Civil and Administrative Tribunal

New South Wales

Case Name:	Trentelman v The Owners – Strata Plan No 76700
Medium Neutral Citation:	[2021] NSWCATAP 222
Hearing Date(s):	1 December 2020
Date of Orders:	21 July 2021
Decision Date:	21 July 2021
Jurisdiction:	Appeal Panel
Before:	K Ransome, Senior Member J Kearney, Senior Member
Decision:	The appeal is dismissed.
Catchwords:	APPEAL – strata scheme – reallocation of unit entitlements – application to vary past contributions in line with new allocation of unit entitlements – application of s 87 of Act – denial of procedural fairness – exercise of discretion – while error of law found no error in exercise of discretion
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 1996 Strata Schemes Management Act 2015
Cases Cited:	Brennan v New South Wales Land and Housing Corporation [2011] NSWCA 298; (2011) 83 NSWLR 23 Cleggett v OC SP 35541 [2013] NSWCTTT 359 Davis v Owners Corporation SP 63429 [2018] NSWCATAD 27 House v The King [1936] HCA 40; (1936) 55 CLR 499 North East Developments Pty Limited v The Owners – Strata Plan No. 53374 [2007] NSWSC 1063 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Sahade v The Owners – Strata Plan 62022 [2014]

	NSWCA 208; (2014) 81 NSWLR 261 Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284; 103 NSWLR 352
Category:	Principal judgment
Parties:	Natalia Trentelman (Appellant) The Owners – Strata Plan No 76700 (Respondent)
Representation:	Counsel: T Davie (Appellant) Solicitors: Bannermans Lawyers (Appellant) Sarvaas Ciappara Lawyers (Respondent)
File Number(s):	2020/00371004 (AP 20/36279)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	27 July 2020
Before:	G Blake AM SC, Senior Member
File Number(s):	SC 19/48069

REASONS FOR DECISION

1 This is an internal appeal by Natalia Trentelman from a decision of the Tribunal's Consumer and Commercial Division in matter SC 19/48069 which dismissed her application against The Owners – Strata Plan No. 76700 (the owners corporation) seeking orders under the *Strata Schemes Management Act 2015* (SSMA 2015) varying the levies struck by the owners corporation at various meetings from 2015 to 2018. Her application to the Tribunal also concerned action taken by the owners corporation to pay for legal costs

incurred in other Tribunal proceedings, but this appeal is only in relation to Ms Trentelman's application to vary the levies.

2 The background to the proceedings from which this appeal arises was set out in some detail in the decision of the Tribunal made on 27 July 2020 in matter SC 19/48069. A summary appears below to give context to the appeal.

Background

3 As we understand it, the strata scheme comprises a four-storey building in Bogangar which was originally a motel and adjacent land. On 16 March 2006 Strata Plan No. 76700 (SP 76700), which consisted of 8 lots, was registered. Lot 1 comprised the building and adjacent land with lots 2 to 8 being surrounding land. Lot 7 included a swimming pool. The scheme had an aggregate unit entitlement of 373 units, of which lot 1 had 73 units, lots 2 to 7 each had 30 units and lot 8 had 120 units. On 6 September 2006 Ms Trentelman purchased lots 5 to 8.

4 Over the years certain subdivisions of various of the original and subsequent lots occurred and there was a reallocation of unit entitlements in 2011. By 21 July 2015 SP 76700 comprised the following strata schemes: SP 79344, SP 85596 and SP 91510, SP 91510 having been registered on that date. On 19 November 2015 some of the original lots were converted to common property.

5 There have been several applications to the Tribunal made by either Ms Trentelman or the owners corporation over the years. There is no need to detail the nature of many of those applications. The only matters of relevance to this appeal are the applications concerning the reallocation of unit entitlement in SP 76700.

6 On 20 July 2018 Ms Trentelman commenced proceedings in the Tribunal (matter SC 18/32379) against the owners corporation seeking orders reallocating unit entitlement among the lots forming SP 76700. The owners corporation did not file any evidence in these proceedings nor did it appear at the hearing. On 24 January 2019, in the exercise of its powers under s 236 of the SSMA 2015, the Tribunal made orders reallocating unit entitlement in accordance with a schedule of unit entitlement as at 21 July 2015 which had been contained in a valuation report by Mr Gary Taplin of Taplin Consultancy

and which had been filed by Ms Trentelman with her application to the Tribunal. The owners corporation was ordered to take all necessary steps with the Registrar-General of the Land and Property Management Authority to have the Tribunal's orders recorded on the common property title of SP 76700 within 28 days. The owners corporation did not lodge the orders with the Registrar-General within 28 days.

