Civil and Administrative Tribunal
New South Wales

Case Name:	Warren v The Owners – Strata Plan No. 61618
Medium Neutral Citation:	
Hearing Date(s):	30 August 2019
Date of Orders:	26 November 2019
Date of Decision:	26 November 2019
Jurisdiction:	Consumer and Commercial Division
Before:	L Wilson, Senior Member
Decision:	Pursuant to section 24 of the Strata Schemes Management Act 2015 the Tribunal makes an order invalidating all the resolutions passed at the annual general meeting of the Owners Corporation SP 61618 held on 18 April 2019 and the election of the Strata Committee which occurred at that meeting.
Catchwords:	LAND LAW – Strata title - Owners Corporation – Meetings of owners corporation – Notice period – Proxy forms
Legislation Cited:	Interpretation Act 1987 Strata Schemes Management Act 1996 (repealed) Strata Schemes Management Act 2015 Strata Schemes Management Regulation 2016
Cases Cited:	The Owners - Strata Plan No 62022 v Sahade [2013] NSWSC 2002 The Owners Strata Plan No 57164 v Yau [2017] NSWCA 341 Sher Global Enterprises Pty Ltd v Owners – Strata Plan 31758 [2018] NSWSC 1057
Texts Cited:	
Category:	Principal judgment
Parties:	Annabelle Romaine Warren (applicant) The Owners – Strata Plan No. 61618 (respondent)

Representation:	Counsel: J Williams (applicant) J Knackstredt (respondent) Solicitors: Speirs Ryan (applicant) Swaab (respondent)
File Number(s):	SC19/20132
Publication Restriction:	Nil

REASONS FOR DECISION

1 This is an application lodged on 30 April 2019 by a lot owner in a strata scheme in Woolloomooloo. The applicant seeks an order that all resolutions passed at the Annual General Meeting (AGM) of 18 April 2019 be set aside, pursuant to s.24 or s.232 of the *Strata Schemes Management Act 2015* (SSMA), on the basis that the notice requirements were not met.

2 If the Tribunal is not minded to make this order, the applicant seeks, in the alternative, an order invalidating the resolutions under Motion 13, on the basis that the provisions of the SSMA or the regulations have not been complied with in relation to the meeting, in regards to the use of proxy forms. This order is also sought pursuant to s.24 or s.232 of the SSMA.

Evidence

3 No witnesses gave oral evidence during the hearing. Counsel made submissions orally, which spoke to their written submissions. The Tribunal has had regard to the parties' submissions and the evidence tendered in the proceedings.

4 The applicant tendered the following documents:

(1) A1: folder of evidence filed on 18 June 2019 containing a chronology, points of claim and submissions, eight attachments and a witness statement of the applicant dated 17 June 2019.

(2) A2: folder of evidence filed on 19 August 2019 containing further submissions and four attachments including a further statement of the applicant dated 16 August 2019.

(3) A3: series of emails sent from lot owners to their strata manager (McCormacks) in early April 2019 about the AGM held on 18 April 2019.

5 The respondent tendered the following documents:

(1) R1: folder of evidence filed on 5 August 2019 containing submissions and a letter from Bannermans Lawyers and a spreadsheet of the 212 lot owners.

(2) R2: bundle of proxies received by owners corporation before the April 2019 AGM.

(3) R3: the Strata Management Statement for the strata plan.

(4) R4: draft minutes of the April 2019 AGM.

Facts

6 Strata Plan No 61618 comprises the residential part of a building in Woolloomooloo. There are 212 lots of differing unit entitlements in the scheme: R1, annexure 2. The applicant owns lot 146.

7 On 2 April 2019 the owners corporation gave notice that the AGM would be held at 6pm on 18 April 2019: A1, tab 5. Notice (with the agenda) was posted or emailed as per the strata roll: A1, tab 4 and s.263(3) SSMA.

8 Prior to the AGM several lot owners sent emails to the strata manager, complaining that the meeting would be the night before the Easter long weekend and asking that a new date be allocated: A3.

9 The applicant deposed that it "was not possible to organise an alternative quotation for Strata Manager prior to the AGM as no details of scope or tenders were made available to owners prior to, or even with, the notice of Annual General Meeting": para 18 of the 18 June 2019 affidavit in A1. Further she deposed that, given the short notice period, "[n]o owners motions were possible" and there was "very little time to organise proxies": paras 14 and 15 of the 18 June 2019 affidavit in A1.

