Civil and Administrative Tribunal

New South Wales

Case Name:	Chua v The Owners – Strata Plan No 36156
Medium Neutral Citation:	[2022] NSWCATAP 48
Hearing Date(s):	9 November 2021
Date of Orders:	18 February 2022
Decision Date:	18 February 2022
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member G Curtin SC, Senior Member
Decision:	1. Grant leave to the appellant to amend the Notice of Appeal in the form of that lodged with the Tribunal on 5 July 2021. 2. Appeal dismissed.
Catchwords:	LAND LAW — strata title — owners corporation — meetings of owners corporation – order sought under s 24 of the Strata Schemes Management Act invalidating resolution of and election held by owners corporation – time at which the affected party must establish he or she was “adversely affected” within the meaning of that term in s 24
Legislation Cited:	Evidence Act 1995 (NSW), s 55 Strata Schemes Management Act 2015 NSW, ss 4, 24, Sch 1 cl 23(8)
Cases Cited:	Independent Commission Against Corruption v Cunneen (2015) 256 CLR 1; [2015] HCA 14 Wesiak v D&R Constructions (Aust) Pty Ltd [2016] NSWCA 353
Category:	Principal judgment

Parties:	Chen Chew Chua (Appellant) The Owners – Strata Plan No 36156 (Respondent)
Representation:	Counsel: A Britt (Appellant) N Newton (Respondent) Solicitors: Marcus Madison (Respondent)
File Number(s):	2021/00056039
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	15 December 2020
Before:	D G Charles, Senior Member
File Number(s):	SC 19/18378

REASONS FOR DECISION

1 This is an appeal from a decision of the Tribunal refusing the appellant's application to invalidate certain resolutions passed at (what was alleged to be) an annual general meeting of the respondent held on 22 March 2019 (the "March 2019 AGM") and the election of a strata committee.

2 For the reasons that follow the appeal is dismissed.

Background

3 The appellant is the owner of lot 33 in Strata Plan No 36156 located in Chatswood, NSW.

4 The respondent is the Owners Corporation for that strata scheme.

5 The detail of the events leading up to this appeal are more fully set out in the Tribunal's decision dated 15 December 2020 but may be summarised to the extent necessary for this appeal as follows.

6 In 2018 the Owners Corporation was due to hold its Annual General Meeting ("AGM") on 19 November 2018. At that time the appellant was the Secretary of the Owners Corporation.

7 On the morning of 19 November 2018, the strata committee of the Owners Corporation cancelled the AGM.

8 A group of lot owners then attended the office of the then strata managing agent, Titles Strata Management Pty Ltd ("Titles"), where the meeting was to take place, and asked for the AGM to proceed as planned.

9 The strata committee insisted the AGM could (and would) not proceed.

10 The group of lot owners then proceeded with their own meeting at a nearby venue. On the basis of their opinion that their own votes and proxies represented a majority of the lot owners of the scheme (a matter disputed by the appellant), this group of lot owners voted to remove the existing strata committee, including Dr Chua, and purported to install a new strata committee (comprised of Messrs Stager, Bromley, Gauld and Sombroek, and Ms Christie) and purported to appoint a new strata managing agent, Whitney Group Pty Ltd t/as Northside Strata ("Northside Strata").

11 The existing strata committee did not recognise the actions of this group of lot owners as valid.

12 Thus, from that point in time up until 22 March 2019, there were two different and competing strata committees which claimed to represent the Owners Corporation (and asserting that the other did not), and there were two strata managing agents.

13 On 17 December 2018, the Owners Corporation (per the strata committee of which the appellant was a member) commenced proceedings against the members of the purported new strata committee identified in [10] above. The appellant, as secretary of the strata committee, engaged lawyers on behalf of the Owners Corporation.

14 On 19 December 2018, the new strata committee retained lawyers, Madison Marcus Law Firm, also purportedly on behalf of the Owners Corporation.

15 This impasse, and the question which committee was the valid strata committee, was never adjudicated upon.

16 Instead, and on 18 January 2019, the parties agreed to consent orders in the Tribunal in an attempt to resolve the situation.

17 Those orders (as amended on 21 January 2019) were:

> "1. The Tribunal appoints Whelan Property Group Pty Ltd as strata managing agent to exercise the functions specified in the scope of works initialled by the parties' legal representatives and placed on the Tribunal file.
>
> 2. Until the next annual general meeting is held, the applicant (including Dr Chua and the building manager), other than for regular periodic expenses, must not pay any money from the applicant's accounts or on its behalf without the written approval of Dr Chua (for the applicant) and Mr Ron Gauld (for the respondents), and will instruct Titles Strata Management Pty Ltd in this manner.
>
> 3. The applicant is not to sign any contracts or enter into any new contractual arrangements until after the next annual general meeting.
>
> 4. Both parties are, as soon as possible, and in any case within three business days, to use their best endeavours to agree and finalise a joint statement updating the lot owners on the outcome of the proceedings, how to pay their levies to the previous account (controlled by Titles Strata Management Pty Ltd), and the applicant is to send that joint statement to all lot owners within 24 hours of its being finalised.
>
> THE TRIBUNAL NOTES that it is proposed that the next annual general meeting be held on 27 February 2019."

