuant to s 77 of the VCAT Act.

51 Ms Finch refers to s 77 of the VCAT Act, and the orders made by Senior Member Warren on 23 March 2020 set out in paragraph 15 above, and says that these

> prescribe … that the PROCEEDINGS are transferred to a Judicial Member and do not include, for example the wording: *"Other than a directions hearing/s"* or *"Only for the final hearing and determination"*

52 In paragraph 8 of her submission, Ms Finch states:

> Furthermore, had a Judicial Member have presided over the directions hearing and having the requisite; experience, knowledge, qualifications, competence and remaining impartial, may have; decided to order a compulsory conference, or exercised their powers to strike out the applicant's application upon the grounds raised via the respondents application which section 77 permits, and also hear and determine Ms Ndiege's Interested Party application which is still outstanding since 10 February 2020. Thus evident lost opportunities resulting from Senior Member Price's conduct.

---

15 Ibid.
16 [1979] 2 NSWLR 740.
17 (1992) 29 NSWLR 539.
18 See *Hoskin v Greater Bendigo CC & Anor* [2015] VCAT 1125; *Bodycorp Repairers Pty Ltd v Maisano* (Recusal Application) [No 12] [2017] VSC 676.

53 In paragraph 9(a) of her submission, Ms Finch states that the solicitor for the OC was aware that 'a senior member' would preside, although the listing stated that the member was 'to be advised'. She has made no submission on how this might give rise to an apprehension that I would not make impartial decisions in the directions hearing, but seems to infer that the solicitor for the OC was somehow privy to information about the presiding member that was not available in the law lists. This is incorrect. I was not the member scheduled to conduct the directions hearing. I was given conduct of the directions hearing approximately 10 minutes prior to its commencement, due to the sudden unavailability of the member scheduled to conduct the hearing. In those circumstances it is not possible that the solicitor for the OC was aware that I would be the presiding member prior to the commencement of the directions hearing.

54 Ms Finch states, in paragraph 9(b) of her submission, that:

> By the conduct of Senior Member Price, resulted in the disposing of a Strike Out Application and also a Restraint Application upon Mr Crofton, and thus allowing the proceedings and Mr Crofton to continue acting and defending the recusal application (filing material and attending the hearing). Further delaying the proceedings and matters for three months and causing numerous additional issues and concerns.

55 This assertion is incorrect. Neither the application for the OC's fee recovery claim to be struck out, nor the application to restrain the lawyers acting for the OC from so acting, have been 'disposed of'. Those applications remain to be heard and determined in the hearing of the substantive application, should it not be transferred to another tribunal or court, following consideration of the application made under s 77 of the VCAT Act.

56 In paragraphs 10 to 14 of her submissions, Ms Finch takes issue with the orders that were made by me on 21 October 2020, asserting that they were beyond power, because it was 'unlawful' for me to preside over the hearing on 21 October 2020. Ms Finch submits in relation to the orders made by me on that date, that:

> The member could make no such order pending the determination of the recusal and such an order is not related at this time.
>
> …
>
> The orders dated 21 October 2020 in such circumstances are contrary to, inter alia, the principles of natural justice, as a potentially meritorious application/s would not be considered, nor considered at that time.

57 The orders made by me on 21 October 2020 were orders for the conduct of the hearing of Ms Finch's application for recusal. They were made to facilitate the hearing and determination of Ms Finch's application for my recusal. In that regard, they were necessary, and required because of her application for recusal. The orders provided for each party to file and serve written submissions.

58 Ms Finch states that she was disadvantaged by a delay in dispatch of those orders because that left her only two and not three weeks to complete her submissions. That delay was unfortunate, but as Ms Finch was present at the directions hearing on 21 October 2020, she was aware of the timeline from that date. Given that she was present at the directions hearing on 21 October 2020 and heard the orders given orally, a fair minded lay observer would be unlikely to apprehend that there was a logical connection between a delay in dispatch of the written orders and a feared deviation from giving a fair hearing. A fair-minded lay observer would appreciate that written orders might take a few days to reach the parties and would not wait for these to arrive before starting on their submissions. In addition, the dispatching of orders is an administrative function of the Tribunal which is carried out by registry staff. I had no involvement whatsoever in the dispatching of the orders of 21 October 2020, or the timing of their dispatch.

59 In paragraphs 15 to 19 of her submissions, Ms Finch refers to 'previous recusal applications made against Senior Member Price' in other proceedings in the Owners Corporations List at VCAT in which Ms Finch was a party. Ms Finch asserts that these applications were not heard or determined, and that this in itself demonstrates that I am biased against her.

60 This appears to be the primary ground for Ms Finch's application. Indeed, she placed it first, in her summary of background, referred to in paragraph 43 above.

