



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Gelle v Owners Corporation Strata Plan 55966 and Strata Plan 85816 [2015] NSWCATCD 100
Hearing dates:	14 April 2015
Decision date:	18 August 2015
Jurisdiction:	Consumer and Commercial Division
Before:	P Boyce, Senior Member
Decision:	The decision of Adjudicator dated 11 November 2014 is affirmed.
Catchwords:	Orders to pursue an insurance claim; losses of a lot owner; disciplinary action against a strata manager rebuttal of special levies; amendment of owners ledger; supply of information about loan to owners corporation by strata manager; compensation to lot owner; pursuit of insurance claim; rescission of levies; inspection of records; right to bring application when lot owner in arrears of contributions levied and payable
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 1996
Category:	Principal judgment
Parties:	Warren Douglas Gelle and Anna Sophie Gelle (applicants) Owners Corporation Strata Plan 55966 and SP 85816 (respondent)
Representation:	Applicants: Litigants in Person Respondents: Peter Woodbury-authorized agent
File Number(s):	SCS 14/58230
Publication restriction:	Unrestricted

REASONS FOR DECISION

Application

1 This is an appeal pursuant to s 177 of the *Strata Schemes Management Act 1996*

("SSMA") against the order of a Strata Adjudicator.

- 2 The application is by lot owners appealing against an Adjudicator's decision in regard to their application for orders filed with the Tribunal on 12 May 2014. In that application they sought:

(a) To pursuant to section 146 of the Strata Schemes Management Act 1996 (the SSMA) to compel the owners corporation to pursue an insurance claim for common property damage and recover the repair costs paid by the lot owners through special levies;

(b) Pursuant to sections 138 and 147 of the SSMA, resolve disputes between the parties relating to failure to properly manage, including engaging in meaningful discussions with the applicant's, setting realistic budgets and levies, agreeing to court costs without obtaining proper legal advice, not maintaining accurate records, bias and collusion.

(c) The applicant lot owner also sought orders that the strata managing agent was not properly appointed as strata manager under a current signed management agreement and that the owners corporation failed to properly obtain insurance as required under the SSMA for the common property of Strata Plan 55966 and 85816 and failed to maintain accurate minutes and financial statements.

- 3 Following the submissions of the applicant lot owners the orders sought in the adjudication expanded and the Adjudicator dealt with the lot owners' application as that seeking orders as follows:

(a) An order that the owners corporation pursue an insurance claim;

(b) Relief for losses sustained by Mr Warren Gelle for the period 3 August 2010 to September 2012;

(c) An order for full particulars relating to the discontinuance of the claim in the District Court from Etienne Lawyers;

(d) An order for disciplinary action against the strata manager;

(e) Orders to rebut motion 2 (ii) of the Extraordinary General Meeting of 4 March 2013 for payment of settled amount of \$50,000.00 and other motions and resolutions of the Extraordinary General Meetings held 4 March 2013 and 12 September 2013 for amounts of \$35,000.00 to be raised by special levy to Steven Brown;

(f) Order that the lot owner's ledgers be amended to account for the revocation of the resolution for the levies;

(g) Orders for information in relation to the advance of payment by the strata managing agent;

(h) Order for reimbursement of expenses of Mr Gelle for the failure of the respondent to repair lot 1 making it unfit for occupation;

(i) Orders that the respondent seeks to agitate and settle an insurance claim for common property repairs;

(j) Order that the respondent seek procurement of funds from a bona fide lending institution to satisfy the debts of the Owners Corporation once the debts have been ratified by a qualified accountant and pending settlement of the insurance claim;

(k) That all levies in relation to court application against the applicant be rescinded;

(l) Order for the replacement of the current insurance policy to a commercial strata insurance policy;

(m) Access to inspect the records of the Owners Corporation.

- 4 The Adjudicator dismissed all orders sought in the lot owners' application for the reasons set out in her decision dated 11 November 2014.

- 5 The appellants lot owners filed their appeal against the Adjudicator's decisions on 1

December 2014 on the grounds that the Adjudicators decision was:

- (a) Wrong at law and on the facts;
- (b) With further submission to follow.

6 On 2 December 2014 the appellants sought to amend their appeal by seeking “leave to appeal an order of (sic) lodged out of time”.

Jurisdiction

7 Section 28 of the *Civil and Administrative Tribunal Act 2013* (“CATA”) provides that the NSW Civil and Administrative Tribunal (“Tribunal”) has jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

8 The Dictionary to the *SSMA* provides that for the purposes of the Act “Tribunal” means Civil and Administrative Tribunal.

9 Section 181 of the *SSMA* provides that the Tribunal may determine an appeal against an order of an Adjudicator by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

10 The appellants are lot owners in Strata Scheme 55966. Mr Gelle owning one lot and Mr and Mrs Gelle owning another.

11 The respondent is the Owners Corporation of Strata Plan 55966 & Strata Plan 85816.

12 The appellants contend that Tribunal has jurisdiction to hear and determine the appeal.

Background

13 The strata scheme for Strata Plan 55966 is in relation to a two storey commercial building at Victoria Road Parramatta.

14 The strata plan was registered on 4 December 1997. There are four lots in the scheme.

15 Lots 3 and 4 SP 55966 were subdivided into a further strata scheme Strata Plan 85816 comprising 4 lots in about November 2011.

16 For a lengthy period of time there has been disharmony and disputes among the lot owners.

17 The earliest notation of disharmony in in 2000.

18 Amongst other things, on 20 August 2007 an Adjudicator appointed a compulsory Strata Manager for the period commencing 18 August 2007 and ending on 17 August 2008 to exercise all the functions of the chairperson, secretary, treasurer of the strata plan.

19 On 18 February 2013 the CTTT appointed Australian Property Managers Pty Ltd as compulsory Strata Manager for a period of 12 months ending on 14 February 2014 to exercise all the functions of the Owners Corporation.

Legislation

20 Section 177 (3)(b) of the *SSMA* provides that appeal against an Adjudicators order must be lodged:

In the case of an appeal against an order dismissing an application-not later than 21 days after the order takes effect;

21 Section 177 (4) of the SSMA provides:

Section 41 of the Civil and Administrative Act 2013 does not apply in relation to the periods referred to in subsection (3)

22 Section 41 of CATA provides:

The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.

Such an application may be made even though the relevant period of time has expired.

23 Section 210 of SSMA provides when an Adjudicators order takes effect:

An order takes effect when a copy of the order is served:

- (a) If the order requires a person to do or refrain from doing a specified act, on that person, or
- (b) in any other case, on the owners corporation for the strata scheme to which the order relates.

This section does not apply if express provision is otherwise made by this Act or in the order itself.