7 On 19 March 2019 Ms Trentelman filed a renewal application with the Tribunal in which she sought an order that the owners corporation comply with the unit entitlement reallocation order made in matter SC 18/32379 on 24 January 2019 (matter SC 19/13598). The owners corporation in fact lodged the Tribunal order with the Registrar-General on the same day that Ms Trentelman filed her application with the Tribunal. The Registrar-General refused to register the order on the basis that some of the lots for which unit entitlement was proposed were now common property or had been subdivided and had a new identity.

8 Mr Taplin prepared an amended valuation in late June or early July 2019 excluding various lots and valuing each lot forming the scheme as at 21 July 2015. By orders made on 22 August 2019 the Tribunal revoked the orders made on 24 January 2019 and made new orders in line with Mr Taplin's revised valuation of unit entitlement for the scheme.

9 On 19 September 2019 the reallocation of the unit entitlements in the scheme was registered. As a result, the scheme has an aggregate unit entitlement of 8,910 units. The unit entitlement attaching to lot 53, the lot owned by Ms Trentelman, is now proportionally much less than previously as a result of the reallocated entitlement.

The proceedings before the Tribunal the subject of the appeal

10 On 25 October 2019 Ms Trentelman commenced proceedings SC 19/48069 against the owners corporation in which she sought orders varying levies struck at the following meetings:

- the 20 August 2015 Annual General Meeting (AGM);
- an Extraordinary General Meeting (EGM) on 8 November 2016;

- the 6 February 2017 Annual General Meeting (AGM); and
- the 15 October 2018 Annual General Meeting (AGM).

11 Ms Trentelman asked that the contributions levied on the owners be increased or decreased pursuant to ss 87, 88 and 232 of the SSMA 2015 to reflect the reallocated unit entitlement. Her evidence was that she had raised with the owners corporation since 2015 that the unit entitlement for her lot was too high and that the owners corporation had accepted that this was the case. In her estimate, she had overpaid almost $106,460 in levies from 1 July 2015 to 30 June 2019 if the unit entitlement for the lot owned by her had been applied to the levies each year at the corrected value as registered on 19 September 2019.

12 Ms Trentelman also sought orders requiring a special levy to be struck to repay to the capital works fund and administrative fund any sum withdrawn from either of those funds in relation to costs, expenses and fees incurred by the owners corporation in Tribunal proceedings SC 17/51022, SC 18/32379, SC 18/42490 and SC 19/13598. She also asked that lot 53 be excluded from any such special levy.

13 In addition, Ms Trentelman sought her costs of the application be paid by the owners corporation.

14 The final hearing in matter SC 19/48069 was dealt with on the papers. On 27 July 2020 the Tribunal dismissed the application with respect to the orders sought varying contributions for the levies struck at the meetings in 2015, 2016, 2017 and 2018 specified above. The Tribunal did make orders requiring the owners corporation to repay to its Capital Works Fund and Administrative Fund by way of special levy any sum withdrawn from those funds relating to the costs, expenses and fees it incurred in Tribunal proceedings SC 18/3232379, SC 18/42490 and SC 19/13598. The levy was to be reduced by any insurance sum received and the lot owned by Ms Trentelman was excluded from having to pay that levy.

Relevant provisions in the SSMA 2015

15 Before turning to the Tribunal's reasoning behind its decision, it is useful to set out some relevant provisions of the SSMA 2015. Those provisions commenced on 30 November 2016.

16 Under ss 73 and 74 of the SSMA 2015 an owners corporation is required to establish an administrative fund and a capital works fund from which expenses and accounts of the strata scheme are paid. The owners corporation is required to set contributions to the administrative and capital works funds and levy these contributions by giving owners written notice of the contribution payable. Under s 83(2) of the SSMA 2015 contributions levied by an owners corporation must be levied in respect of each lot in the scheme and are payable by the owners in shares proportional to the unit entitlements of their respective lots.

17 Under s 87 the Tribunal, on the application of certain persons including an owners corporation or an owner, may make orders varying contributions or the manner in which they are paid. Relevantly, s 87(1) provides:

> (1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable –
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> (a) an order for payment of contributions of a different amount,
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> (b) an order for payment of contributions in a different manner.

18 If the Tribunal makes an order under s 87(1) varying contributions in circumstances where payments have already been made, an order by the Tribunal to pay less imposes a duty on the owners corporation to refund the difference (s 88).