61 The VCAT proceeding numbers are OC2779/2014, OC1558/2018, OC2513/2018 and OC1233/2019. Ms Finch states that the recusal applications have not been heard or determined. In relation to these applications, Ms Finch says, in paragraphs 18 and 19 of her submission:

> Such a decision as the refusal to recuse oneself, and an application being a person's right and made as a separate interlocutory application/s and thus made in it's own right, consequently warrants and legally binds a separate order/s and full and proper reasons to be published for such a decision, and including the litigant's rights of review of such.
>
> It is evident however Senior Member Price includes herself in matters involving the respondent and certain parties along with legal representatives, of which she has no judicial power to preside over or be a part of, etc, however then does not abide by the rule of law and standard practice and procedure when doing so, and thereafter causing, inter alia, prejudice and discrimination to the respondent/applicant (whatever litigant she may be at the time) as verified herein, and has also made previous adverse findings against the respondent and judged her character/credibility (albeit wrongly and in unjust circumstances) disqualifying the member.

62 In paragraphs 20 to 24 of her submissions, Ms Finch summarises the grounds for her application as follows:

> Senior Member Price's conduct and actions clearly indicate, inter alia, she has taken on the 'Robe of An Advocate' and is particularly more

> prominently evident when collectively reviewing the events and issues and concerns such as those raised herein and the continuous demonstration of a total disregard for the rule of law, and acts contrary to her legally binding obligations and is un-deterred despite these stark irregularities at law and knowingly engaging in the wasting of tax payers monies on this charade also wasting time and foremost failing to adhere to tenets of rules and procedure of any cases under law, and resulting in prejudice an discrimination upon the respondent amongst other things.

Submissions of the OC

63 The OC submits that Ms Finch's submissions are not compliant with the Tribunal's orders. Although it is true that Ms Finch did not abide by the direction that submissions should be limited to four A4 pages at 12 pitch, because she attached several pages of additional material, I do not propose to disallow any part of Ms Finch's submissions.

64 The OC submits that, following the second of the principles set out in *AJH Lawyers*, a tribunal member is not compelled to accept recusal purely because a party has requested it. The OC submits that paragraphs 1(f) and 1(g) of Ms Finch's submissions are 'in contradiction' with the second principle set enunciated in *AJH Lawyers*.

65 The OC submits that the conduct identified in Ms Finch's submissions is my conduct in presiding over the directions hearing on 21 October 2020. The OC submits that the implication in paragraph 8 of Ms Finch's submissions, that only a judicial member would have the competence to conduct the directions hearing does not identify conduct that might lead to a decision being made other than on its legal and factual merits. The OC noted that, in *Taylor & Ors v Owners Corporation RP2044*,[19] Member Sweeney observed that 'incompetence itself is not the identification of conduct that a decision might be made other than on legal and factual merits'.

66 The OC notes that the hearing on 21 October 2020 was a directions hearing only and not a substantive hearing of the issues in dispute in the proceeding. It submits that Ms Finch has failed to meet the threshold for recusal.

Apprehension of Bias

Conduct of the Directions Hearing on 21 October 2020

67 It is made clear in Ms Finch's submissions that her application for my recusal has its foundation in the failure to meet her expectation that any directions hearing in relation to her application under s 77 of the VCAT Act, would be presided over by a judicial member.

68 That would not have been the usual course of action in this Tribunal.

---

[19] [2019] VCAT 2011, [32], [34].

69 Ms Finch makes the submission to be that by conducting the directions hearing, contrary to the interpretation of the legislation she puts forward, I demonstrated bias against her. A significant difficulty with that submission is that the language of s 77 of the VCAT Act does not support the premise of her submission.

70 Section 77 of the VCAT Act provides as follows:

> (1) At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.
>
> (2) The Tribunal's power to make an order under subsection (1) is exercisable only by a judicial member.
>
> (3) If the Tribunal makes an order under subsection (1), it may refer the matter to the relevant tribunal, court, person or body if it considers it appropriate to do so.
>
> (4) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

71 Section 77 does not refer to 'transfer of a proceeding' but rather gives the Tribunal a power that is only exercisable by a judicial member. Section 77 says nothing about the procedural steps that must, or might, be taken to bring an application that is made under sub-s 77(4) before the judicial member.

72 Section 77 is clear that orders to strike out a proceeding on the grounds that it would be more appropriately dealt with by another tribunal or court, may only be made by a judicial member. The principles of natural justice would require that a hearing be conducted, allowing submissions and argument from both parties, before such a strike out order could be made. However, it is the Tribunal itself that determines its own procedure, including the conduct of interlocutory steps in a proceeding.[20]

73 Further, the text of the order made on 24 March 2020 by Senior Member Warren does not support Ms Finch's assumption.

74 The first sentence of the order made on 24 March 2020 recorded that '[b]y Application for directions hearing dated 9 March 2020 the respondent has, inter alia, applied for an order pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act 1998*' (emphasis added).[21] That is, the order records that, in an application for a directions hearing, Ms Finch had included an application for an order pursuant to s 77 of the VCAT Act.

75 With respect, a failure to meet a mistaken expectation about the procedure of the Tribunal is not grounds for recusal. Nor may a party dictate who will

---

[20] See s 98 VCAT Act.