18 The scope of works referred to in paragraph 1 of the consent orders ("Scope of Works") appointed Whelan Property Group Pty Ltd ("Whelan") to do the following:

> "1. Convene an Annual General Meeting (AGM) for the strata scheme on 27 February 2019 in Chatswood or, if that date is impracticable, on the soonest practicable date;
>
> 2. Prepare the agenda for that AGM, including:
>
> (a) Preparing a proposed budget for approval by the members (in accordance with section 79 of the Act), which may be similar to the budget prepared for the AGM proposed for 19 November 2018;
>
> (b) A motion to determine the amount to be levied as a contribution to the strata scheme under section 81 of the Act;
>
> (c) Motions sent to the strata manager (by no later than 1 February 2019) under clause 4 of Schedule 1 to the Act;
>
> (d) All motions referred to in clause 9 of Schedule 1 to the Act, which must be included in each AGM agenda;

(e) In an attachment, notifying all lot owners that any company nominee should be received by the Strata Manager 48 hours before the AGM in order for the strata roll to be amended accordingly;

3. Send out the agenda to all owners, based on the strata roll provided by Titles Strata Management and updated under 5 below;

4. Prepare a spreadsheet or a meeting attendance register showing:

(a) The lot numbers;

(b) The owner;

(c) The unit entitlement;

(d) If the owner is a company, the nominee shown on the strata roll, including verifying those nominee appointments;

(e) Any proxy based on proxies received, including verifying those proxy appointments (which may be at the AGM); and

(f) Whether the lot is financial and if in arrears, the amount of the arrears;

5. Update the strata roll as needed, including verifying the company nominee and proxy records for each lot, and updating the strata roll in accordance with that verification process;

6. Liaise with and respond to requests from each of Dr Chua, Tony Dicembre, Ron Gauld and James Moir, above what is required under s 182 of the Act, including in relation to:

(a) That spreadsheet, including sending updated versions and copies of all company nominee and proxy appointments;

(b) All other matters affecting the AGM, including checking financial status of owners and otherwise their right to vote; and

(c) Providing a copy of the strata roll, including the updated strata roll after the verification process in 5 is complete;

7. Chair that AGM."

19 The person from Whelan responsible for carrying into effect the Scope of Works was Mr Michael Price. He purported to do so, and the AGM referred to in paragraph 1 of the Scope of Works took place on 22 March 2019 (being the March 2019 AGM).

20 A number of motions were put, and resolutions passed at that March 2019 AGM.

21 Adopting the same numbering as the Motions put at that meeting, Resolution 9 concerned the election of a (new) strata committee (in place of the two, earlier, competing strata committees). Resolution 12 resolved to withdraw or dismiss the earlier Tribunal proceedings (referred to at [13] above) in which the consent

orders earlier referred to had been made on the basis that the Owners Corporation paid the costs of the respondents to those proceedings (being Messrs Stager, Bromley, Gauld and Sombroek, and Ms Christie) and resolved to pay those costs. Resolution 14 resolved that the Owners Corporation would retain Madison Marcus Law Firm to act for it on the basis of their costs disclosure dated 21 January 2019. Resolution 20 resolved that Northside Strata be appointed as strata managing agent (in preference to the then two competing managing agents).

22 The appellant was dissatisfied with a number of matters leading up to the March 2019 AGM, several aspects relating to the conduct of the AGM, and ultimately with Resolutions 9, 12, 14 and 20 and the election of the strata committee.

23 On 3 April 2019, the strata committee elected at the March 2019 AGM held their first meeting. That committee had invited Dr Chua to attend that meeting, but he declined to attend.

24 On 16 April 2019, the appellant commenced fresh proceedings in the Tribunal (on his own behalf) seeking an order pursuant to s 24 of the *Strata Schemes Management Act 2015* NSW (the "SSMA") that Resolutions 9, 12, 14 and 20 referred to above were invalid as was the election of the strata committee. He also sought an order pursuant to s 237 of the SSMA for the appointment of a compulsory strata managing agent to exercise all functions of Owners Corporation.

25 Section 24 of the SSMA says:

> **24 Order invalidating resolution of owners corporation**
>
> (1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.
>
> (2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the Strata Schemes Development Act 2015 have not been complied with in relation to the meeting.

(3) The Tribunal may refuse to make an order under this section only if it considers:

(a) that the failure to comply with the provisions of this Act or the regulations, or of the Strata Schemes Development Act 2015, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

(4) The Tribunal may not make an order invalidating a resolution under subsection (2) if an application for an order has been made under Division 6 of Part 10 of the Strata Schemes Development Act 2015 in relation to the same or a related matter.

(5) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

26 Section 237 of the SSMA need not be considered because the Tribunal made the order sought by the appellant in that regard.

27 There was no dispute that the appellant had standing to commence those proceedings, he being an owner of a lot in the strata scheme.