10 Approximately 90 lot owners gave proxies to other lot owners to exercise their votes on their behalf: A1, tab 8 and R2, and para 11 of the 18 June 2019 affidavit in A1. Most of the proxies were for a 12 month period but some were for the AGM only (the box next to "1 meeting" was ticked). On the Proxy Appointment Form used by the owners in this strata scheme (under letterhead McCormacks Strata Management) there is a heading "Right of proxy to vote" with 4 items following. The first three items are (emphasis in the original):

> *1. This form authorises the proxy to vote on my/our behalf on all matters.
> OR
> *2. This form authorises the proxy to vote on my/our behalf on the following matters only: *[Specify the matters and any limitations on the matter in which you want the proxy to vote.]*
>
> * *Delete paragraph 1 or 2, whichever does not apply*.
>
> * 3. If a vote is taken on whether (the strata managing agent) should be appointed or remain in office or whether another managing agent is to be appointed, I/we want the proxy to vote as follows:
>
> * *Delete paragraph 3 if proxy is not authorized to vote on this matter. For examples, read note 1 below/ over page.*
>
> *4 I understand that, if the proxy already holds more than the permitted number of proxies, the proxy will not be permitted to vote on my/our behalf on any matters.
>
> Signature of owner/s

11 A number of lot owners had completed part 3 on the Proxy Appointment Form by directing the proxy not to vote for McCormacks: A1, see for example pages 206, 207, 208, 211, 218, 223, 249, 240. Many of the Proxy Appointment Forms were blank at part 3; see also the Schedule of Proxy Votes which is an aide memoire agreed to be accurate by the applicant.

12 The AGM was held at 6pm on 18 April 2019. The draft minutes of this meeting show the number of lot owners who attended in person (only 26), the number of owners present by proxy and by company nominee: R4. The applicant attended the meeting.

13 Motion 13 at the AGM was resolved. The draft minutes for motion 13 are as follows (emphasis in the original):

13. Appointment of Strata Management Agent

A. TERMINATION OF STRATA MANAGING AGENT

a) **Resolved** that the Owners Strata Plan No. 61618 terminate the services of Julmic Pty Ltd as managing agent effective from 30 April 2019 and that the Owners Corporation revokes all of the functions:
i. conferred by it to Julmic Pty Ltd under contract and;
ii. of its chairperson, secretary and treasurer;
effective from the date of termination.

B. TERMINATION OF STRATA MANAGING AGENT

a) **Resolved** that pursuant to sections 49 and 50 of the Strata Schemes Management Act 2015, McCormacks NSW Pty Ltd trading as McCormacks Strata Management (herein called the Agent) be appointed as managing agent of The Owners – Strata Plan No. 61618 from 1 May 2019, for a term of three (3) years, on the terms contained in the Agency Agreement tabled at the meeting.*

b) **Resolved** that The Owners – Strata Plan No. 61618 delegate to the Agent all of the functions of:
i. the Owners Corporation (other than those listed in section 52(2) of the Act); and
ii. its Chairperson, Treasurer, Secretary, and Strata Committee necessary to enable the Agent to carry out the 'agreed services' and the 'additional services' as defined in and subject to the conditions and limitations in the Agency Agreement.

c) **Resolved** that, pursuant to section 273 of the Strata Schemes Management Act 2015, the common seal of the Owners Corporation be affixed to the agency agreement and signed by two person nominated by the Owners Corporation (being owners of lots or members of the Strata Committee) which incorporates instruments appointing the Agent and delegating all the powers, authorities, duties and functions referred to therein.

d) That the Owners Strata Plan 61618 appoint McCormacks NSW Pty Ltd trading as McCormacks Strata Management as strata managing agent for the Building Management Committee (BMC) DP1007565 in accordance with the Strata Management Statement for a term of three years

Poll vote requested by Annabelle Warren
Voting for: 4,057
Voting against:2,467
Abstaining: 40

14 The other resolutions which had polls requested and included in the draft minutes were Motion 1 (minutes from 2018 AGM) and there was a poll for the proposition to vote on Motion 15 first (being the election of the strata committee): R4.

15 Of the approximately 90 proxy forms counted at the AGM, approximately 60 of those had not filled out option 3 on the form, which was about voting for the strata managing agent: R2, affidavit of applicant para 11 in A1, aide memoire agreed by the parties. Those 60 odd proxy forms where option 3 was blank were counted in favour of electing McCormacks as the strata managing agent: para 11 of affidavit of applicant in A1. Paragraph 11 actually stated that the 60 proxy forms voted in favour of McCormacks had been crossed out, this is not correct. It should be read as the 60 odd proxy forms where nothing was written in the part 3 section, as per the aide memoire and the submissions at the hearing.