24 Section 174 of the SSMA requires a copy of an order of an Adjudicator to be served as follows:

A copy of an order of an Adjudicator under this Part must be served by the principal registrar on:

- (a) The owners corporation for the strata scheme to which the order relates and, in the case of a leasehold strata scheme, the lessor under the scheme, and
- (b) The applicant for the order, and
- (c) any person who duly made submissions to an Adjudicator in connection with the application, and
- (d) any person against whom the order was sought and any person who, by the order, is required to do, or refrain from doing, a specified act.

25 Section 235 (2) of the SSMA permits certain documents to be served on an Owners Corporation:

A document other than a summons or other legal process may be served on an owners corporation:

- (a) By leaving it with a person referred to in subsection (1) or in the letterbox of the owners corporation, or
- (b) By posting it, by prepaid mail, to the owners corporation at its address recorded in the folio of the Register comprising the common property, or
- (c) By sending it by facsimile transmission to a person referred to in subsection (1).

26 Section 76 of the *Interpretations Act 1976* provides for service by post as follows:

If an Act or instrument authorises or requires any documents to be served by post (whether the word "serve", "give" or "send" or any other word is used), the service of the document:

- (a) May be effected by properly addressing, preparing and posting a letter containing the document, and
- (b) In Australia or in an external Territory-is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and

(c) In another place-is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post

(2) In this section:

“**Working day**” means a day that is not:

(a) A Saturday or Sunday, or

(b) A public holiday or a bank holiday in the place to which the letter was addressed.

Time for making Appeal

- 27 The time for making the appeal against the dismissal of the appellants’ application for adjudication is prescribed by s 177(3) (a) of the SSMA.
- 28 The words in that section, critical to the time for making the appeal before the Tribunal, are that the appeal must be lodged “not less than 21 days after the order takes effect”.
- 29 The day that the order took effect is the day that it was served on the Owners Corporation.
- 30 The Tribunal is satisfied that the Registrar caused notice of order to be served on the Owners Corporation and other interested parties including the applicants by post on 11 November 2014.
- 31 Section 76 of the Interpretation Act deems service by post to be effected on the fourth working day after being posted “unless evidence sufficient to raise doubt is adduced to the contrary”. There is no evidence adduced to the contrary to consider in this matter.
- 32 The deemed date of service is 17 November 2014, that date being four working days after posting the notice. Twenty one days after service of the notice is 8 December 2014.
- 33 The appellants filed their appeal against the Adjudicator’s orders on 1 December 2014 and amended it on 2 December 2014.
- 34 There is no need for the Tribunal to consider the application for leave to file the appeal. The Tribunal is satisfied that the appellants have filed their appeal within the time permitted by s 177 (3).

Subpoenaed documents in Local Court proceedings being available to Tribunal

- 35 The appellants sought to adduce documents subpoenaed in Local Court proceedings in the proceedings before the Tribunal. The appellants relied upon the Uniform Civil Procedure Rules 2005 (“UCPR”) applying to the Tribunal.
- 36 The subpoenaed documents were not before the Tribunal on the day of the hearing.
- 37 By email to the Tribunal on 10 April 2015 the appellants sought to have the Registrar of the Tribunal request the subpoenaed documents at the Local Court sent to the Tribunal and be available to the appellants in the prosecution of their appeal.
- 38 The procedure of the Tribunal generally is set out in s 38 of the *Civil and Administrative Tribunal Act 2013* (“CATA”). That is, the Tribunal may determine its own procedure in

relation to any matter for which the Act or the procedural rules do not otherwise make provision.

39 The UCPR provide at Rule 1.5 that they apply to civil proceedings in Courts set out in Column 1 of Schedule 1. Column 1 does not refer to the Tribunal. The UCPR do not apply to the Tribunal.

40 There is no procedural rule under CATA in relation to the transfer of documents produced to another Court to be made available to the Tribunal as sought by the appellants.

41 The appellants have the onus of proof and it is upon them to adduce the material they rely on. The Tribunal has no power to obtain the documents that the appellants wished to be sent to the Tribunal by the Local Court in the manner proposed by the appellants.

42 It was open to the appellants to summons the documents produced to the Local Court that they sought to rely in in the Tribunal proceedings. They did not do so.

43 The appellants sought to adjourn the hearing to allow for the documents at the Local Court to be available for the Tribunal hearing. The respondent opposed any adjournment.

44 The respondent was ready and able to proceed at the hearing. The Tribunal considers that it was in the interests of justice that the matter proceed on the day the matter is listed for hearing and the application for adjournment was refused.

Procedural

45 At a directions hearing on 16 December 2014 the Tribunal directed that the appellants file and serve the documents upon which they relied on or before 5 January 2015 and that the respondents file and serve any documents on which they rely by 19 January 2015.

46 On 5 January 2015 the appellants sought an extension of time in which to file their documents.

47 On 9 January 2015 the Tribunal varied the timetable and extended the time for the appellants to file and serve their documents until 16 January 2015 and the respondents until 30 January 2015.

48 On 16 January 2015 the appellants sought another extension of time to file and serve their documents.

49 On 27 January 2015 the Tribunal varied the timetable again and extended the time for the appellants to file and serve their documents until 27 January 2015 and the respondents until 10 February 2015.

50 The matter was listed for further direction hearing on 11 February 2015.

51 On 11 February 2015 the Tribunal varied the directions orders and extended the time for the appellants to file and serve their documents until 13 February 2015 and the respondents until 27 February 2015.

52 On 13 February 2015 the appellants sought to vary the timetable again to enable them

to file and serve their documents on or before 16 February 2015.

- 53 On 13 February 2105 the respondent Owners Corporation, by email sought to have the appellants appeal dismissed pursuant to s 55(1)(d) of CATA. No order was made dismissing the appeal
- 54 The appellants filed their documents on 16 February 2015.
- 55 On 17 February 2015 the Tribunal ordered that the timetable be varied by extending the time for the appellants to file and serve their documents until 16 February 2015 and the respondents by 5 March 2015. The Tribunal also ordered that the appellants provide to the Tribunal and the respondent not less than seven days before the hearing date a two page submission that deals with the relevant factual and legal issues. In addition the parties were limited to 90 minutes each to present their respective cases at the hearing.
- 56 On 18 February 2015 the appellants sought to file and serve additional documents on which they proposed to rely at the hearing.
- 57 On 23 February 2015 the Tribunal directed that whether the documents filed by the appellants will be considered would be determined at the hearing of the appeal having regard to any prejudice suffered by the respondents by their late service.
- 58 It is noted that the appellants did not file the 2 page summary of their case as directed by the Tribunal and as a consequence the respondents have not provided their reply.