28 The bases for the orders sought pursuant to s 24 of the SSMA (so far as is relevant to this appeal) were as follows:

(1) The appellant alleged Mr Price was biased in favour of Messrs Stager, Bromley, Gauld and Sombroek, and Ms Christie, and against the appellant.

(2) The appellant alleged a number of the persons elected to the strata committee at the March 2019 AGM were ineligible to be elected.

(3) The appellant alleged that a large number of persons allowed to vote at the March 2019 AGM were ineligible to vote.

(4) The appellant alleged Madison Marcus was not validly appointed at the March 2019 AGM and that the resolution to pay the legal fees of Messrs Stager, Bromley, Gauld and Sombroek, and Ms Christie, in the former proceedings was invalid.

(5) The appellant alleged that Resolution 20 of the March 2019 AGM resolving to appoint Northside Strata as the strata scheme's managing agent should be invalidated.

29 By notice dated 29 October 2019, the Owners Corporation called an annual general meeting for 14 November 2019 (the "November 2019 AGM") which included proposed resolutions to ratify Resolutions 9, 12, 14 and 20 passed at the March 2019 AGM, and for the election of a new strata committee.

30 After receiving the notice for that meeting Dr Chua brought an interim application in the Tribunal seeking to restrain the Owners Corporation from holding the meeting. The application for interim orders was declined by the Tribunal which observed that it was open to Dr Chua to attend the meeting, to vote for or against the proposed resolutions, and to seek to persuade other lot owners to vote against the resolutions.

31 The November 2019 AGM took place. Dr Chua did not attend the meeting and he did not give a proxy to anyone else at that meeting to vote on his behalf.

32 The Owners Corporation, without any dissenting votes, ratified the resolutions made at the March 2019 AGM and elected a strata committee comprising the same members as were appointed at the March 2019 AGM, save that Mr Ramsey replaced Mr Bromley.

33 The hearing before the Tribunal took place on 22 November 2019, 24 March and 8 July 2020, with written submissions dated 21 August 2020, 6 October 2020 and 20 October 2020 being received from the parties.

34 The Tribunal's decision was given on 15 December 2020.

The Tribunal's Decision

35 The Tribunal delivered comprehensive and cogent reasons for its decision which are a credit to the Member who gave them.

36 The Tribunal rejected the appellant's submissions that Mr Price had been biased and made factual findings to that effect.

37 The Tribunal found that Ms Christie and Mr Sombroek were not correctly nominated for election to the strata committee and therefore were not eligible to be elected to the strata committee at the March 2019 AGM. The Tribunal seemed to make a similar finding in relation to Mr Stager.

38 The Tribunal declined to make any finding that Madison Marcus were not validly appointed.

39 The Tribunal found there were no irregularities in relation to voting so far as it was alleged some lot owners were disentitled to vote as they were in arrears in

relation to strata levies but did find there were some irregularities in relation to some proxies.

40 Having made those findings (and various subordinate factual findings supporting them) the Tribunal turned to the discretion referred to in s 24 of the SSMA.

41 The Tribunal referred to s 24(1) and the word "may". The Tribunal then referred to s 24(3) and the words "may refuse to make an order under this section only if" it considered either that the failure to comply with the provisions of the SSMA did not adversely affect any person or that compliance with the SSMA would not have resulted in a failure to pass the resolutions or affected the result of the election.

42 The Tribunal noted the appellant's submission to the effect that there was a failure to comply with the provisions of the SSMA, Dr Chua was clearly adversely affected, and once those findings were made the terms of s 24(3) mandated that orders invalidating the resolutions should have been made.

43 The Tribunal disagreed.

44 The Tribunal reasoned that whilst in one sense Dr Chua was adversely affected (as all lot owners were) by resolutions passed,

> "… it is objectively determined whether s 24(3) operates in any particular case to exclude operation of the Tribunal's discretion to make orders."

45 The Tribunal referred to Dr Chua's attendance at the March 2019 AGM (in the company of his solicitor), that his solicitor spoke on behalf of Dr Chua in relation to the Motions, that Dr Chua put forward his own motions (subsequently withdrawn) and that there was no contemporaneous note containing any expression of the prejudice, or adverse effect, which Dr Chua asserted he had suffered.

46 The Tribunal then reasoned, in dismissing the appellant's submission and finding that it should decline to exercise its discretion under s 24 despite finding the irregularities it did with three strata committee nominations and some proxies:

> "93 I am not satisfied in the events which occurred that Dr Chua was adversely affected by what happened at the meeting, or further that the