Issues

16 Did the owners corporation comply with the notice requirements for the AGM set out in Sch. 1, s.7 of the SSMA? If not, does that noncompliance invalidate the AGM in its entirety?

17 Were proxy forms which made no election as to the appointment of a strata manager in the part for option "3" valid? If not, what implications, if any, arise from this finding?

Legislative framework

18 Schedule 1 to the SSMA applies to annual general meetings and other general meetings of an owners corporation for a strata scheme: Sch 1, cl.1.

19 Clause 7 of Sch 1 is as follows (emphasis added):

> **Notice of general meetings other than first AGM**
> (1) This clause applies to general meetings other than the first annual general meeting of an owners corporation.
> (2) Written notice of a meeting *must, at least 7 days* before the meeting, be given to each owner.
> (3) Notice of a meeting must also be given, at least 7 days before the meeting, to each first mortgagee or covenant chargee on the strata roll if an item on the agenda is one in which the mortgagee or covenant chargee may cast a priority vote.
> Note. A priority vote may be cast in the circumstances set out in clause 24.

(4) Nothing in this Part requires an owner to give notice of a meeting to himself or herself.

20 Section 36 of the Interpretation Act 1987 is as follows:

Reckoning of time

(1) If in any Act or instrument a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall be reckoned exclusive of that day or of the day of that act or event.
(2) If the last day of a period of time prescribed or allowed by an Act or instrument for the doing of any thing falls:
(a) on a Saturday or Sunday, or
(b) on a day that is a public holiday or bank holiday in the place in which the thing is to be or may be done,
the thing may be done on the first day following that is not a Saturday or Sunday, or a public holiday or bank holiday in that place, as the case may be.
(3) If in any Act or instrument a period of time is prescribed or allowed for the doing of any thing and a power is conferred on any person or body to extend the period of time:
(a) that power may be exercised, and
(b) if the exercise of that power depends on the making of an application for an extension of the period of time—such an application may be made,
after the period of time has expired.

21 Section 76 of the Interpretation Act is as follows:

Service by post

(1) If an Act or instrument authorises or requires any document to be served by post (whether the word “serve”, “give” or “send” or any other word is used), service of the document:
(a) may be effected by properly addressing, prepaying 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 seventh 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.

22 Clause 24 of Sch 1 is, relevantly, as follows (emphasis added):

Appointment of proxies

(1) **Duly appointed proxy** A person is a ***duly appointed proxy*** for the purposes of this Part if the person is appointed as a proxy by an instrument in the form prescribed by the regulations and the form is signed by the person appointing the proxy or executed in any other manner permitted by the regulations.
(2) **Form of proxy** The prescribed form is to make provision for the giving of instructions on—
(a) whether the person appointing the proxy intends the proxy to be able to vote on all matters and, if not, the matters on which the proxy will be able to vote, and
(b) *how the person appointing the proxy wants the proxy's vote to be exercised on a motion for the appointment or continuation in office of a strata managing agent*.
…

23 Section 24 of the SSMA is as follows (emphasis added):

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.

24 Section of the SSMA is as follows:

242 Dismissal of application on certain grounds
The Tribunal may dismiss an application for an order if—

(a) the ground for the application is the absence of a quorum at a meeting or a defect, irregularity or deficiency of notice or time, and
(b) the Tribunal believes no substantial injustice has resulted.

Resolution of the issues

Did the owners corporation comply with the notice requirements in cl.7?

25 No. It is in fact conceded that the notice was insufficient by 1 day: OC's subs para 3. However the OC also argued that s.76 had been displaced by evidence. The Tribunal does not accept that submission.

26 The lot owners who receive their notices by email would have received their notices on 2 April 2018, the day they were emailed. However the lot owners who receive their notices by post are taken to have received them "on the seventh working day after the letter was posted": s.76(1)(b) Interpretation Act. Furthermore the day they were posted is not included in the reckoning of time: s.36(1) Interpretation Act. Therefore the posted notices were taken to have been received on 11 April 2019 "unless evidence sufficient to raise doubt is adduced to the contrary": s.76(1)(b) Interpretation Act.