19 As set out above, the background to the issues arising in this case relate to a reallocation of unit entitlements among the lots in SP 76700. Section 236 of the SSMA 2015 gives the Tribunal the power to make such an order if it 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.

20 When a copy of an order allocating unit entitlements among lot owners in a strata plan is lodged with the Registrar-General, the Registrar-General must amend the schedule of unit entitlement recorded in the folio of the Register comprising the common property to which the order relates to the extent necessary to give effect to the order (s 247 SSMA 2015).

The Tribunal's reasons for decision

21 As the appeal is only from that part of the Tribunal's orders dismissing the application to vary the levies struck at the various meetings between 2015 and 2018, we shall only set out the Tribunal's reasoning relating to that part of the original application.

22 The Tribunal identified that, deciding whether the applicable levies struck by the owners corporation should be varied and the contributions levied on the owners adjusted, requires consideration of the following questions:

(1) whether the proceedings are properly constituted;

(2) whether the Tribunal has power to make an order under s 87(1) of the SSMA 2015; and

(3) whether the Tribunal, if having power to do so, should in the exercise of its discretion make an order under s 87(1) of the SSMA 2015.

Whether proceedings properly constituted

23 The Tribunal referred to the rules of natural justice which require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. The Tribunal stated that it is clear that other owners in the scheme may be affected by the making of the orders sought by Ms Trentelman as these orders may increase contributions payable by them in one or more of the applicable financial periods. These owners, it was stated would be entitled both to adduce evidence and make submissions on the second and third issues mentioned above.

24 The Tribunal found that the failure to have joined the other owners in the scheme to these proceedings was not a mere technicality or a matter of legal form (which could be overlooked pursuant to s 38(4) of the CAT Act) but a matter of substance. As such the Tribunal held that the proceedings were not properly constituted and should therefore be dismissed so far as the relief claimed with respect to contributions to levies for the period 2015 to 2019 was concerned.

25 The Tribunal, however, went on to deal with whether it has the power to make an order under s 87(1) of the SSMA 2015 if, contrary to its finding set out above, the proceedings were properly constituted notwithstanding the failure of Ms Trentelman to have joined the other owners of the scheme.

Does the Tribunal have power to make an order under s 87(1)?

26 There was no dispute before the Senior Member that s 87(1) of the SSMA 2015 confers a discretionary power on the Tribunal to make an order under paragraph (a) or (b) of that subsection. In relation to s 87(1)(a), prior to the exercise of the discretion, the Tribunal must consider that any amount levied or proposed to be levied by way of contributions is inadequate or excessive. The Tribunal identified that the question arising in this application is whether the Tribunal has power under s 87(1)(a) to make an order for payment of contributions of a different amount on the basis that any amount levied is excessive where the unit entitlement of an owner has been subsequently reduced.

27 The Tribunal referred to the financial and management consequences flowing from a unit entitlement as noted by the Court of Appeal in *Sahade v The Owners – Strata Plan 62022* [2014] NSWCA 208; (2014) 81 NSWLR 261 as follows:

> 35 The proportionate allocation of unit entitlements forms the basis for liability to rates (Freehold Development Act, s 92(2)(c)); payments with respect to the maintenance and upkeep of common property (Management Act, s 54(2)); levies for administration and sinking funds (Management Act, s 78(2)); liability for statutory charges (Management Act, s 241(2)) and sharing in the assets and liabilities of the body corporate on termination of a strata scheme (Freehold Development Act, s 51A(8)).

> 36 In addition to financial consequences, unit entitlements control the power of management through an owners' corporation. Thus they are counted for determining a quorum (Management Act, Sch 2, cl 12); with respect to elections and motions generally, where a poll is required (Sch 2, cll 17 and 18), and provide the basis for determining whether a requisition for a general meeting is effective (Sch 2, cll 33 and 37).

28 *Sahade* dealt with provisions in the former *Strata Schemes Management Act 1996* and the *Strata Schemes(Freehold Development) Act 1973* but the Senior Member accepted its continuing relevance.

29 The Tribunal also referred to *North East Developments Pty Limited v The Owners – Strata Plan No. 53374* [2007] NSWSC 1063 and s 83 of the SSMA 2015 which embodies the principle that an owners corporation can only levy contributions that are payable by owners in shares proportional to the unit entitlements recorded in the Register.