> instances of non-compliance at the March 2019 AGM, as found by the Tribunal, would have resulted in a failure to pass the resolutions, now challenged by Dr Chua, or would have affected the result of the election of the strata committee members. I find the Applicant's evidence is insufficient to establish that compliance with the provisions of the SSMA as regards proper voting procedures meant the resolutions would have been lost rather than passed, or that a different strata committee would have been elected. In this regard, I do not consider that findings consistent with s 24(3) of the SSMA, so as to exclude the operation of the Tribunal's discretion to make orders, are made out by the Applicant's schedule (see annexure A to the Applicant's Supplementary Submissions) as regards votes said to be invalid and the unit entitlements of such votes.
>
> 94 Moreover, I find that Dr Chua cannot now maintain in the present proceedings that he was adversely affected by what happened at the March 2019 AGM. Subsequent events including his (failed) interim orders application, the November 2019 AGM, which he chose not to attend, and the March 2020 EGM, have seen the resolutions passed in March 2019, and which he continues to seek invalidation thereof, ratified, and furthermore, essentially the same strata committee re-elected.
>
> 95 Quite apart from my finding that s 24(3) of the SSMA does not operate in the circumstances to prevent the Tribunal exercising its discretion to make orders, the subsequent events I have referred to, as well as my decision (considered later in these Reasons) to appoint a compulsory manager for the scheme, provide a further discretionary basis to decline making any orders under s 24(1) of the SSMA.
>
> 96 In short, I am completely unpersuaded that there is now any utility in the Tribunal making orders to invalidate resolutions passed more than 20 months ago."

The Grounds of Appeal

47 The appellant sought leave to amend his Notice of Appeal. No prejudice was asserted by the respondent, and we grant leave to the appellant to file (and proceed upon) his Amended Notice of Appeal lodged with the Tribunal on 5 July 2021.

48 The appellant appealed on the following five grounds:

(1) The Tribunal erred in finding that in the lead-up to the March 2019 AGM Mr Price was not biased, impartial and/or neutral.

(2) The Tribunal erred in finding that a number of persons allowed by Mr Price to vote at the March 2019 AGM were eligible to vote at that AGM when such persons were not eligible to vote.

(3) The Tribunal erred in failing to determine whether a majority of persons eligible to vote approved Motions 9, 12, 14 and 20.

(4) The Tribunal erred in finding that the Motion to pay legal fees of the five named respondents in the former proceedings was valid when such payments cannot be made pursuant to the SSMA.

(5) The Tribunal failed to properly apply s 24(3) of the SSMA and took into account irrelevant considerations when failing to make orders pursuant to s 24.

49 The appellant submitted Grounds 1-3 and 5 raised questions of law and he therefore had a right of appeal on those grounds. He conceded Ground 4 did not raise a question of law and did not seek leave to raise any other ground of appeal in relation to the matters referred to therein. In those circumstances Ground 4 was not pressed and will not be further considered. We note that the appellant only proceeded with Grounds 1-3 and 5 on the basis of that they raised questions of law.

50 The only order sought by the appellant in his Notice of Appeal was:

> "An order pursuant to s.24 of the Strata Schemes Management Act 2015 (the "Act") that the Resolutions 9, 12, 14 and 20 made at the Annual General Meeting (the "AGM") on 22 March 2019 are invalid."

51 In his counsel's written submissions, the appellant said that should his appeal be successful:

> "The Tribunal should make orders invalidating the election of the Strata Committee and Motion 12 at the March 2019 AGM."

Ground 1

52 The appellant submitted that the Tribunal erred in that it applied a subjective rather than objective test for bias in relation to Mr Price. This submission was supplemented by a submission that the Tribunal had addressed the incorrect issue.

53 Taking the second submission first, the appellant submitted that the Tribunal directed its attention to whether there was a conspiracy between Mr Price and Mr Moir to thwart the interests of the Appellant and said that this was the wrong issue. The appellant submitted that the correct issue was whether Mr Price was biased in the lead up to and conducting of the March 2019 AGM.

54 We do not accept that submission. Whilst the Tribunal did make a finding that there was no such conspiracy, it also addressed its mind to and made findings in relation to the issue identified by the appellant at [41]-[43] of its reasons, namely whether Mr Price was biased.

55 In relation to that issue the Tribunal found at [43]:

> "… but I do not infer that this establishes any bias, or even an absence of neutrality or impartiality."

56 Therefore, contrary to the appellant's submission, the Tribunal did address the correct issue.

57 As to the first submission, the appellant directed our attention to the Tribunal's finding at [44] of its reasons that began:

> "I also accept Mr Price's evidence that it was not his intent to show any bias towards the new strata committee or any prejudice against Dr Chua's interest …"

58 The appellant relies upon that passage as indicating the Tribunal applied a subjective rather than objective test.

59 We disagree.

60 In our opinion the Tribunal addressed its mind to and made findings of an absence of bias on an objective test at [43] of its reasons, read in the context of the matters set out in [41]-[42]. In [43], after the first sentence, the Tribunal said:

> "I am satisfied that there was no collusion between Mr Price and Mr Moir, and the new strata committee, to defeat Dr Chua's interest. Mr Price received various emails from Mr Moir and members of the new strata committee which he responded to (Exhibit 1, CB 4, pages 239 – 265; Transcript, 22 November 2019, p 98.44). The correspondence between Mr Price and Mr Moir and the new strata committee was more extensive than Mr Price's correspondence with Dr Chua and those representing Dr Chua's interest, but I do not infer that this establishes any bias, or even an absence of neutrality or impartiality. In this respect, I am satisfied that consistent with his responsibility to liaise with and respond to requests, Mr Price received multiple emails and requests for information from the new strata committee and its representatives, such as Mr Moir, and that they provided him with information and asked to be kept up to date."