27 The owners corporation pointed to the fact that 25 of the 42 lot owners who were given notice by post attended the meeting (either in person or by proxy): para 49 of the Aug subs and para 4 of the summary subs. This does not prove the 25 lot owners who attended the meeting received their notices before the deemed date of 11 April 2019; it merely shows they received their notices in time to either turn up at the meeting or appoint a proxy. A person could receive notice on the day of the meeting and still attend it later that evening. Some proxy forms were for 12 months covering the April AGM regardless of notice. There is no evidence sufficient to raise doubt that the lot owners who receive their notices by mail, received notice of the AGM prior to 11 April 2019. What was needed to displace the presumption was evidence; not submissions. While the applicant bears the onus of proof to satisfy the Tribunal on the balance of probabilities that it should make the orders sought, if the owners corporation wanted to raise doubt about the seven day period it had to adduce sufficient evidence to do so. It has not.

28 The notice requirements in cl.7 Sch. 1 were not met.

Does that noncompliance invalidate the AGM in its entirety?

29 Clause 7 of Sch 1 applied to the AGM in April 2019. The owners corporation did not comply with cl 7(2).

30 The applicant correctly submitted that the Tribunal must follow decisions of the Supreme Court of NSW on "the very point before the Tribunal" and set out the following extract from *Federal Commissioner of Taxation v Salenger* (1988) 81 ALR 25 at 34:

> I should add, with the greatest of respect to the Tribunal, that it is difficult to see how it is open to a Senior Member to form the view that a decision of the Supreme Court of a State which is on the very point before the Tribunal is incorrect and not to be followed. In the special case of conflicting decisions of superior courts, the Tribunal may have to decide which to follow, but that occasion does not arise here. Ordinarily, Senior Members of the Tribunal should apply the law as stated by the judges of this Court or by judges of the Supreme Courts of the States.

31 In particular the applicant submitted that the Tribunal must follow *The Owners - Strata Plan No 62022 v Sahade* [2013] NSWSC 2002 which she submitted was "directly on point". In *Sahade*, Rothman J was called on to determine whether sufficient notice of a general meeting was provided in that strata plan, according to the now repealed *Strata Schemes Management Act 1996* (the former Act). In so do his Honour held, at [15] to [17]:

> 15 This second aspect requires the recitation of some preliminary matters. The provisions of clause 32(1) of Schedule 2 of the Act is in the following terms:
>
> > "32 Persons to whom notice of general meeting must be given
> > (1) Notice of a general meeting of an owners corporation must, at least 7 days before the meeting, be served on each owner."
>
> 16 In the foregoing, it is relevant to note the use of the words "must" and "at least". The manifest purpose of the provision, which applies in the circumstances in dispute here, is to compel an owners' corporation (or those managing it) to give sufficient notice to those with the requisite interest to attend and participate in such general meetings.
>
> 17 The aforesaid purpose accords with the purpose adopted by the common law in requiring strict adherence to notice provisions for general meetings. In

so doing, it distinguished between general meetings and regularly held executive meetings…

18 Further the aforesaid purpose and policy is not qualified by a mere exercise in arithmetic. The fact that, in these circumstances, a vote at the meeting by the defendant, if she were to have attended, would not have affected the adoption of the resolution does not affect the validity, or otherwise, of the resolution. The principles underpinning the common law approach include the concept that a person participating in the meeting may be able to persuade others.

19 Whether the requirement for notice in the Schedule requires strict adherence is ultimately a matter of statutory construction, the modern principles for which were clarified in Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 to make clear that a grammatical or literal meaning may not necessarily be the meaning the legislature is taken to have intended. Rather, the words must be read in context and the provisions of a statute (or other instrument) construed bearing in mind that its provisions were intended to effect harmonious goals.

32 His Honour then sets out ss.153 and 154 of the former Act, which are analogous to ss.24 and 25 of the SSMA. His Honour then went on to find:

22 Conduct in breach of a prescribed norm of conduct or process does not necessarily render the result of the conduct void or a nullity: *Project Blue Sky*; *Victoria v Sutton* [1998] HCA 56; (1998) 195 CLR 291 at [36]-[38]. The effect will be determined by a proper construction of the Act.
23 It is convenient, at this juncture, to discuss the operation of ss 153 and 154 of the Act.

27 The terms of s 153 of the Act apply to irregularities going significantly beyond the requirements of the calling of the meeting. It would apply to a breach of standing orders or the rules of the conduct of the meeting itself: see Clauses 7-20 of Schedule 2.