30 The Tribunal held that it has no power under s 87(1)(a) of the SSMA 2015 to make an order for payment of contributions of a different amount on the basis that any amount levied is excessive during a period prior to the requirements of ss 236 and 247 having been complied with. That is, there is no power under s 87(1)(a) to make an order for the payment of contributions of a different amount during a period prior to the Tribunal making an order for the reallocation of unit entitlements and amendment of the schedule of unit entitlements recorded in the Register by the Registrar-General.

31 The Tribunal, however, went on to consider if indeed the Tribunal does have power under s 87(1)(a) to make the orders sought, whether it would have exercised its discretion in favour of Ms Trentelman.

Exercise of the discretion under s 87(1)

32 The Tribunal found that it would not have exercised the discretion to make the orders sought by Ms Trentelman for the following reasons:

(1) the owners corporation, while having standing to do so under both the SSMA 1996 (the Act relevant to the period prior to 30 November 2016) and SSMA 2015, was under no obligation to make an application for the reallocation of unit entitlements in the scheme;

(2) Ms Trentelman, who also had standing under both Acts to make an application for the reallocation of unit entitlements in the scheme, and had grounds to make such an application from 21 July 2015 (the date of

the registration of the current configuration of the scheme), failed to commence proceedings in the Tribunal until 20 July 2018 (SC 18/32379). The owners corporation was not responsible for this delay. A request by Ms Trentelman in July and October 2017 for a reduction in contributions and reimbursement of the monies she had overpaid in past years was not grounded in any reallocation of unit entitlements;

(3) at the 20 August 2015 AGM Ms Trentelman exercised her voting rights on the basis of her unit entitlements in the election of the executive committee;

(4) there would be financial detriment to the other owners in the scheme; and

(5) Ms Trentelman had provided no evidence as to whether there was any change in the ownership of lots during the applicable period.

Legal principles - internal appeals

33 Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (NCAT Act) provides that internal appeals other than on a question of law require the leave of the Appeal Panel.

34 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel said that the following are errors of law:

(1) whether the Tribunal provided adequate reasons;

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

(3) whether it applied a wrong principle of law;

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

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it 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.

35 Where the first instance decision is made in the Consumer and Commercial Division of the Tribunal clause 12(1) of Schedule 4 of the NCAT Act limits the ability of the Appeal Panel to grant leave to cases where the Appeal Panel is 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) there is significant new evidence which was not reasonably available at the time of the hearing.

36 An appeal from a decision made in the Consumer and Commercial Division must be lodged within 14 days of the date the appellant was notified of the decision. We are satisfied the appeal was made within time.

Consideration

Whether proceedings were properly constituted

37 Dealing first with the issue of whether the Tribunal was correct in its finding that the proceedings were not properly constituted, we note that in the reasons for decision the Tribunal stated that neither party made any submissions on this issue. The parties state that they were not afforded any opportunity to make submissions on this matter prior to the decision being published.

38 The owners corporation supports the Tribunal's finding that failure to join the other owners in the scheme was a matter of substance. Ms Trentelman argues, firstly, that the Tribunal made an error of law by overlooking the effect of s 228 of the SSMA 2015. Secondly, she submits that the parties were denied procedural fairness as the issue was not raised with them before the Tribunal made its decision.

39 Both parties refer in their submissions to s 228 of the SSMA 2015 which provides that the Registrar of the Tribunal must give the named parties to the application, and the owners corporation, a copy of an application for an order. On receipt of the application, the owners corporation is required to display the application on a notice board on the common property to allow submissions to be made to the Tribunal.

40 Both parties accept that, in relation to s 228, the presumption of regularity can apply and, unless shown otherwise, it can be assumed that the Tribunal and the owners corporation complied with their responsibilities under s 228 and the other owners, therefore, had been given an opportunity to make submissions. Ms Trentelman says that the Tribunal imposed an obligation on her to join

other owners in circumstances where the SSMA 2015 specifically places the onus on the owners corporation to notify other owners. She submits that, in doing so, the Tribunal erred.

41 The owners corporation states that the scheme is a holiday resort and the owners of the lots do not live there. This was a fact of which Ms Trentelman was aware and, affixing the application to the notice board would not have been effective in drawing the application to the attention of the owners. The owners corporation states that the presumption of regularity is displaced by the very nature of the scheme and the nature of the application – a retrospective adjustment of levy contributions – and the other owners should have been given a proper opportunity to be joined.

42 The more fundamental question in our view, however, is whether the Tribunal should have proceeded to dismiss the application on this basis in circumstances where neither party were aware that this course was under consideration and were not afforded any opportunity to make submissions.