61 The language of [43] is to be contrasted with the opening words of [44] where the Tribunal began "I *also* accept …" (emphasis ours). In our view the "also" points to the finding set out in [44] as an additional finding of the absence of subjective bias, with [43] containing the objective finding of the absence of bias.

62 Therefore, in our view the Tribunal did not fail to apply an objective test to the question of bias.

63 In addition to those matters we note that the appellant was not able to identify any statutory provision or authority which would entitle him to any relief in relation to this Ground even if we agreed with his submission. We add that even had Mr Price been biased, there was no evidence to the effect that the outcome of the voting would have been any different.

64 We dismiss Ground 1.

Ground 2

65 The appellant submitted that the Tribunal erred in finding that Northside Strata was a strata managing agent for the Owners corporation and that that finding raised a question of law. The real question raised by the appellant was, however, a little different. A little more background is needed to explain.

66 As we have summarised above, between 19 November 2018 and the March 2019 AGM there were two committees purportedly acting as the duly elected strata committee and two entities purportedly acting as strata managing agents (Titles and Northside Strata). It appears that some lot owners paid their levies to Titles and some to Northside Strata.

67 Dr Chua's case was that Northside Strata was not a validly appointed strata managing agent because it had been appointed by a body of people who did not comprise a validly appointed strata committee. Therefore, he argued, any levies paid to Northside Strata were not levies paid to the Owners Corporation, and thus the lot owners who paid their levies to Northside Strata were "unfinancial owners" as defined in s 4 of the SSMA and were thus not entitled to vote at the March 2019 AGM per cl 23(8) of Sch 1 of the SSMA.

68 Clause 23(8) of Sch 1 says:

> **(8) Voting rights cannot be exercised if contributions not paid**
>
> A vote at a general meeting (other than a vote on a motion requiring a unanimous resolution) by an owner of a lot or a person with a priority vote in respect of the lot does not count if the owner of the lot was an unfinancial owner at the date notice of the meeting was given and did not pay the amounts owing before the meeting.

69 The Tribunal said that at the March 2019 AGM Mr Price treated lot owners as having paid their levies provided the levies had been paid to either Titles or Northside Strata, noting the evidence that the moneys held in Northside

Strata's trust account had been transferred to Titles at an unidentified time but apparently before the March 2019 AGM.

70 The Tribunal said at [65]:

> "I am unpersuaded by the Applicant's contention that lot owners who were not financial, were allowed to vote at the March 2019 AGM. In my opinion, Dr Chua's arguments disregard the particular context in which the meeting was held. Mr Price faced a situation in the lead-up to the meeting where there were two rival strata committees and two different strata managers (i.e. Titles and Northside Strata)."

71 And at [69]:

> "Given that the consent orders of the Tribunal made on 21 January 2019 were for the purpose of resolving an impasse between two rival groups of lot owners each of whom had appointed their own strata manager, and given also that the strata managers, Titles and Northside Strata each held moneys in their respective trust accounts for the Owners Corporation on account of strata levies, I find that Mr Price whose task it was under the consent orders to convene the March 2019 AGM, acted appropriately in all of the circumstances by treating those who had paid their levies to Northside Strata as being financial."

72 The more accurately expressed question of law raised by the appellant is whether the Tribunal erred in holding that the owners who paid levies to Northside Strata were not unfinancial owners and thus were entitled to vote at the March AGM.

73 We do not agree with the appellant's submission that the Tribunal erred for three reasons.

74 First, and as the appellant properly accepted, there was no evidence of the owners corporation having determined the amounts to be levied as a contribution to the administrative fund and the capital works fund to raise the amounts estimated as needing to be credited to those funds (as required by s 81 of the SSMA) prior to the March 2019 AGM.

75 An "unfinancial owner" is defined in s 4 of the SSMA as follows:

> (U)nfinancial owner means an owner of a lot in a strata scheme who has not paid all contributions levied on the owner that are due and payable, and any other amounts recoverable from the owner, in relation to the lot.

76 In the absence of the Owners Corporation having determined the contributions, no owner could have been an unfinancial owner because no contributions had been levied (albeit some owners had paid some funds to either Titles or

Northside Strata). As no contributions had been levied, the question of payment and to whom payment had been made was irrelevant.

77 It follows that the factual basis for the submission was wanting and the submission must fail.

78 Second, there had been no determination as to which strata committee was the valid committee during the relevant period, and thus which strata managing agent was validly appointed. For all we know, had the issue been litigated, it may have been found that Dr Chua's strata committee ceased having any authority after 19 November 2018 and that Northside Strata had been validly appointed.

79 Third, any monies paid to Northside Strata, in the circumstances of this case, would have been held on a bare trust for the benefit of the Owners Corporation. In that sense those monies had been paid to the Owners Corporation because there was only one entity legally entitled to those funds, being the Owners Corporation.