Appellants Evidence

- 59 There is a considerable amount of material produced by the appellants in support of their appeal. In order to fully appreciate the breadth and depth of material relied upon by the appellants the Tribunal sets out the description of those documents.
- 60 The appellants evidence is contained in documents tendered to the Tribunal as follows:
- (a) Exhibit A-a folder with:
 - (i) A letter from the appellants to the Tribunal dated 22 July 2014 in support of their application for adjudication comprising 30 pages;
 - (ii) A photograph of 3 Victoria Road Parramatta;
 - (iii) Title search of CP/SP55966 and a copy of Strata Plan 55966 and a copy of DP 707759;
 - (iv) A copy of approved plans with DA352/2011, Certificates of Title 6, 7, 8,/SP85816;
 - (v) A copy of a title search of edition 4 of CP/SP55966;
 - (vi) A copy of title search of edition 6 of 1/SP55966 with Warren Douglas Gelle as registered proprietor;
 - (vii) A copy of tile search of edition 8 of 2/SP55966;
 - (viii) A copy of tile search of edition 1 of 5/SP55966;
 - (ix) A copy of tile search of edition 2 of 6/SP85816;
 - (x) A copy of tile search of edition 2 of 8/SP85816 with registered proprietor shown as Warren Douglas Gelle and Anna Sophia Gelle;

- (xi) A copy of title search of edition 2 of 7/SP85816;
- (xii) A copy of the application for adjudication to the Tribunal filed 5 November 2012;
- (xiii) A copy of the Orders dated 18 February 2013 of the Adjudicator appointing Australian Property Managers Pty Ltd as strata managers for a period of 12 months of SP55966 and an order that the Mr Gelle hand over the records of the Owners Corporation to the newly appointed strata manager;
- (xiv) A copy of an email from Mr Gelle dated 15 February 2013;
- (xv) A copy of s 136 of the SSMA;
- (xvi) A copy of a commercial lease dated 5 October 2013;
- (xvii) Copies of invoices from Harvey Air Conditioning dated 21 December 2009, 21 January 2010, 23 March 2010, quote dated 28 July 2010, invoice dated 3 August 2010, 27 July 2011;
- (xviii) A copy of s 62 of the SSMA;
- (xix) A copy of a letter from Mr Gelle to OC SP 55966 dated 16 August 2011 with a report from Norman Disney & Young;
- (xx) A copy of a letter from Hunt and Hunt Solicitors dated 28 November 2011;
- (xxi) A copy of an invoice for Ductclean dated 9 November 2011 and 9 November 2011;
- (xxii) A copy of an application for credit with Haden and invoices dated 27 January 2012, 29 March 2012;
- (xxiii) Photographs of air conditioning ducting;
- (xxiv) A copy of an insurance claim form dated 27 March 2012;
- (xxv) A copy of a Workcover Authority of NSW Inspection Report dated 30 April 2012 and an Improvement Notice dated 18 April 2012;
- (xxvi) A copy of a quote from Brick-A-Fix dated 10 April 2012;
- (xxvii) A copy of a quote from Coral Air dated 19 April 2012, 30 April 2012, tax invoice dated 21 May 2012;
- (xxviii) A copy of an email from Workcover dated 13 September 2012;
- (xxix) A copy of Australian Property Managers consent to act as Strata Manager dated 31 October 2012; a copy of s 31 of the SSMA;
- (xxx) A copy of a trial of emails ending with an email dated 19 February 2013 from Fran Lyndon-Ross of the strata manager;
- (xxxi) A copy of a minute of delegation to appoint a solicitor to represent the Owners Corporation in relation to court proceedings involving a claim against Harvey Air Conditioning;
- (xxxii) A copy of the Solicitors Rule 11- Conflict of duties concerning current clients;
- (xxxiii) A copy of Consent Judgement of the District Court of NSW as between the Anne Gelle trading as Lush n Loud Gallery as first plaintiff, Owners Corporation Strata Plan 55966 as second plaintiff and Harvey Air Conditioning Pty Ltd as defendant;

- (xxxiv) A copy of the Solicitors Rules 7-Communication of advice, 8-Client instructions;
- (xxxv) A copy of s36 of the SSMA;
- (xxxvi) A copy of an email from Bannermans Lawyers dated 14 March 2014;
- (xxxvii) Copies of letters dated 24 May 2014 from Mrs Gelle and 10 June 2014;
- (xxxviii) A copy s 30 of the SSMA;
- (xxxix) A copy of the Notice of Extraordinary General Meeting ("EGM") of SP 55966 to be held on 4 March 2013;
- (xl) a copy of s 68 of the SSMA;
- (xli) A copy of the minutes of the EGM held 4 March 2013
- (b) Exhibit B- a folder containing:
 - (i) A copy of s 153 of the SSMA;
 - (ii) A copy of a letter dated 8 October 2013 from Mrs Gelle;
 - (iii) A copy of a notice of EGM to be held 12 September 2013 and minutes;
 - (iv) A copy of an invoice from Frigcorp dated 12 August 2013;
 - (v) A copy of s149 of the SSMA;
 - (vi) A copy of the Cash Management Statement for The Owners-SP 55966 to 28 February 2103;
 - (vii) A copy of a letter form Mrs Gelle dated 10 June 2014;
 - (viii) A copy of a letter form Mrs Gelle dated 10 June 2014;
 - (ix) A copy of an email dated 7 July 2014 form Etienne Lawyers;
 - (x) A copy of a letter dated 9 October 2012 from Grech & Bannerman to Etienne Lawyers;
 - (xi) A copy of a letter of demand from Haden to Strata Plan 55966 dated 17 July 2012;
 - (xii) A copy of a statement of claim with Haden as plaintiff and The Owners, SP 55966 as defendant in the Local Court dated 6 September 2012;
 - (xiii) A copy of an email dated 19 September 2012 from Mr Andrews, secretary of the SP55966;
 - (xiv) A copy of an email dated 25 September 2012 from Mr Gelle;
 - (xv) A copy of an email dated 18 September 2012, from Mr Andrews resigning as secretary;
 - (xvi) A copy of the Cash Management Report for SP55966 to 30 November 2013 and 31 March 2014;
 - (xvii) A copy of s 110 of the SSMA;
 - (xviii) A bundle of internet posts;
 - (xix) A copy of an insurance claim form dated 21 February 2013;
 - (xx) A copy of two final notices to Mr Gelle from Australian Property