28 Moreover, it is difficult, if not impossible, to imagine a circumstance where a person was provided no or inadequate notice of the meeting, yet it could be said that the failure "did not adversely affect" that person, except in circumstances where the person attended the meeting notwithstanding and waived the notice provision. I note, at this juncture, that paragraphs (a) and (b) of s 153(2) of the Act must each be satisfied in order for an adjudicator to refuse to make an order invalidating the resolution or the election. Thus, the legislative presumption, with a limited exception, is that non-compliance with any provisions of the Act dealing with the conduct of a meeting will result in an order invalidating any resolution or election held.

29 In my view the operation of neither s 153 or s 154 of the Act qualifies the ordinary and grammatical meaning of Clause 32 of the Schedule. Nor does either disclose goals or purposes inconsistent with the ordinary and grammatical construction of Clause 32. Moreover, if the requirement of the Schedule were not, in the intention of the legislature, to be construed strictly, there would be no need for Clause 27(2) of the Schedule, dealing with ordinary general meetings.

> 30 In my view, Clause 32 requires strict compliance as is evidenced by the use of the word "must" which is consistent with the use of the words "at least".
> …
> 32 Further, at least 7 days' notice must be provided. Pursuant to s 36 of the *Interpretation Act*, the day that the notice was received or effected is excluded from the calculation and, therefore, the first day of the notice period is 24 January 2012 and the first day upon which the AGM could be held (and comply with Clause 32) was 31 January 2012. The meeting was held one day too early to comply with the Act.

33 In the Local Court, the Magistrate had dismissed the owners corporations' claim that the lot owner (Sahade) should pay a levy which was resolved to be paid at a general meeting. The Magistrate had found that the notice requirements had not been met and on that basis dismissed the owners corporations' claim. The owners corporation appealed to the Supreme Court. The Supreme Court upheld the Magistrate's finding that because the owners corporation had not given 7 days' notice of the meeting, none of the resolutions passed at the AGM were valid including that the lot owner (Sahade) pay a certain amount of contributions (including a special levy voted on and passed at the AGM): see [7], [32], especially [35] and [38]. The Court of Appeal has since correctly set out the law which is that meetings and resolutions passed therein are valid until such time as a Tribunal Member (now) or an adjudicator (under the 1996 Act) makes an order invalidating any resolution under s.24 (now) or under s.153 (under the 1996 Act).

34 The aforementioned Court of Appeal decision is that of *The Owners Strata Plan No 57164 v Yau* [2017] NSWCA 341. The Tribunal agrees with what the President of the Court of Appeal (as she then was) said in paragraphs 111 and 116, that non-compliance with a statutory provision relating to the giving of notice of a meeting does not result in the meeting being invalid. (In *Yau* it was an executive committee meeting but the principle still applies.) The meeting, or motions passed therein, only become invalid upon an order of the Tribunal (now) or an order of an adjudicator (under the 1996 Act as in *Yau*) making such an order to invalidate the meeting or motions.

35 As can be seen, the Court of Appeal decision of *Yau* means that the finding of the Magistrate at first instance, and the Supreme Court in upholding the Magistrate's decision, is wrong. However the findings of Justice Rothman in *Sahade* about the interpretation of s.153(3) considerations (now s.24(3)) and the meaning of cl. 32 (now cl.7) are relevant and applicable to these proceedings and have been adopted accordingly. There is nothing in *Yau* that contradicts Justice Rothman's interpretation of cl.32 or s.153(3) such that it should not be followed by the Tribunal in interpreting cl. 7 or s.24(3).

36 The decision of a single Associate Justice of the Supreme Court does not take the matter further. The owners corporation referred the Tribunal to *Sher Global Enterprises Pty Ltd v Owners – Strata Plan 31758* [2018] NSWSC 1057 and particularly to paragraphs 81 to 84 inclusive. Associate Justice Harrison referred to a Court of Appeal and Supreme Court decision and said "[t]hese decisions provide authority for the proposition that a failure to comply with a condition to exercise statutory power under the *Strata Schemes Management Act* will not necessarily render the act invalid". This is a precise statement of the law. The remainder of the decision in *Sher* is not on point. The owners corporation submitted that her Honour effectively concluded at [84] that "'must' in the Act was not mandatory": sound recording 2 hrs, 24 mins. Paragraph 84 says no such thing. Her Honour said "the use of the word "must" in the language of these clauses [not including cl.32 which is the same as cl.7] is important but not determinative". The owners corporation then went on to read [97] in *Sher* which bears setting out in these reasons:

> The Magistrate was entitled to arrive at the conclusion he did in relation to clauses 32, 33, 34, 34A and 35 for the 2014 AGM. In particular, his Honour was correct when he stated at [85] that the orderly management of strata schemes would not be assisted in anyway by an interpretation of these clauses as invaliding an AGM for every breach of these clauses. There does not appear to be a discernible intention that all acts done in violation of these clauses should be invalid…

37 The Tribunal agrees with Harrison AsJ. The mere finding of a breach of cl.7 does not render the meeting invalid or resolutions passed therein invalid. Only an order of the Tribunal pursuant to s.24 can do that, and the Tribunal will refuse to make such an order if both circumstances in s.24(3) exist.