80 We dismiss Ground 2.

Ground 3

81 The appellant submitted that the Tribunal erred in failing to determine whether a majority of persons eligible to vote approved motions 9, 12, 14 and 20 (which became Resolutions 9, 12, 14 and 20). Alternatively, the Tribunal failed to give adequate reasons "for the failure to give the relief sought".

82 In relation to the eligibility point, the appellant had contended that there were two reasons certain lot owners were unable to vote: first, because they were unfinancial owners; and second, there were a number of invalid proxies and nominations.

83 As to the first reason, we have dealt with that matter in relation to Ground 2. The Tribunal did not err in finding that there were no unfinancial members.

84 As to the submission regarding proxies, the Tribunal found that Mr Gauld held three proxies in circumstances where the SSMA limited the number of proxies to two.

85 In relation to company nominees, the Tribunal found that there were instances of Mr Price not verifying company nominees and thus not complying with the requirements of the SSMA in relation to the March 2019 AGM. Such non-compliance, the Tribunal said, warranted consideration of the Tribunal's discretion under s 24 of the SSMA.

86 It is true that the Tribunal did not then make any finding about the number of invalid company nominees (if any), but nor can we find any submission having been made by the appellant to the Tribunal setting out the numbers of unit entitlements cast for and against the Resolutions in issue such as to demonstrate that if the appellant's point was good, a different result would have been achieved in relation to the Resolutions.

87 It is a general maxim that he who asserts must prove. Thus, if the appellant was asserting that certain proxies and company nominees should not have been counted, he also needed to prove that had invalid proxies and invalid company nominees (assuming there were any) not been taken into account, a different result would have ensued.

88 The appellant did not do so (as far as we are aware) at the hearing before the Tribunal and did not do so on this appeal.

89 Rather, as the respondent's submissions indicate, even had the votes challenged by the appellant been ignored, the Resolutions would still have passed.

90 As for the submission of inadequate reasons, in our opinion the Tribunal's reasons met the minimum acceptable standard. Indeed, we should make clear that the Tribunal's reasons exceeded that standard.

91 In any event, even were we to accept this submission, the Ground would still fail for the reason that the evidence is that even if the appellant's contentions as to invalid votes be good, the Resolutions would still have passed.

92 We dismiss Ground 3.

Ground 5

93 The appellant submitted that the Tribunal failed to properly apply s 24(3) of the SSMA and took into account irrelevant considerations at [92]-[96] of its reasons

when refusing to make orders pursuant to s 24 of the SSMA and this was an error on a question of law.

94 In relation to this ground the appellant took aim at both the Resolutions and the election of the strata committee. As the rejection of Grounds 2 and 3 on this appeal is dispositive of any complaint in relation to the Resolutions, we need not consider the resolutions in relation to Ground 5.

95 That leaves for consideration Ground 5 so far as it applies to the election of the strata committee, given the Tribunal's findings that three members of that committee were not properly nominated.

96 We have set out the terms of s 24 at [25] above.

97 The appellant's point, to put it briefly and hopefully not over simplistically, was that once a Tribunal has found that there was non-compliance with the SSMA or the regulations in relation to a meeting of an owners corporation, it was required to (i.e. there was no discretion to refuse to) invalidate any resolution of, or election held by, the persons present at that meeting.

98 The submission was founded on the wording of s 24(3) in which it is said that the Tribunal *may* refuse to make an order under this section *only if* it considers two things both occurred.

99 Section 24 has at least three difficulties.

100 First, the word "may" appears in both sub-s (1) and (3) and are prima facie in conflict. That is, because "may" usually denotes a discretion, the prima facie discretion in sub-s (1) conflicts with sub-s (3) in that the discretion in sub-s (3) is fettered by the words "only if". Read literally, sub-s (3) says that the Tribunal may *only* refuse to exercise the discretion in sub-s (1) if both conditions in sub-s (3) are met, meaning that there is, in effect, no discretion to be exercised in sub-s (1).

101 Second, the expression "adversely affect" in sub-s (3)(a) is a protean expression (*Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14 per French CJ, Hayne, Kiefel and Nettle JJ at [2]) which has not been the subject of any judicial attention in this context so far as our research has revealed.

102 *Cunneen* involved the proper construction of that expression in s 8 of the *Independent Commission Against Corruption Act 1988* (NSW) and concerned the question of what may adversely affect the exercise of official functions by various people and bodies. Section 24 is concerned with the possible adverse effect on persons, rather than exercise of official functions by persons.

103 The plurality in *Cunneen* restated the basal principle of statutory construction at [31] (footnotes omitted):

> "As was said in *Project Blue Sky Inc v Australian Broadcasting Authority*:
>
> > 'The primary object of statutory construction is to construe the relevant provision so that it is *consistent with the language and purpose of all the provisions of the statute*. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". …
> >
> > A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while *maintaining the unity of all the statutory provisions*. (emphasis added, footnotes omitted)'"

104 At [57] the plurality said:

> "As was earlier observed, "adversely affect" is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended. Contrary to counsel's submission, there was and is nothing impermissible about looking to the context in which s 8(2) appears or seeking guidance from the objects of the ICAC Act as stated in s 2A."

105 Their Honours also observed at [59] that words in a statute:

> "… may and frequently do mean one thing in one legislative context and something quite different in another."

106 The phrase "adversely affect" is not defined in the SSMA. Nor does it appear anywhere else in the Act, nor even the word "adversely" alone.

107 The two parts of s 24(3) are connected by the word "and" indicating that both parts must exist for the sub-section to be engaged. In the context of this ground of appeal we are therefore concerned with the question of whether the appellant was adversely affected by the result of the election. In this case, the appellant submitted he was adversely affected as follows (footnote omitted):

> "The non-compliance with the Act in respect to the nominations of Mr Stager, Ms Christie and Mr Sombroek meant that the Appellant would have been elected to the Strata Committee at the March 2019 AGM. This adversely affected the Appellant and the Tribunal was in error for not so finding."

108 In our opinion, there is no evidence that had Mr Price ruled (as the Tribunal did) that the nominations of Mr Stager, Ms Christie and Mr Sombroek were defective, that Dr Chua would automatically, or probably, been elected to the strata committee. There was another realistic possibility, and that is that those persons would have been nominated by others at the meeting. This seems to be the more likely scenario given the collection of owners who, in general terms, supported those nominees and the motions they put forward (those three persons were part of a group of people who proposed motions 12, 14 and 20) were reasonably clearly in the substantial majority as indicated by the substantial difference in numbers between the majority and minority in voting.

109 The "non-compliance with the Act" at [107] above refers to the appellant's submissions that certain votes should not have been accepted because they were from "unfinancial owners" (a point the Tribunal and we have rejected), invalid proxies and invalid nominations.

110 The third problem with s 24 is the time at which the Tribunal is to make a judgment whether a person is adversely affected. Is it at the time of the election, the time at which the Tribunal hears the proceedings, both of those times, or some other time?

111 Logic would suggest a person would need to establish they were adversely affected both at the time of the election and the time the proceedings are heard. The first is logical because the section uses the word "result" in sub-s 24(3)(b) and encompasses the notion that if compliance with the Act had occurred, the result would have been different. Therefore, the section addresses the time of the election as a temporally relevant point.

112 In our opinion someone in the appellant's shoes is also required to establish that they are adversely affected at the time the proceedings are heard. This is logical because events which occur after the subject meeting may have removed any adverse effect on a person (such as another election, or the person affected no longer being a lot owner because they'd sold their lot) and

there would seem to be no practical utility is taking up the Tribunal's limited resources by entertaining disputes involving a person who was once, but was no longer, adversely affected.

113 In this case the Tribunal addressed both points in time. The Tribunal held:

> "93 I am not satisfied in the events which occurred that Dr Chua was adversely affected by what happened at the meeting, or further that the instances of non-compliance at the March 2019 AGM, as found by the Tribunal, would have resulted in a failure to pass the resolutions, now challenged by Dr Chua, or would have affected the result of the election of the strata committee members. I find the Applicant's evidence is insufficient to establish that compliance with the provisions of the SSMA as regards proper voting procedures meant the resolutions would have been lost rather than passed, or that a different strata committee would have been elected. In this regard, I do not consider that findings consistent with s 24(3) of the SSMA, so as to exclude the operation of the Tribunal's discretion to make orders, are made out by the Applicant's schedule (see annexure A to the Applicant's Supplementary Submissions) as regards votes said to be invalid and the unit entitlements of such votes.
>
> 94 Moreover, I find that Dr Chua cannot now maintain in the present proceedings that he was adversely affected by what happened at the March 2019 AGM. Subsequent events including his (failed) interim orders application, the November 2019 AGM, which he chose not to attend, and the March 2020 EGM, have seen the resolutions passed in March 2019, and which he continues to seek invalidation thereof, ratified, and furthermore, essentially the same strata committee re-elected."

114 The appellant submitted the Tribunal erred in considering whether he was adversely affected the time the proceedings were heard (a point which raises a question of law) but we disagree. Although the appellant summarised the relevant principles regarding statutory construction in his written submissions (at [76]), the appellant did not then make any submissions as to how one would arrive at the construction for which he contended by applying those principles. For example, the appellant did not make any submissions per *Project Blue Sky* as to the language or purpose of the statute, or the language of the statute viewed as a whole, or indeed any submissions supporting his construction.

115 There is nothing we can see in the language or the structure of the SSMA which points one way or the other. But it does seem to us that the purpose of the SSMA is to concern itself with acts or omissions which adversely affected a lot owner at the time of the meeting, and continue to adversely affect that person when proceedings in the Tribunal are heard. In our opinion the purpose

of the statute is not to concern itself with disputes where a relevant person had been but is no longer adversely affected.

116 The question whether a person has been adversely affected is a question of fact, and the Tribunal found that the appellant was not adversely affected either at the time of the election or at the time the proceedings were heard.

117 The appellant's ground of appeal did not challenge these findings of fact, at least in any way which raised a question of law. Rather, the appellant submitted that the Tribunal erred in finding the appellant was not adversely affected because the Tribunal considered several irrelevant matters and thereby fell into an error of law.