- Managers dated 24 May 2013 claiming \$23,611.56 and to Mr and Mrs Gelle of the same date claiming \$20,988.06 in unpaid levies;
- (xxi) A copy of an email trail ending with an email dated 11 December 2013 from Mr Gelle;
 - (xxii) A copy of s 146 of the SSMA;
 - (xxiii) A copy of the Cash Management Report of SP 55966 for the period ending 5 June 2014;
 - (xxiv) A copy of a Statement of Claim issued out of the Local Court on 1 November 2013 with the Owners Strata Plan 55966 as plaintiff and the appellants as the first and second defendants respectively;
 - (xxv) A copy of a Statement of Claim issued out of the Local Court on 1 November 2013 with the Owners Strata Plan 55966 as plaintiff and Mr Gelle as defendant;
 - (xxvi) A copy of a notice dated 15 April 2014 to Mr Gelle in respect of outstanding levies due in March and September 2013 for lot 8;
 - (xxvii) A copy of a notice dated 15 April 2014 to Mr Gelle in respect of outstanding levies due in March and September 2013 for lot 1 and March and September 2013 for lot 8;
 - (xxviii) A copies of letters dated 10 and 23 April 2014 from Mrs Gelle to Gilbert M. Johnstone & Co Lawyers ;
 - (xxix) A copy of a letter dated 16 April 2014 to Mrs Gelle;
 - (xxx) A copy of a letter dated 8 May 2014 form Mrs Gelle to Gilbert M. Johnstone & Co Lawyers;
 - (xxxi) A copy of a Statement of Claim issued out of the Local Court on 20 May 2014 with the Owners –Strata Plan 55966 as plaintiff and the appellants as the first and second defendants respectively;
 - (xxxii) A copy of a Statement of Claim issued out of the Local Court on 20 May 2014 with the Owners –Strata Plan 55966 as plaintiff and Mr Gelle the defendant;
 - (xxxiii) A copy of an annual report of Strata Plan 55966 presented to a meeting held on 12 February 2014;
 - (xxxiv) A copy of an email dated 26 April 2013 from Mr Andrews to Mrs Gelle;
 - (xxxv) A copy of s 116 of the SSMA;
 - (xxxvi) A copy of a trial of emails ending with an email dated 24 June 2013 from Mrs Gelle ;
 - (xxxvii)A copy of trial of emails ending with an email dated 30 June 2013 from Mr Gelle;
 - (xxxviii)A copy of a trial of emails ending with an email dated 7 August 2013 from Mr Woodbury;
 - (xxxix) A copy of s118 of the SSMA;
 - (xl) A copy of the annual general meeting minutes held on 19 February 2014;
 - (xli) A copy of a statement of Paul De Myers dated 15 July 2014;

- (xlii) A copy of an email dated 24 April 2014 from Mr Gelle;
 - (xliii) A copy of an email dated 29 April 2014 from Mr Scott to Mr Gelle with a proposed management agreement attached;
 - (xliv) A copy of s238 of the SSMA;
 - (xlv) A copy of the first page of a management agreement assumed to be dated 19 February 2014 as the handwriting is partially illegible between The Owners Strata Plan 55966 and Australian Property Managers;
 - (xlvi) A copy of s108 of the SSMA
- (c) Exhibit C-containing:
- (i) The appellants responses to the Adjudicators reason for dismissing the application for adjudication;
 - (ii) A trail of emails ending with a copy of an email dated 14 March 2013 from Jaime Richards, Solicitor, to Bannermans Solicitors;
 - (iii) A copy of the response by Australian Property Managers to the application for adjudication by the appellants dated 24 June 2014;
 - (iv) A copy of an email dated 19 March 2013 from Bannermans, Solicitors, to Mr Woodbury;
 - (v) A copy of an invoice dated 26 November 2012 from Etienne Lawyers;
 - (vi) A copy of a notice for an EGM to be held on 31 December 2014;
 - (vii) A copy of trial of emails ending with an email dated 25 September 2012 from Mr Andrews;
 - (viii) A copy of an invoice dated 1 October 2012 from Etienne Lawyers;
 - (ix) A copy of a letter to Mr Gelle dated 6 February 2015 that the Statement of Claim against him issued in 2013 had been discontinued;
 - (x) A copy of a letter dated 10 October 2012 from Etienne Lawyers and various invoices;
 - (xi) A copy of a emails dated 11 December 2014 to and from Mr Gelle and Mr Woodbury;
 - (xii) A copy of a letter dated 12 February 2015 from Mr Gelle to the Owners Corporation Strata Plan 55966 claiming damages for losses suffered by him as a result of the owners corporation failing to maintain the common property;
 - (xiii) A copy of s 93 of the SSMA;
 - (xiv) A copy of the Cash Management Report for the month ending 31 December 2014, noting that Mr Gelle is in arrears of levies as at 30 January 2015 in the amount of \$33,498.00 and Mr and Mrs Gelle in the amount of \$29,702.75 for the administrative fund and \$6,583.00 and \$5,804.25 respectively for the sinking fund;
 - (xv) A copy of a page of a s 109 certificate;
 - (xvi) A copy of a letter dated 12 February 2015 from Mr Gelle to the Owners Corporation asserting entitlement to damages for loss.
- (d) Exhibit D- a copy of an email dated 11 September 2013 from Etienne

Lawyers to Mr Woodbury with attachments;

- (e) Exhibit E- a copy of an email dated 26 February 2013 from Etienne Lawyers and a copy of a letter dated 26 February 2015 from Grech & Bannerman to Australian Property Managers Pty Ltd;

61 Both Mr and Mrs Gelle made oral submission to the Tribunal.

RESPONDENTS EVIDENCE

62 The respondents' evidence is contained in the documents tendered to the Tribunal as follows:

- (a) Exhibit 1- a bundle of documents including;
 - (i) The respondents submissions;
 - (ii) A copy of notice of adjourned EGM to 12 September 2014;
 - (iii) Owner's Ledgers for Lot 1 and lot 8, Cash Management Report to 22 September 2014; copy of a letter dated 25 August 2014 from Moray and Agnew acting on behalf of the insurer in relation to a claim by the Owners Corporation and by Mr Gelle;
 - (iv) A copy of the minutes of the EGM of 4 March 2013 and 12 September 2013;
 - (v) A copy of a debtors status reports fax dated 23 September 2014;
 - (vi) A copy of an email from Mr Woodbury dated 22 September 2014 to Mr Pobi, Solicitor;
 - (vii) A copy of an agenda for an executive committee meeting of the Owners Corporation to be held on 5 September 2007;
 - (viii) A copy of an Adjudicators compulsory appointment of a managing agent to the Owners Corporation of SP 55966 dated 20 August 2007;
 - (ix) A copy of a table "Response to Claims of Malfunctions and Breaches of SP 55966 from 2005 to 2007";
 - (x) A copy of a letter from Mr Gelle in about August 2007 and 7 November 2007;
 - (xi) A copy of a letter from Etienne Lawyers dated 17 July 2012 to Grech Partners;
 - (xii) A copy of an email dated 27 June 2012 from Mrs Gelle to Mr Andrews;
 - (xiii) A copy of a notice of executive committee meeting to be held on 29 June 2012;
 - (xiv) A trail of emails ending with an email dated 25 February 2015 from Mr Woodbury to Mr Pobi;
 - (xv) A copy of a letter dated 24 February 2015 from Australian Property Managers to Etienne Lawyers;
 - (xvi) A copy of a letter dated 25 February 2015 from Etienne Lawyers to Mr Woodbury with attachments;
 - (xvii) A copy of the minutes of the executive committee meeting held on 29 June 2012;

- (xviii) A copy of the minutes of the executive committee meeting held on 5 July 2012;
 - (xix) A copy of the minutes of the executive committee meeting held on 9 July 2012;
 - (xx) A copy of the minutes of the executive committee meeting held on 16 July 2012;
 - (xxi) A copy of the minutes of the executive committee meeting held on 16 August 2012;
 - (xxii) A copy of the minutes of the executive committee meeting held on 21 August 2012;
 - (xxiii) A copy of the minutes of the executive committee meeting held on 28 August 2012;
 - (xxiv) A copy of the minutes of the executive committee meeting held on 13 September 2012;
 - (xxv) A copy of the Common Property title Deed and Strata Plan also tendered by the appellants;
- (b) Exhibit 2- a letter from the Australian Property Managers Pty Ltd to the Tribunal dated 9 April 2015.
 - (c) Mr Woodbury made oral submissions.