38 The owners corporation did not comply with the notice requirements and therefore the Tribunal may make an order invalidating any resolution of, or election held by, the persons present at the April AGM.

Reasons to decline to invalidate the resolutions made at the AGM

39 Whilst s.24(1) directs that the Tribunal *may* make an order invalidating any resolution, it may refuse to do so *only if* it finds the circumstances in subsections 24(3)(a) *and* (b) exist. That is, the Tribunal may invalidate any resolution, but it can only refuse to do so (after it finds non-compliance with the SSMA or the regulations) if the circumstances in subsection 24(3) are found.

40 The owners corporation's submissions that the notice requirements were not met by only 6 hours, that these 6 hours made no tangible difference, and the 17 lot owners who receive postal notices who did not attend would not have attended even if the notice requirements had been met, are rejected. Where the SSMA provides that the owners corporation should meet a requirement it is to meet the requirement, not submit that meeting the requirement makes no difference. Further the applicant is entitled to bring an action against the owners corporation on the basis that the owners corporation has not complied with its statutory obligations; the Tribunal does not accept the submission that by the applicant attending the AGM she "forfeited the right to complaint": para 56 Aug subs. The owners corporation should remind itself that it consists of all owners in the scheme including the applicant.

41 As Rothman J found in *Sahade*, at [28], "it is difficult, if not impossible, to imagine a circumstance where a person was provided no or inadequate notice of the meeting, yet it could be said that the failure "did not adversely affect" that person, except in circumstances where the person attended the meeting notwithstanding and waived the notice provision". This did not apply to the applicant who attended the AGM. However 17 persons who receive notice by post did not attend. The Tribunal does not accept the submission that they would not have attended even if there had been compliance with the notice

period. Subsection 24(3)(a) refers to “any person”. There is no evidence that the failure to comply with cl.7 adversely affected any person, but given Rothman J’s findings above, the Tribunal accepts that those 17 lot owners who did not waive the notice provision could be found to have been adversely affected. Certainly the Tribunal is not satisfied that the failure to comply with cl.7 did not adversely affect any person; there is simply no evidence about this.

42 Again, in its summary submissions, the owners corporations submitted that the applicant has not demonstrated that she or anyone else has been adversely affected by the meeting taking place in the absence of the requisite notice: para 6(c). What s.24(3)(a) requires the Tribunal to consider is whether the owners corporations’ failure did not adversely affect any person. The starting point is that giving inadequate notice does adversely affect those who are entitled to receive adequate notice. The applicant does not have to prove persons were adversely affected (although if she did it would assist her case); the owners corporation was able to adduce evidence that its failure did not adversely affect any person. It has not.

43 Further, the Tribunal takes into account A3. Here ten lot owners sent emails to the strata manager complaining about the inconvenient date for the AGM and in particular, explaining that the timing of the AGM would make it extremely difficult to attend as they had already made plans to be elsewhere for Easter. For example co- owner of lot 130 (A3, page 3) who, while receiving the notice by email according to Annexure B in R1, wrote “this timing will make it impossible [to get a quorum] and is unfair to those residents who do want to attend”. Annexure B in R1 shows he did not attend, and that was with 2 weeks notice (via email). Likewise the owner of lot 95 whose email is A3, page 2, and gave his proxy to the applicant. Likewise owner of lot 200 who replied to the notice email including that the AGM date “is an unusual date for an AGM and the minimum required notice. Please pass on this correspondence to the Committee and request an alternative date with as much notice as possible”: A3, page 4. This lot owner could not attend in person and gave his proxy to the applicant, and he received 14 days’ notice by email. On page 7 of A3 the

owner of lot 55 complained to her strata manager that “I request rescheduling on behalf of owners who would like to participate and will be discriminated and excluded unless the date is moved”. She received her notice by email but also could not attend and nominated a proxy.