[21] The second sentence dealt with the listing of the application for an order pursuant to s 77 of the VCAT Act.

preside over a hearing. To do so would amount to accepting recusal simply because a party has requested it.

76 As I recorded in the order I made on 21 October 2020, s 80 of the VCAT Act provides that where directions are required for the orderly conduct of a proceeding, the Tribunal's power to give directions is exercisable by any member. There is no requirement in the VCAT Act that only a judicial member make directions in relation to an application that must be heard by a judicial member.

77 The assertion that a judicial member might have made different directions for the conduct of the s 77 application does not identify a factor which might lead a non-judicial member to make a decision other than on the legal and factual merits. It is apparent that the applicant's application would not have been struck out, had a judicial member presided. The hearing listed on 21 October 2020 was a directions hearing only, it would not be the occasion for a final decision striking out any part of the applicant's application. Relevantly, directions for the conduct of the hearing of the application under s 77 of the VCAT Act could not be made because it was necessary to give directions for the hearing of the application for recusal. None of the grounds listed in paragraphs 6 and 7 of Ms Finch's submissions establishes a factor that might give rise to an apprehension that I would make decisions regarding directions in the proceeding that were not impartial and fair to all parties.

The Prior Applications for Recusal

78 An application for recusal is not a mechanism for having a different member allocated to hear a proceeding. It is a serious application, which requires the applicant to demonstrate 'substantial ground for contending' that the member is disqualified from conducting the case. The applicant must identify conduct of the member that a fair-minded lay observer would conclude logically leads to the apprehension that the member might not determine the question before the Tribunal impartially and according to the legal and factual merits.

79 An application for recusal must necessarily be an application to the presiding member. I was not the presiding member in any of the four proceedings in the Owners Corporations List referred by Ms Finch. As I set out below, I made procedural orders in each of those four proceedings, but I was not the presiding member in any of those proceedings.

80 In OC2779/2014 I made an order in chambers granting an application for adjournment sought by the legal representative of the OC who was the applicant in that proceeding. The legal representative was to appear in a separate proceeding listed before VCAT at the same date and time as a directions hearing listed in OC2779/2014. It is the Tribunal's usual practice to grant such adjournments, as it is apparent that a legal representative cannot meet their professional obligations to their clients if, through the listing decisions made in the Tribunal's Registry, they find themselves having to be

in two places at once. In adopting this practice, the Tribunal is facilitating legal practice generally. I made no other orders in that proceeding and did not preside over any of the hearings conducted in respect of that proceeding. In that light, a fair-minded lay observer would be unlikely to apprehend that there was a logical connection between the granting of an adjournment to the legal representative of the OC and a feared deviation from giving a fair hearing.

81 In OC1588/2018 I made orders in chambers granting leave to the OC who was the applicant in that proceeding to withdraw its application. Those orders were made at the request of the applicant. It is the Tribunal's usual practice to grant applications for leave to withdraw, without conducting a hearing into the application. Section 74(2)(b) of the VCAT Act permits an application to be made for costs by the other parties in that circumstance, and such an application is the proper process for determining any entitlements of the other parties in those circumstances. Ms Finch wrote to the Tribunal requesting my recusal shortly after this order was made.

82 I did not preside over a hearing in that proceeding, but I did make one other procedural order in chambers. That order was to join Ms Finch to the proceeding, on the Tribunal's own initiative pursuant to s 60 of the VCAT Act. That order was made prior to the first directions hearing in the proceeding. It was made because it was apparent from the application that her interests were likely to be affected, and she should be provided an opportunity to participate in the proceeding.

83 In those circumstances a fair-minded lay observer would be unlikely to apprehend that there was a logical connection between granting leave to withdraw the application and a feared deviation from giving a fair hearing.

84 In OC2513/2018 Ms Finch requested the recusal of several members, including myself, from hearing and determining the application. I did not preside over a hearing in that proceeding and made no orders in chambers in relation to the proceeding. There was therefore no application for recusal to be heard and determined by me, as I was at no time the presiding member.

85 In OC1233/2019 I made a general directions order on receipt of Ms Finch's application. Her application had sought an injunction against the OC to prevent an Annual General Meeting from going ahead. The application was made one week before the AGM was scheduled and was referred to me to make general directions in chambers two days after the date of the AGM. Consistent with the Tribunal's usual listing practice, I made orders listing the proceeding as a general dispute, as there was no longer utility in the injunction application. The orders made were consistent with the Tribunal's usual practice. I did not preside over any hearings in the proceeding. I do not consider that a fair-minded lay observer would be likely to apprehend that there was a logical connection between the decision to list as a general dispute and a feared deviation from giving a fair hearing.

86 For completeness, I note that, as I did not preside over a hearing in any of the four proceedings in the Owners Corporations List, no application for recusal was made to me, and consequently, there has been no failure to hear and determine any such application. In addition, given that I was not the allocated presiding member in any of those proceedings, the applications made by Ms Finch in writing on those files were not referred to me by the administrative staff who received them, which was entirely appropriate for the reasons I have stated above.

C. Price
Senior Member