63 The Tribunal has read and considered all the evidence and submissions placed before it in making its determination.

FINDINGS

64 So that the Tribunal can review each of the decisions made by the Adjudicator it will refer to those issues by reference to the headings used by the Adjudicator in the body of her reasons with reference to the appropriate sections of the SSMA.

An order under s 146 of the SSMA that the Owners Corporation pursue an insurance claim;

65 The appellants seek this order to pursue a claim made by Mr Gelle, the then secretary of the Owners Corporation, on behalf of the Owners Corporation as set out in the completed CHU claim form dated 27 March 2012 seeking indemnity for “loss and damage to Body Corporate/Lot Owners property including damage to a lease holders contents, stock fixture and fittings, resulting from contaminated air quality caused when a contractor failed to identify & rectify the cause: Repairer offering advice which failed to address the issues”; Exhibit A(xxiv).

66 The appellants contend that the Adjudicator failed to take into account “voluminous material and documentation” to the insurer’s appointed loss adjuster by the appellant.

67 The appellants contend that Mr Gelle was the secretary at the time the claim was made and then Mr Andrews was appointed as secretary on 29 June 2012 resigning on 18 September 2012.

68 Mr Gelle submits that he assumed the position of secretary after Mr Andrews resigned as secretary.

- 69 The material tendered by appellants is fully set out in these reasons for decision. Mr Gelle contends that material supports his claim that the Owners Corporation has not pursued the insurance claim.
- 70 The respondents refer the Tribunal to the Moray and Agnew letter of 25 August 2014. The reason for the solicitors stating that they regarded the claim to be abandoned or withdrawn was because they had no response to correspondence to the Owners Corporation requesting information.
- 71 There is no evidence before the Tribunal as to who Moray and Agnew wrote to or contacted within the owners corporation requesting the information..
- 72 The appellants say that their company WD Gelle Insurance & Finance Brokers Pty Ltd, has never had a request for information from the insurer or its solicitor. That company had acted as broker in arranging for the insurance required under the SSMA for the Owners Corporation at the time Mr Gelle was the secretary.
- 73 The Adjudicator found that the correspondence submitted by the respondent from Moray and Agnew dated 25 August 2014, as solicitors for the underwriter, considered that the claim was abandoned or withdrawn as they alleged they had received no satisfactory response to the request for information for the period of two years.
- 74 The appellants have not adduced any additional evidence that would satisfy the Tribunal that it should grant the order sought by the appellants.
- 75 The respondent submits that the order sought by the appellants is frivolous, vexatious and lacking in substance.
- 76 In the absence of any evidence to the contrary the Tribunal accepts the position outlined in the letter of Moray and Agnew that the Owners Corporation had either abandoned the claim or withdrawn it.
- 77 The Tribunal is then left to determine whether it considers the Owners Corporation has unreasonably refused to make or pursue the claim under s 146(2). The Moray and Agnew letter at [6] comment that Mr Gelle in his personal claim as a lot owner under the policy has failed to provide information and material for his claim under the policy. On the evidence available, the Tribunal is satisfied that the Owners Corporation has not unreasonably refused to make or pursue the claim.
- 78 The Tribunal is not satisfied that the appellants have established on the evidence placed before the Tribunal an entitlement to the order sought.

An order under s 93 of the SSMA for relief for losses sustained by Mr Warren Gelle for the period 3 August 2010 to September 2012;

- 79 Mr Gelle, as a lot owner, seeks an order that he be paid damages for loss that he alleges he has suffered.
- 80 That loss or the damages alleged to have been suffered are not particularised in a manner that the Tribunal is able to draw any inference from.
- 81 An Adjudicator may only make orders in respect of the powers granted by the SSMA

under Divisions 1 to 11 of Part 4 of Chapter 5 of the Act.

82 Appeals may be made to the Tribunal against the orders of an Adjudicator in relation to those matters set out in Chapter 5. Those appeals and the matters for which the Tribunal may make orders are set out in Division 1 of Chapter 5 of the SSMA are the extent of the Tribunal's jurisdiction. All other matters are beyond the jurisdiction of the Tribunal.

83 Section 93 permits a lot owner to bring an action against an Owners Corporation. However, s 138 (3) (d) prohibits an Adjudicator from making an order settling a dispute that involves the payment by a person to another person for damages.

84 The order sought by the appellant is not within the jurisdiction of the Tribunal.

An order under s 36 of the SSMA that full particulars relating to the discontinuance of the claim in the District Court from Etienne Lawyers be disclosed to the appellants;

85 The appellants contend that the Adjudicator was in error in her decisions to dismiss this part of the application on the basis that she was wrong in fact.

86 The appellants allege that they have "repeatedly requested "evidence from Peter Woodbury [of Australian Property Managers Pty Ltd] of the formal advice as to settlement given (sic) the instructions to Etienne Lawyers" and that the person alleged to have given those instructions were Mr Andrews and Mr Christian, who the appellants allege had no authority to act in the matter on behalf of the Owners Corporation.

87 Regardless, the Tribunal must first determine if it has jurisdiction to make the order sought.

88 The respondents submit that pursuant to s 36 of the SSMA it is only the Owners Corporation who may require a strata manager to provide full particulars as to any specified transaction that may be entered into by the agent on behalf of the Owners Corporation.

89 Neither the Adjudicator, nor the Tribunal in an appeal against the Adjudicator's decision has power under Chapter 5 of the SSMA to make an order as sought by the appellants.

90 The order sought is not within the Tribunal's jurisdiction.

An order pursuant to s 30 of the SSMA for disciplinary action to be taken against the strata manager;

91 The appellants submit that the Adjudicator's decision to dismiss the application for an order to discipline the compulsory strata manager was wrong in fact.

92 Section 30 provides that:

If a strata managing agent has been delegated a duty by an owners corporation and a breach of the duty by the owners corporation would constitute an offence under a provision of this Act, the agent is guilty of an offence under that provision (instead of the owners corporation) for any breach of the duty by the agent occurring while the delegation remains in force.