44 A3 contains complaints from owners who had notice of at least 7 days. The Tribunal can infer those who received less than 7 days notice were equally, if not more, unhappy by the lack of notice, and these people were clearly adversely affected by the lack of notice. However that is not the consideration the Tribunal is bound to consider; it is whether the failure did not adversely affect any person and the Tribunal does not so find.

45 The owners corporation also argued that compliance with the notice provisions would not have resulted in a failure to pass a resolution or affect the result of the election: s.24(3)(b) SSMA. The outline of submissions by the respondent referred to their earlier submissions at paragraph 57: OC’s subs para 6. Paragraph 57 is as follows:

> The 17 lots receiving notice by email [sic – this must be a typographical error and should read mail – see submissions 48 - 51] that did not attend the meeting or provide a proxy represent 660/10,000 units of entitlement. Even if all these lots were in attendance and voted against the motions, none of the voting outcomes would have changed.

46 The owners corporation did not take the Tribunal through evidence that would support this submission. It is unknown how the owners corporation calculated that the absent 17 lot owners who receive notice by mail have 660 unit entitlements between them. There is a spreadsheet behind tab Annexure B in R1 which has highlighted 18 lot owners who did not attend in dark green. It is unknown who created this spreadsheet. Attachment 4 in A1 is a copy of the strata roll: page 23ff.

47 Comparing the lots highlighted in green in Annexure B of R1, the Tribunal calculated 745 unit entitlements from 18 lots which are noted as “POSTED NOTICE, NO ATTENDANCE”. If these 745 unit entitlements were all exercised by voting against Motion 13 the votes against would have been

3,212 and the votes for remained 4,057. On this basis the failure to comply would not have affected the result of the election.

48 If the 18 lot owners had attended and voted against motion 1 (minutes of 2018 AGM confirmation) and against the proposed order for the meeting (not a motion) their combined 745 votes could not have resulted in a failure to pass the resolution and proposal referred to herein: see polls in R4. As to the remaining motions there were no polls in the draft minutes so the Tribunal cannot make a determination as to whether compliance with the notice period would not have resulted in a failure to pass them.

49 However, the Tribunal may refuse to make the order invalidating any resolution only if both (a) and (b) are found. The Tribunal does not consider that the failure to comply did not adversely affect any person, therefore it becomes irrelevant that this would not have resulted in the failure to pass the resolutions or affected the result of elections. In these circumstances the Tribunal may not refuse to make the order under s.24(1). On this basis the Tribunal makes the order sought under s.24 SSMA.

50 The order was sought in the alternative pursuant to s.232 SSMA. That section does not prescribe considerations to take into account when exercising discretion under s.232. Only one of the factors pointed to by the respondent are relevant: OC subs para 6. That is that invalidating the whole meeting would have no discernible benefit and would come at great inconvenience and cost and would potentially invalidate acts undertaken by the owners corporation affecting third parties. The other circumstances the respondent points to are not considerations which the Tribunal accepts should be the basis of a decision to refuse to make the order.

51 The Tribunal agrees with the respondent that the specific consideration in s.24(3)(b), should be considered when deciding to exercise the Tribunal's discretion in s.232 as well, given the primary section to make such an order is s.24. Not only should the Tribunal have regard to the circumstances in s.24(3) before making an order to invalidate the motions passed at the AGM, the

Tribunal should not make such an order pursuant to s.232 where s.24 specially empowers the Tribunal to make the order sought. The Tribunal should not use a general power (in s.232) when a specific power (s.24) exists. This reasoning is also why the Tribunal would not dismiss the application under s.242 as there are specific requirements to meet before the Tribunal can dismiss under s.24 and these should not be obviated by dismissing under s.242. Neither party raised s.242 in any event.

52 The owners corporation submitted that "[i]nvalidating the meeting as a whole would not resolve the dispute about the validity of the proxy forms… giving rise to the likelihood of a further application if another general meeting was held and the same proxy forms relied upon": OC's subs para 6(e). For this reason the Tribunal makes findings about the alternate claim, even though it is not necessary given the finding about the meeting as a whole.

Were proxy forms which made no election as to the appointment of a strata manager in the box for option "3" valid?

53 The provisions of the Act or regulations that the applicant claims have not been complied with in this regard is cl.26 of Sch. 1. The applicant claims that there are 60 proxy forms which did not give instructions on how the person appointing the proxy wanted the proxy's vote to be exercised on a motion for the appointment or continuation of a strata managing agent.

54 For the purposes of clause 26 (1) of Schedule 1 to the Act, an instrument appointing a proxy is to be in or to the effect of Form 1 in Schedule 1: Reg 13 SSMR.