43 Section 38(2) of the NCAT Act expressly establishes that the Tribunal must observe the rules of natural justice. That subsection provides that the Tribunal "is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.".

44 Common law notions of procedural fairness which encompass the natural justice hearing rule are set out in s 38(5) of the NCAT Act, which relevantly provides:

> "The Tribunal is to take such measures as are reasonably practicable:
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> …
>
> (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings."

45 The hearing rule, as s 38(5)(c) indicates, is not absolute. The Tribunal is only required to take "reasonably practicable" measures to ensure that a party has a "reasonable opportunity" to be heard. A similar point was made in *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 298; (2011) 83 NSWLR 23 at [63], where Giles JA said that:

> "...in principle, the requirements of procedural fairness are identified as a matter of law depending upon the institutional setting in which decision-making is to operate, the relevant statutory scheme, the subject matter of the decision and, as part of that analysis, the seriousness of the potential consequences of an adverse decision."

46 What constitutes a "reasonable opportunity" to be heard will, therefore, vary from case to case. In this matter, the parties agreed that the case could be dealt with on the basis of the written material before the Tribunal. The fact that the parties have agreed a matter can be determined on the papers in their absence does not, however, mean that the Tribunal's obligation to afford procedural fairness is diminished by that fact.

47 The issue of the proper constitution of the proceedings had not been raised at any stage by either party or the Tribunal. Prior to making a decision that the proceedings should be dismissed on this basis, the Tribunal should have raised the issue with the parties so that submissions, including on the effect of s 228, could be made. Not to do so was a denial of procedural fairness and therefore an error of law.

48 In the normal course of events our conclusion that the Tribunal erred in making its decision would require us to remit the matter to the Tribunal for reconsideration. However, in light of our conclusions below, we do not find it necessary to follow that course.

Power to make an order under s 87 of the SSMA 2015

49 Ms Trentelman submits that the Senior Member made several errors in coming to his decision that the Tribunal lacks the power to make the order sought. These are:

(1) that the Tribunal dealt with the matter under s 87(1)(a) – an order for the payment of contributions of a different amount – when what is being sought is an order under s 87(1)(b) – an order for payment of contributions in a different manner;

(2) failure to consider whether the manner of contributions is "unreasonable" and therefore should be varied; and

(3) failure to consider whether s 87, when read along with s 232, gives the Tribunal the power to make the orders sought noting that the Court of Appeal in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284; 103 NSWLR 352 has endorsed the breadth of the order making power in s 232 of the SSMA 2015.

50 Ms Trentelman states that there was no argument that the aggregate amount to be levied during the relevant periods be changed. Her argument was that the distribution of levies between lot owners should be changed because the manner of payment of contributions was unreasonable. Ms Trentelman referred to the approach taken by the Tribunal in *Cleggett v OC SP 35541* [2013] NSWCTTT 359. In that case, the Tribunal held that s 149 of the SSMA 1996 (which contains materially the same wording as s 87) permitted an adjudicator to make an order relieving a lot owner who was conducting litigation against an owners corporation from being subject to a levy raised by the owners corporation to fund the litigation against the lot owner.

51 The Tribunal in this matter at [84] considered that *Cleggett* has no bearing on the proper application of s 87 of the SSMA 2015 as that case was not concerned with circumstances where there had been a reallocation of unit entitlements. Ms Trentelman states that the difficulty with the Tribunal's approach is that, if, as the Tribunal seems to have considered, there is no power to make an order under s 87 in advance of a reallocation of unit entitlements, there is no power to make differential orders at all. As a result, the distribution of levies is dictated solely by s 83 and this approach is inconsistent with *Cleggett*.

52 While her primary submission is that s 87 empowers the Tribunal to make the orders sought, Ms Trentelman also submitted that, if s 87 does in fact contain such a restriction as found by the Tribunal, the Tribunal nevertheless has power under s 232 to make the orders. Section 232 provides:

> (1) The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following -
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> (a) the operation, administration or management of a strata scheme under this Act,
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> (b) an agreement authorised or required to be entered into under this Act,
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> (c) an agreement appointing a strata managing agent or a building manager,
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> (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata

scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

53 Ms Trentelman submits that the dispute in the present case falls within s 232(1)(a), that is, a dispute about the operation, administration or management of the scheme. She referred to various extracts from the Court of Appeal's judgment in *Vickery* to support her contention that the orders could be made under that section "to settle a complaint or dispute". Ms Trentelman also referred to the Tribunal's decision in *Davis v Owners Corporation SP 63429* [2018] NSWCATAD 27, a decision which pre-dates *Vickery*, where the Tribunal held that the broad power in s 232 permitted it to order that levies and contributions collected by the owners corporation in reliance on a by-law found to be invalid be refunded. Ms Trentelman conceded that in *Davis* the owners corporation had failed to properly exercise its functions under the SSMA 2015 which is not a matter the subject of any finding in this case.