93 The respondent submits that s 30 is not within the Adjudicator's jurisdiction under Chapter 5 of the Act and therefore beyond the jurisdiction of the Tribunal.

94 The Tribunal is satisfied that it does not have jurisdiction to make the order as sought by the appellants under s 30.

Orders pursuant to s 153 of the SSMA to rebut motion 2 (ii) of the Extraordinary General Meeting of 4 March 2013 for payment of settled amount of \$50,000.00 and other motions and resolutions of the Extraordinary General Meetings held 4 March 2013 and 12 September 2013 for amounts of \$35,000.00 to be raised by special levy to Steven Brown;

95 The appellants contend:

- (a) Through their solicitors, the appellants contend that “Of particular concern is the validity of the resolutions passed appointing [Lawyers for the Owners Corporation] to act for the OC. On the face of it, that resolution was illegally made and therefore has the effect that representation in the District Court by [Lawyers for the Owners Corporation] is void”. Exhibit B(x);
- (b) That the lawyers for the Owners Corporation on 8 October 2012 expressed that they were unable to act as they did not know from whom to take instructions;
- (c) The Adjudicator failed to give weight to the “importance of legal advice... and advocates that the strata manager was under no obligation to understand the impact of his decision” without that properly instituted advice in making a decision to reach a settlement in the proceedings before the District Court;
- (d) Mr Woodbury’s responses “beg all belief considering as the Compulsory Strata Manager at the time he was solely and legally liable for the carriage and outcome of the consent judgement and its process”.
- (e) That the invoices from the lawyers for the Owners Corporation were sent to the lot owners, Andrews, Christian Semaan.

96 The Adjudicator’s reasons for dismissing the order sought by the appellants were that the resolutions complained of were made during the period of compulsory management. The evidence before the Tribunal is that the appointment of the compulsory strata manager was appointed for the period 18 February 2013 to 14 February 2014 to exercise all the functions of the Owners Corporation (Exhibit A (xiii)).

97 A compulsorily appointed strata manager exercises all the functions of the Owners Corporation. As such, the strata manager is empowered to make decisions in relation to the conduct of the District Court proceedings on foot during its appointment. Despite the agitation of the appellants to make a finding that the strata manager made a decision to settle the proceedings unfavourable to the appellants’ perception of the expediency of the commercial terms agreed upon and without the benefit of legal advice; the Tribunal is not satisfied that the appellants have established such a deficiency.

98 The Tribunal finds that the appellants have failed to satisfy the Tribunal that the decision to settle the District Court claim by the strata manager was against the interest of the Owners Corporation or any lot owner.

99 The appellants seek orders under s149 of the SSMA to revoke the resolution of the

EGM on 4 March 2013 and 12 September 2013.

100 Section 153 of the SSMA provides:

(1) An Adjudicator may make an order invalidating any resolution of, or election held by, the persons present at a meeting of an owners corporation if the Adjudicator considers that the provisions of this Act have not been complied with in relation to the meeting.

(2) An Adjudicator may refuse to make an order under this section but only if the Adjudicator considers:

(a) that the failure to comply with the provisions of this Act did not adversely affect any person, and

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

(3) An application for an order under this section may be made only by an owner or first mortgagee of a lot.

101 The meetings held were during the period of compulsory strata management and there is no evidence before the Tribunal that satisfies the Tribunal that the provisions of the Act were not complied with in relation the meetings.

102 The resolution of 4 March 2013 has been passed at an EGM properly constituted with the compulsory strata manager exercising its duties to raise a special levy to pay the settlement of \$50,000.00 in the District Court proceedings and to raise levies to pay the Lawyers for the Owners Corporation their fee of \$35,000.00.

103 The minutes of the meeting of the EGM of 12 September 2013 properly rescinds the motion of 4 March 2013 in respect of the motion for the special levy for the lawyers' fees and passes the motion to raise a special levy of \$35,000.00 to provide funds for the installation of a new Air Conditioning roof top unit, the reduced legal fee due to the Owners Corporation Lawyers and to provide funds for the payment of outstanding accounts.

104 The Tribunal may refuse to make an order invalidating a resolution if it considers that the failure to comply with the provisions of this Act did not adversely affect any person, and that compliance with the provisions of this Act would not have resulted in a failure to pass the resolution or have affected the result of the election.

105 Notwithstanding that the appellants are dissatisfied with the resolutions passed. The Tribunal is satisfied that the resolutions were passed in accordance with the Act and as such refuses to make the order invalidating the resolutions as sought by the appellants.

An order under s149 of the SSMA that the lot owner's ledgers be amended to account for the revocation of the resolution for the levies;

106 Section 149 provides:

(1) An Adjudicator may make either or both of the following orders if the Adjudicator 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:

(a) an order for payment of contributions of a different amount,

(b) an order for payment of contributions in a different manner.

(2) If an Adjudicator considers that the consent of an owner referred to in section 77 has

been unreasonably refused, the Adjudicator may make an order for payment of a different amount of one or more contributions levied or proposed to be levied by the owners corporation.

(3) If a contribution which is the subject of an order under this section has been wholly or partly paid:

(a) an order to pay more has effect as if the owners corporation had decided to levy a contribution equal to the difference, and

(b) an order to pay less imposes a duty on the owners corporation to refund the difference.

(4) An application for an order under this section may be made only by the lessor of a leasehold strata scheme, an owners corporation, an owner or by a mortgagee in possession (whether in person or not).

107 The complaint by the appellants is in regard to the levies raised. The compulsory Strata Manager "inherited" the proceedings and is in the position of now having to accommodate the consequences and circumstances that flow from the management of the Owners Corporation before the compulsory Strata Manager was appointed. Mr Gelle was, on the evidence before the Tribunal, the secretary of the Owners Corporation at the time the complaints about the air conditioning were initiated.

108 The SSMA imposes on the Strata Manager the obligation of managing the affairs of the Owners Corporation. As part of those obligations it must raise the funds necessary to fulfil its obligations under the SSMA.

109 The evidence adduced by the appellants is not sufficient to establish that the amounts levies are excessive. The compulsory Strata Manager properly held the meetings at which the motions were passed and is entitled under the terms of its appointment to exercise all the functions of the Owners Corporation.

110 The respondent submits that there is no jurisdiction to make the order sought by the appellants to amend the lot owner ledgers.

111 The Tribunal is satisfied that s 149 does not provide the authority to grant the orders sought by the appellants. Such orders sought are beyond the jurisdiction of the Tribunal

Orders pursuant to s 36 of the SSMA for information in relation to the advance of payment by the strata managing agent;

112 The appellants contend that the s 109 certificate tendered in Exhibit C (xv) establishes that the appellants are members of the executive committee. Exhibit C (xv) is one page of a document. The appellants do not identify its purpose, author and date it was created. Of itself it is not sufficient to support their contention.