118 The error of law was not identified, nor is one apparent to us.

119 In *Wesiak v D&R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 the Court of Appeal was called upon to consider what questions of law may arise in relation to findings of fact.

120 McDougall J, with whom Beazley P (as Her Excellency then was) and Simpson JA agreed, reviewed a number of authorities commencing at [57] and ultimately concluded:

> "[73] In my view, the authorities to which I have referred, although they deal with different statutory appellate regimes, establish that an ultimate finding of fact can only be vitiated by error of law if:
>
> (1) there is no evidence to support that finding; or
>
> (2) the finding was not reasonably open on the whole of the evidence ("reasonably" in this usage denotes "rationally", not "something on which minds may reasonably differ").
>
> [74] Put conversely, and adapting what Mason J said in *Hope* at 9, there will be no error of law if the evidence reasonably admits of different conclusions, one of which is the conclusion sought to be impugned."

121 The appellant does not contend for either of the errors of law identified by McDougall J. Indeed, none of the authorities referred to by McDougall J concern a situation where an ultimate finding of fact (in this case whether the appellant had been "adversely affected") was based upon several relevant subordinate facts together with several irrelevant subordinate facts.

122 Suffice to say that, per the first of the two errors identified by McDougall J at [73], in our opinion, if the relevant subordinate facts amounted to evidence which supported the finding (which in our opinion in this case they do, and the appellant did not contend otherwise) then the error of law that there was no evidence to support the ultimate finding did not occur.

123 In relation to McDougall J's second described error, and assuming the identified subordinate facts were irrelevant, their irrelevance did not mean that the ultimate finding was not reasonably open on the whole of the evidence.

124 In any event, we disagree that the facts identified were irrelevant. The appellant's submission that these subordinate facts were irrelevant is in two parts.

125 The first part concerns subordinate facts which occurred after the election such as the compulsory appointment of a strata manager. So far as those facts are concerned, the appellant's submission was based on the proposition that the only time at which the Tribunal should consider whether the appellant was adversely affected was at the time of the election. The post-election facts identified by the appellant (as being irrelevant) all concerned the Tribunal's determination that the appellant was not adversely affected at the time of the hearing. As we have said above, we disagree that the temporal element of "adversely affected" is limited to the time of the meeting and thus do not accept that post-election facts were irrelevant.

126 The second part concerned the subordinate facts in existence at the time of the meeting and recorded by the Tribunal at [92] of its reasons. We do not agree that those facts were irrelevant.

127 At [92] the Tribunal said:

> "However, it is objectively determined whether s 24(3) operates in any particular case to exclude operation of the Tribunal's discretion to make orders. In this regard, the evidence clearly established that both Dr Chua and his solicitor, Mr Johnson attended the meeting and that the solicitor spoke on behalf of Dr Chua against a number of Motions including Motions 9, 12, 14 and 20. As importantly, Dr Chua was afforded the opportunity to put his own Motions 22 and 23 as to the appointment of Titles as the scheme's strata manager, even though the Motions as put in the meeting agenda did not comply with s 4(2) of Schedule 1 of the SSMA; i.e. Motions 22 and 23 did not include proper Motion Explanations. Dr Chua's Motions were withdrawn by

> him. Following the meeting, Mr Johnson prepared a file note bearing date 1 April 2019 (Exhibit 1, CB 2 pages 180 – 184), so it is relatively contemporaneous to the March 2019 AGM. The file note refers to the fact that the Motions opposed by Dr Chua were accepted by the meeting. Furthermore, the file note contains no expression of the prejudice, or adverse effect, which Dr Chua now asserts he had suffered."

128 Those were not the only facts relied on by the Tribunal (others appear at [92]-[93]), but the point of those facts (in [92]) was to point out that the appellant was not prevented from moving motions, speaking in support of them, putting forward alternatives and like matters. In our view they were relevant to the question of whether the appellant was adversely affected because, in the language of s 55 of the *Evidence Act 1995* (NSW), the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of the fact in issue (whether the appellant was adversely affected).

129 We must then have regard to the Tribunal's specific finding at [93], in accordance with the terms of s 24(3)(b) SSMA, that it was satisfied strict compliance with the relevant provisions would not have resulted in a failure to pass the motions or to elect the strata committee. That finding of fact having been made, s 24(3) was not engaged.

130 Therefore, we see no error in the Tribunal's application of s 24 of the SSMA and the apparent tension between the use of the word "may" in both sub-s (1) and (3) does not need to be resolved in these proceedings.

131 For those reasons we do not accept Ground 5.

132 The parties were directed to make any application for costs, supported by preliminary submissions in their substantive submissions in the appeal. The respondent, who has been successful, did not do so. There is a matter where, prima facie, each party would be expected to bear their own costs: *Civil and Administrative Tribunal Act 2013* (NSW), s 60.

Orders

133 We make the following orders:

(1) Grant leave to the appellant to amend the Notice of Appeal in the form of that lodged with the Tribunal on 5 July 2021.

(2) Appeal dismissed.

****

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