54 In its submissions the owners corporation primarily supported the findings of the Tribunal and distinguished *Davis* and *Cleggett* as those cases did not involve a reallocation on unit entitlements. The owners corporation stressed that at the meetings concerned it had struck levies in accordance with the provisions of the SSMA 2015 and that contributions had been payable in accordance with the relevant unit entitlements as provided for by s 83 of the SSMA 2015. In those circumstances, the owners corporation states, the manner of payment of contributions could not be said to be unreasonable.

55 We have serious reservations about the approach taken by the Tribunal in its decision. We have formed a preliminary view that what was proposed was not a change in the amount of levies but a change in the manner of payment of contributions. The Tribunal was therefore required to consider under s 87(1)(b) whether the change was unreasonable, but it did not do so. We are also inclined to the view that the fact that the orders sought followed on from a reallocation of unit entitlements is not necessarily a barrier to the making of an order under s 87 (but may be a factor going to the exercise of the discretion).

56 However, for reasons which will become apparent, we make no concluded determination about whether the Tribunal erred in its approach to the construction of s 87 of the SSMA 2015.

57 In addition, while the breadth of the meaning of the language "make an order to settle a complaint or dispute" in s 232 adopted by Justices Basten and White supports the position that the Tribunal does have the jurisdiction to make the orders sought by Ms Trentelman if s 87 does not permit such an order to be made, we do not consider that we must reach a final view on this issue. We note that, while s 232 was raised in Ms Trentelman's application, it was not a matter canvassed by the Tribunal in its decision.

58 We have reached these conclusions because we are ultimately of the view that the exercise of the Tribunal's discretion to make the orders sought did not miscarry.

Exercise of the discretion

59 Both s 87 and s 232 (if it is indeed relevant) involve the exercise of a discretion to make the orders sought. The Tribunal is not compelled under either section to make orders if satisfied of the necessary prerequisites but "may" do so. The failure to properly exercise a discretion can constitute an error of law (*House v The King* [1936] HCA 40; (1936) 55 CLR 499). As the High Court said at pp 504-5;

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

60 The matters which the Tribunal identified as the reasons for why it decided not to exercise its discretion in Ms Trentelman's favour, even if the prerequisites were made out, are set out above. Ms Trentelman's primary issue appears to be that, although on her evidence the owners corporation acknowledged as far

back as 2015 that the then allocation of unit entitlement for her lots was too high, it took no steps to remedy the situation. We note that there is some disagreement between the parties about what was said between them on this issue.

61 In any event, as the owners corporation points out, the subdivision which resulted in the current configuration of the scheme was registered on 21 July 2015 but Ms Trentelman took no action in the Tribunal for three years to obtain a reallocation of unit entitlements. Furthermore, any such reallocation was dependent upon a valuation being obtained and she took no steps until 2018 to obtain such a valuation. We agree with the Tribunal that, while the owners corporation may have had some sympathy for her situation, it was under no legal obligation to take the necessary steps itself.

62 We also agree that the other factors that the Tribunal took into account – the fact that Ms Trentelman exercised her rights to vote during the relevant period (arguably to her benefit) in accordance with her then unit entitlement, that other owners in the scheme would suffer a financial detriment if the orders were made and that no evidence had been provided by Ms Trentelman of any change in ownership during the period – were matters that were relevant to the exercise of its discretion.

63 The submissions of Ms Trentelman focus on whether the matters referred to by the Tribunal as the reasons for why he would not exercise his discretion to make the orders sought, do not address whether the manner in which the levies were paid was not unreasonable. To our mind, that is to misconstrue the task the Tribunal was faced with. Even if the Tribunal had decided that the factors allowing it to make an order under s 87 had been established, it still had a discretion whether to make those orders. The same may be said for the order making power under s 232.

64 In our view, no error in the *House v King* sense arises from the Tribunal's decision. The Tribunal made findings that were open to it on the available evidence and reached a conclusion based on that evidence that it should not exercise its discretion to make the orders sought.

Orders

(1) The appeal is 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