113 The appellants also submit that s 108 authorises them to inspect the records of the Owners Corporation. Such an assertion is not denied, however, they are entitled under s 36 to require the strata manager to provide full particulars of the transaction involving the Strata Manager lending the Owners Corporation the amount of the insurance premium.

114 Section 36 provides:

An owners corporation may require a strata managing agent to provide full particulars as to any specified transaction that has been entered into by the agent on behalf of the

owners corporation

- 115 The respondent contends that the only party able to request the particulars of the transaction is the Owners Corporation. The appellants are lot owners and the section does not provide for a lot owner to request the particulars.
- 116 During the compulsory appointment of the Strata Manager it was appointed to exercise all the function of the Owners Corporation.
- 117 The Tribunal is satisfied that the appellants have no legal standing to make the request.
- 118 Additionally, s 36 is not within the jurisdiction granted to an Adjudicator or the Tribunal under Chapter 5 of the SSMA.

Order pursuant to section 93 of the SSMA for reimbursement of expenses of Mr Gelle for the failure of the respondent to repair lot 1 making it unfit for occupation;

- 119 Mr Gelle seeks an order for compensation of soot ingress through the air-conditioning service to Lot 1. The appellants rely on their submission and evidence in support of their claim for losses alleged to have been sustained between 3 August 2010 and 13 September 2012.
- 120 For the same reasons as set out under that claim, s 138 (3) (d) prohibits an Adjudicator from making an order settling a dispute that involves the payment by a person to another person for damages.
- 121 The application under s 93 is not within the Tribunal's jurisdiction under the SSMA.

Orders pursuant to section 146 that the Owners Corporation agitate and settle an insurance claim for common property repairs;

- 122 The appellants generally appeal the Adjudicator's decision to refuse to make an order as sought. They rely on the material adduced in their evidence.
- 123 At best, that material consists of two claim forms completed by Mr Gelle and dated 27 March 2012 and 21 February 2013. The Tribunal finds that those forms provide that Mr Gelle is nominated as contact person in relation to both claims and no doubt was fully apprised of the claims. There is no other material adduced to the Tribunal that would satisfy the slightest test as to the issues in relation to the claims, quantum and evidence in support of them.
- 124 The letter previously considered by the Tribunal from Moray and Agnew dated 25 August 2014 expresses the difficulty in obtaining instructions. It specifically refers to requesting information from Mr Gelle and any responses from him "[did] not address[ing] the requests for relevant information and material" and as a result the solicitors for the insurer regarded the claims by The Owners Corporation not maintained under any policy.
- 125 The respondent in addition submits that Mr Gelle, despite being requested by the insurer for substantiation of any loss of rent has failed to provide that information.
- 126 The Tribunal is not satisfied that appellants request for an order can be sustained in light of the insurer's solicitors advice that despite the requests for information to

substantiate the claim from Mr Gelle he has failed to provide that information. It was within Mr Gelle's bailiwick to progress the claim. His failure to respond is sufficient for the Tribunal to be satisfied that the order sought by the appellants should not be granted.

Order pursuant to s 110 of the SSMA for the procurement of funds from a bona fide lending institution to satisfy the debts of the Owners Corporation once the debts have been ratified by a qualified accountant and pending settlement of the insurance claim;

127 The appellants contend that in reaching the decision she did, the Adjudicator erred in not considering the provisions of s 62 in dismissing the claim for these orders. They also accept that the Adjudicator was entitled to refuse the order.

128 Section 110 provides:

(1) An owners corporation may borrow money and secure the repayment of the money and of any interest in such manner as may be agreed on by the owners corporation and the lender, otherwise than by charging the repayment on the common property.

(2) An owners corporation may dispose of or otherwise deal with any lot vested in the owners corporation as a result of a subdivision effected under section 9 of the Strata Schemes (Freehold Development) Act 1973 or section 11 of the Strata Schemes (Leasehold Development) Act 1986.

(3) Section 50 (1) (d) of the Interpretation Act 1987 does not apply to an owners corporation.

Note. Section 50 (1) (d) of the Interpretation Act 1987 provides that a statutory corporation may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property.

129 Section 62 sets out the duties of an Owners Corporation as follows:

(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

Note. The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138).

130 The appellants say that the Adjudicator should have taken into account the "commercial reality in regards to the levies struck and whether the unrealistic financial burden imposed on 4 groups of owners was fair and reasonable or sustainable given their individual financial commitments and history of the scheme". The appellants complain that the Strata Manager "continues to financially burden the Lot Owners with exorbitant levies based on unsubstantiated budgets". The appellants submit that the Tribunal should take into account the obligations of an Owners Corporation to maintain and keep the common property in good and serviceable repair, although they have not sought a review of the decisions of the Owners Corporation under s 62. The Tribunal

notes that the appellants did not seek such an order from the Adjudicator and now agitate for the Tribunal in this appeal against the Adjudicator's decision to consider the obligations on the Owners Corporation to maintain the property in light of the dispute in regard to the air conditioning.

- 131 The respondent submits that the neither the Adjudicator nor the Tribunal has jurisdiction under s 110 as it is outside the jurisdiction granted by Chapter 5 of the SSMA.
- 132 The orders sought by the appellants are under s 110. There is no jurisdiction granted by the SSMA to the Tribunal to make the orders sought by the appellants.

An order under s 30 and s 149 of the SSMA that all levies in relation to all four court applications against the applicant be rescinded;

- 133 The appellants complain that the Adjudicator accepted the unsupported material from the respondent and has rejected the appellants' submission that the proceedings were dismissed.
- 134 In support of their contention the appellants tender at Exhibit C (ix) a letter from the local court supporting the appellants' contention that the proceedings against Mr Gelle by the respondent had been discontinued. The document makes no mention of the terms of the discontinuance. The appellants' contend that it was discontinued with a costs order made.
- 135 The Tribunal is not able to make a finding in relation to the proceedings. On the evidence adduced there is no support for the contention that a costs order was made in favour of Mr Gelle.
- 136 The material before the Tribunal supports a finding that the appellants were and remain in arrears of levies made and due. The Tribunal is satisfied that the evidence adduced is sufficient to support a prima facie right of the Owners Corporation to commence legal proceedings against the appellants under the SSMA to recover the arrears of levies.
- 137 The Tribunal is on notice that there are current further proceedings in the Local Court commenced by the respondent against the appellants for the recovery of the arrears of levies.
- 138 The Tribunal is not satisfied on the material before it that there is sufficient evidence to support the appellants' claim for orders they seek.

Order pursuant to s 87 of the SSMA for the replacement of the current insurance policy to a commercial strata insurance policy;

- 139 The appellants contend that the Adjudicator was wrong in declining to make the order as sought. The Adjudicator declined to make the order because she was unable to be satisfied as to the terms of the insurance policy. No policy has been tendered to the Tribunal.
- 140 The evidence before the Tribunal is that there was at the relevant time an insurance policy complying with the minimum requirements of the SSMA in place.

141 However, the respondent submits that the provision of s 87 do not give an Adjudicator authority to make orders sought by the appellants and is outside the jurisdiction granted by Chapter 5 and the Act generally.

142 The Tribunal is satisfied that the SSMA does not grant jurisdiction to the Tribunal to make orders as sought by the appellants under s 87 of the Act.

Orders pursuant to s 108 and s 156 of the SSMA for full access to inspect the records of the Owners Corporation

143 There is no doubt that the appellants are lot owners and entitled to request access to the records of the Owners Corporation under s 108.

144 Despite the sheer volume of the documents tendered by the appellants, there is no evidence before the Tribunal that there is a request in writing and fee prescribed by the regulation has been paid as required by s 108 (2). Notwithstanding, the evidence supports the respondent's assertion that the appellants accessed the records on 3 May 2013.

145 The respondent contends that the records have always been available to the appellants except for documents and records subject to privilege in proceedings against the appellants.

146 On the evidence before the Tribunal it is satisfied that the records, subject to privilege, are and always have been available to the appellants. The Tribunal is not satisfied that the respondent has failed to make the records available to the appellants.

147 The Tribunal is not satisfied that it should make an order under s 156 to order access of the records to the appellants.

CONCLUSION

Tribunal's discretion under s 163

148 Section 163 of the SSMA provides:

(1) (Repealed)

(2) If the ground for an application for an order under this Part is:

(a) the absence of a quorum at a meeting, or

(b) a defect, irregularity or deficiency of notice or time,

an Adjudicator may, by order, dismiss the application if the Adjudicator believes that no substantial injustice has resulted.

(3) An Adjudicator may, by order, dismiss an application for an order under this Part on any other ground that the Adjudicator considers appropriate.

(4) Without limiting the generality of subsection (3), an Adjudicator may, by order, dismiss an application for an order under this Part if:

(a) the Adjudicator believes that the application is frivolous, vexatious, misconceived or lacking in substance, or

(b) the Adjudicator believes that a decision in favour of the applicant is not within the jurisdiction of the Adjudicator, or

(c) the Adjudicator believes that the applicant has unreasonably delayed the provision of information required by the Adjudicator, or

(d) in the case of an application made by an owner of a lot in the strata scheme concerned, the applicant has not paid all contributions levied and payable in relation to the lot under this Act.

(5) An Adjudicator may dismiss an application in accordance with this section even though the notice requirements of Part 3 have not been complied with and despite that a time, or extended time, specified for making written submissions on the application has not expired.

149 The respondent submits that in respect of:

- (a) all the orders sought by the appellants they should be dismissed by the Tribunal exercising its discretion because the appellants have not paid all the contributions levied and payable in relation to their lots and the application are frivolous, vexatious, misconceived and lacking in substance (s 163(4)(a) and (d)); and,
- (b) the applications for orders under s 30, 36, 30, 87, 93 and 110, the Tribunal should dismiss the applications as the orders sought are outside the jurisdiction of the Tribunal (s 163(4)(b)); and,
- (c) the applications for orders under 153 should be dismissed under s 163(3).

150 The appellants contend that generally the Adjudicator erred by not taking into account the “purpose of NCAT”, amongst other thing is to “grade the information provided for accuracy and strike out wilful and deliberate lies contained in the respondents responses”. The appellants submit that they have “provided sufficient proof to the serious flaws in handing down her dismissals when clearly lies and misinformation were easily recognised as is the case now” in regard to the Adjudicators decision. The appellants also suggest that NCAT should have in place a competency test prior to making a compulsory appointment of a strata manager. Amongst other things the appellants, also submit that the purpose of NCAT is to apply due diligence and adjudicate only when all facts are supported and not hearsay evidence.

151 It is timely to comment on the purpose of NCAT, the issue having been raised by the appellants. The Tribunal was established by the *Civil and Administrative Act 2013*. The objects of the Act are set out in s 3 as follows:

The objects of this Act are:

- (a) to establish an independent Civil and Administrative Tribunal of New South Wales to provide a single point of access for most tribunal services in the State, and
- (b) to enable the Tribunal:
 - (i) to make decisions as the primary decision-maker in relation to certain matters, and
 - (ii) to review decisions made by certain persons and bodies, and
 - (iii) to determine appeals against decisions made by certain persons and bodies, and
 - (iv) to exercise such other functions as are conferred or imposed on it, and
- (c) to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and
- (d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and

- (e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and
- (f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and
- (g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.

152 NCAT fulfils its legislative obligations by abiding by the guiding principle set out in s 36:

(1) The **guiding principle** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The Tribunal must seek to give effect to the guiding principle when it:

- (a) exercises any power given to it by this Act or the procedural rules, or
- (b) interprets any provision of this Act or the procedural rules.

(3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:

- (a) a party to proceedings in the Tribunal,
- (b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

(5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

153 As can be seen the objects of the Tribunal and the guiding principle are clearly set out in the Act. In regard to the appellants submission that the Adjudicator erred in not taking into account the "purpose of NCAT" the appellants have provided no evidence in support of such a bold statement. The Tribunal is not satisfied that the statement by the appellants has any support either in fact or in law.

154 The appellants are disappointed with the determination of the Adjudicator. As is their right they bring this appeal. The evidence adduced and submissions by the appellants are not sufficient for the Tribunal to overrule the decision of the Adjudicator.

155 Of particular concern to the Tribunal is that the appellants have brought the application for adjudication and this appeal when they have not paid all contributions levied and payable in relation to their lots. The amount unpaid on the evidence before the Tribunal is considerable.

156 The appellants disagree with the cause of the expenses, the amount and how they are levied. Nevertheless, it is an expense that has arisen. There is inevitability in relation to levies with strata title ownership. It is the levies that must be paid in order to comply with statutory obligations. It is a fundamental obligation and consequence of property ownership that there are expenses that must be paid in order to comply with the law.

157 Section 163(4)(d) permits the Tribunal to take into account in considering dismissing an application if levies have not been paid. The Tribunal is satisfied that the appellants

have not paid their levies over a lengthy period of time. It is not an isolated refusal to pay. On this ground alone the Tribunal is satisfied that it can exercise its discretion in dismissing the application.

158 The Tribunal has considered the merits of each of the appellants' applications for order and in respect of each application for order; the Tribunal has given its reasons for dismissing the applications. In addition, the overriding reason for dismissing the application is the appellants not having paid all contributions levied and payable.

159 In accordance with s 181 (4) of the SSMA the Tribunal affirms the order of the Adjudicator.

P Boyce

Senior Member

Civil and Administrative Tribunal of New South Wales

18 August 2015

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

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Decision last updated: 06 October 2015