55 The proxy form used by McCormacks is an instrument in the form prescribed by the regulations: cl.26(1) of Sch. 1 SSMA. This is an agreed fact between the parties: sound recording 1 hour and 48 minutes.

56 Why the proxy form must be filled out in accordance with subcl.26(2) in particular subcl.26(2)(b) was submitted by the applicant to be (1 hr 50 mins to 55 mins):

(1) The issue of appointing a strata managing agent is so important it is necessary to separately indicate how the principal wants the proxy to vote on this matter and it is not part of “all matters” referred to in subcl.26(2)(a). The use of the word “and” between the two subclauses (a) and (b) is conjunctive. Consistent with *Thoo* at [168].

(2) There is an “or” between options 1 and 2 but no “or” between 2 and 3, nor is there an “or” above option 4 as the form must be signed (4 is the part to sign, and the form must be signed). There is no “or” between 2 and 3 because the principal must fill out 3 regardless of which election they made between 1 and 2.

57 Subclause 26(2) of Sch. 1 of the SSMA is titled “Form of proxy” and mandates how the “prescribed form” should give instructions. The Member put to the applicant that 26(2) is not a subclause that describes a requirement for the principal to comply with when appointing a proxy; it describes requirements for the prescribed form to meet: 1 hr, 58 mins. The applicant submitted that for the form to be valid it must not only be a prescribed form (which in this case it was) but also filled in validly, and that is in accordance with the instructions described in subcl.26(2) otherwise the proxy is not duly appointed, and cited *Thoo* at [168], which is, relevantly:

> In my view a person is not "a duly appointed proxy" within clause 11(1), being a person "appointed as a proxy by an instrument in the form prescribed by the regulations", unless the form of proxy is not only executed by the appointor, as Form 3 provides, but is completed in relation to the clause 11 (2) instructions embedded within the form. A form of proxy instrument incomplete as to a signature is no more "in the form prescribed by the regulations" than an instrument where the instructions to the proxy are not verifiable from the instrument itself.

58 The Tribunal agrees that this is the effect of *Thoo* at [168]. The Tribunal is bound by the decision of *Thoo*. It is a superior Court deciding an issue in relation to the same legislation (it was clause 11 of Sch. 2 in the 1996 Act and is now cl. 26 in Sch 1 of the SSMA, but the wording is identical). Paragraph 168 of Justice Slattery’s decision does not distinguish between (a) and (b) in subclause 26 (cl.11 in the Act applied in *Thoo*), the finding in paragraph 168 is

a statement of the law in relation to the instructions about matters in both (a) and (b).

59 To be a duly appointed proxy the form must be filled out in accordance with the instructions in cl.26(2), which are choosing an option 1 or 2 (there is no issue about this presently) *and* nominating how the principal wants the proxy to vote on the motion appointing a strata managing agent. Clearly this is not part of the "all matters" referred to in cl.26(2)(a) as if this were the case cl.26(2)(b) would have no role to play. Further the subclause using "and" in the conjunctive sense and the prescribed form does not have "or" between parts 2 and 3 as it does between 1 and 2. Nor is there an "or" between 3 and 4, and it is accepted by all that 4 must be filled in which is the signature bar.

60 The prescribed form may be criticised for being poorly set out, but it is the case that to be a duly appointed proxy, the form appointing the proxy must fill out one of the two options 1 and 2, fill out 3 and sign at 4. If these instructions are not completed, as required by cl.26(2) then the proxy is not duly appointed: cl.26.

If not, what implications, if any, arise from this finding

61 The proxy forms which left the option 3 part blank did not duly appoint a proxy and therefore could not be used as the basis for the voting by a proxy for a principal using such a form. This finding will lead to an order that the resolution appointing the strata managing agent is invalid unless the inclusion of the invalid proxy forms did not adversely affect any person or would not have affected the passing of the resolution.

62 There does not appear to be any evidence that the election of McCormacks did not adversely affect any person, or that it did, except the significant number of persons (including the applicant) who did not want McCormacks re-elected. How they are adversely affected is unknown, but they certainly did not want McCormacks as their strata managing agent.

63 Neither party compared the 60 odd proxy forms which left part 3 blank, as summarised in the aide memoire, to the strata roll (page 23ff, A1) and added up the unit entitlements to see if it would change the outcome of the poll. As the meeting has already been held invalid the Tribunal did not again undertake this accounting task but had the 60 forms changed the vote then the Tribunal could not have refused to make the order invalidating the resolution of Motion 13.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar