

Applicant LOT 158 -V- THE OWNERS – STRATA PLAN NO. 52948 AND ORS

NSW CIVIL & ADMINISTRATIVE TRIBUNAL FILE NO. SC 20/33352

1<sup>st</sup> of February 2021

### Requests to be considered by NCAT

1. The Applicant requests that Solicitor Adrian Mueller be struck out from the proceedings due to lack of evidence of his retainer, conflict of interest, repeated failures to comply with Tribunal directions and orders (five times since 2012), being listed as person-of-interest in a Police Event for fraud and Office of Legal Services Commissioner case for professional misconduct.

Instead of dealing with the CTTT/NCAT cases, Solicitor Adrian Mueller secretly attempted to initiate four alleged “defamation cases”, last time on 21 October 2020. His persistence to obstruct legal processes disqualify him from acting on behalf of few owners.

2. Solicitor Adrian Mueller, even in the short outline of his response sent in email on 25 January 2021, failed to comply with Section 71 of the Civil and Administrative Tribunal Act 2013 which states that a person must not in any proceedings or application provide any information, or make any statement, to NCAT knowing that the information or statement is false or misleading.

The Solicitor made such statements many times before and now tries to prevent NCAT to deal with them.

To make his defence more vulnerable, the document that he emailed on 25 January 2021 has the following hidden metadata, showing with reasonable level of confidence, that Solicitor Adrian Mueller deliberately kept the document undisclosed to the Applicant and NCAT until the deadline to submit it expired:

<b>Producer:</b>	Aspose.Words for .NET 18.4
<b>Creator:</b>	Microsoft Office Word
<b>Created:</b>	Mon 14 Dec 2020 00:55:00 AEDT
<b>Modified:</b>	Thu 24 Dec 2020 00:43:00 AEDT
<b>Format:</b>	PDF-1.5
<b>Number of Pages:</b>	4
<b>Optimized:</b>	No
<b>Security:</b>	No
<b>Paper Size:</b>	A4, Portrait (210 × 297 mm)
<b>Size:</b>	83.4 kB

He performed similar conduct in the previous instances, including his advice how to prevent the Applicant from submitting Motions at AGM 2017.

Schedule 4, Clause 10(2) of the NSW Civil & Administrative Tribunal Act 2013 provides the following:

- (a) If the party is causing the disadvantage is the applicant – order that the proceedings (or part of the proceedings) be dismissed or struck out, or

(b) If the party causing the disadvantage is not the applicant:

(i) determine the proceedings (or part of the proceedings) in favour of the applicant and make any appropriate orders, or

(ii) order that the party causing the disadvantage be struck out of the proceedings (or part of the proceedings).

The Applicant submits the case where the Council of the NSW Law Society is seeking a finding of unsatisfactory professional conduct and a caution against a solicitor for making a false statement:

<https://www.lawyersweekly.com.au/biglaw/30449-solicitor-who-made-false-statements-faces-caution-and-costs-order>

3. The Applicant is aware that any party to proceedings in the Tribunal can apply for the issue of a summons, which was denied two times in previous CTTT cases without explanations. For that reason, and to avoid costs and procedures which are complex and not easy for the Applicant, we rely on the fact that the Tribunal itself can direct a registrar to issue summonses.

The complexity of requesting summonses (must provide 4 copies of the summons form to each party, fees, filling in the forms), made it difficult for the Applicant to address.

The Tribunal is asked to have regard to the competing interests of the inconvenience and expense of compliance with the request to a summons recipient and the need for the party to the proceedings to have access to evidence to prove the case.

4. The Applicant strongly believes, based on fact that they were genuinely legal member of the committee in many previous years, had/has right to access all strata files, enforce Motions at AGMs be considered, organise EGMs, ensure tenders are conducted for all major contracts and multiple quotes obtained for major expenses, proper 10-Year Capital Works Fund planned, and all owners and tenants having equal rights in the complex, and prevent continuous bullying, stalking, harassment, and exposure to ridicule like it has happened to us.

For those reasons, the Applicant requests that NCAT makes all orders as listed in the Statutory Declaration.

5. The Applicant is confident that if all owners and tenants had had access to full information of affairs in the complex (which they did not because of the Respondent's repeated and deliberate actions), they would have replaced/removed the Respondents from managing SP52948 on their own, without need for legal cases. The Applicant tried to avoid legal costs, hence multiple Fair Trading NSW Mediations that have no expenses but the Respondent declined to attend.

## **Brief details for the Hearing in response to Solicitor Adrian Mueller dated 25 January 2021**

- 1) Even without the need to go through 700-odd pages of evidence that the Applicant provided in paper format (plus thousands of pages via emails, USB key, CD-ROM, and web site), the Respondent and Solicitor Adrian Mueller failed to refute the Applicant's Statutory Declaration in any form that is backed by evidence.

Not a single reference to evidence was offered by the Respondent.

It is irrelevant that the Solicitor Adrian Mueller appears to be overwhelmed by the Applicant's evidence because the files were not meant for him but for the Respondent who should have full knowledge of the affairs in the complex.

- 2) The Respondent and Solicitor Adrian Mueller were offered to dispute the Applicant's evidence and allow democratic processes to vote on Applicant's Motions at many general meetings, which the Respondent and Solicitor Adrian Mueller prevented without valid reasons:

<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/index.html#A7>

One of the efforts by the Applicant was to allow owners corporation to ratify past events with full disclosure of information. The ratification has a retrospective effect, and binds the principal from its date, and not only from the time of the ratification, for the ratification is equivalent to an original authority, according to the maxim, that omnis rati habitio mandate aequiparatur (ratification is equivalent to express command). As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it, he would not be bound.

Even the rushed and ill-prepared Extraordinary General Meeting on 15 January 2021 had the opportunity to comply with the strata laws and the Respondent chose to act contrary to them (notice of meeting not sent to Lot 158 in paper format, as requested since 2017), notice of the meeting not published on notice boards, agenda failed to include the Applicant's Motions that were not listed at AGM 2020, agenda failed to include Auditor's report that was done 11 days after the AGM 2020, agenda failed to include full details of SP52948 insurance, minutes of the meeting not published on notice boards, continuous fire safety non-compliance, second major event with blown sunroom 2x3 meter frame in last 9 years, which almost killed owners enjoying lunch in the BBQ area, disallowed four companies to compete for building management contract in spite of numerous failures of the current building manager and allowed contract worth close to \$350,000.00 per year to proceed without competition, still missing evidence of where around \$92,000.00 (GST incl) was spent on townhouses' improvements where no evidence of such work exists, lack of warranties for building painting, elevator upgrades, and much more).

- 3) The Respondent and Solicitor Adrian Mueller are fully aware of reasons why evidence goes back to 1999 because that is the time when levies were introduced for gas heating in amount of \$200.00 (plus GST from 1 July 2000), which a group of owners and few EC members failed to pay for 20 years, with many attempts to hide it from owners.

Solicitor Adrian Mueller is fully aware of the Applicant's allegations of unfinancial owners and the Applicant has provided evidence about it. Unpaid levies do not have expiration date.

- 4) The Respondent and Solicitor Adrian Mueller are fully aware that the Applicant has both sufficient and irrefutable evidence of serious misconduct and lack of standards offered by EC members in question, strata managers, and the building manager, so much so that:

Evidence satisfies "on the balance of probabilities" requirement for civil legal case,

Evidence satisfies "beyond reasonable doubt" requirement for criminal legal case.

SSMA 2015 S238 states the Tribunal may, even on its own motion make any of the following orders: (a) an order removing a person from a strata committee, (b) an order prohibiting a strata committee from determining a specified matter and requiring the matter to be determined by resolution of the owners corporation, (c) an order removing one or more of the officers of an owners corporation from office and from the strata committee. The Tribunal may order the removal from office of a person, the Tribunal may remove a person if it is satisfied that the person has (a) failed to comply with this Act or the regulations or the by-laws of the strata scheme, or (b) failed to exercise due care and diligence, or engaged in serious misconduct, while holding the office.

The Applicant does not seek all nine members of the committee to be removed but only six, those who persistently engaged in activities contrary to SSMA 2015 S238.

- 5) Solicitor Adrian Mueller provided false statements that "numerous documents and videos have not been served on the Owners Corporation which gives rise to the possibility that the Owners Corporation will be denied procedural fairness at the hearing".

Not only the Applicant provided five sets of evidence (paper copies, CD-ROM, USB key, emails, online web accounts) but also has proof that the Respondent never tried to use them.

- 6) The Respondent and Solicitor Adrian Mueller yet again used regurgitated statements of "extensive and voluminous evidence to review". They are known for making such statements to legal entities and law-enforcement agencies with pleas not to investigate. Examples from their requests to Police and Fair Trading NSW:

**<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/SP52948-Waratah-Strata-Management-urging-Police-not-to-investigate-while-refusing-access-to-files-with-evidence-of-fraud-that-Lot-owner-alleges-13Apr2018.pdf>**

**<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/SP52948-email-by-Waratah-Strata-Management-to-Fair-Trading-NSW-case-9761719-17May2019.pdf>**

- 7) The Applicant has irrefutable evidence that, being valid member of the committee who was disallowed to act as one due to other owners being elected whilst unfinancial, was prevented to act with duty of care at numerous general meetings:

**<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/index.html#ECMEMBER>**

- 8) The Respondent and Solicitor Adrian Mueller yet again used regurgitated statements of "orders being too vague to be capable of being made by the Tribunal, order that would prohibit the strata committee of the Owners Corporation from making any decision concerning all other major maintenance upgrades, the order to resolve disputes and settle complaints enforce compliance with the by-laws, act to prevent nuisance or hazards"...

The Applicant states that the orders are very simple and easy to implement.

In addition, Tribunal can, on its own, make a decision for Compulsory Strata Manager, which the Applicant did not officially request on purpose but provided NCAT with details of strata agency which is willing to help:

<https://www.vk2cot.id.au/NCAT-20-33352/16Oct2020/StrataExcellence-8Oct2020.pdf>

Strata Excellence is one of the strata companies which the Respondent disallowed to be considered for contract at AGM 2020.

The Applicant is giving chance to the Tribunal to make order for Compulsory Strata Manager based on, for example, two legal cases:

- Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45

In respect of s 237 (3) (a) of the SSMA 2015, the Appeal Panel of the Tribunal stated in *Bischoff v Sahade* [2015] NSWCATAP 135 ('Bischoff') at [22]:

Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

(1) Does not perform a required function, for example to properly maintain the common property;

(2) Exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;

(3) Fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and

(4) Raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners Corporation or the Lot owners as a whole.

- Strata-Plan-No-76317-v-Ho-2020-NSWCATAP-205-6-October-2020:

At [92], the Tribunal stated that it was satisfied for the reasons set out at [93] and [94] that an order is required to be made under s237(1) for the appointment of a strata managing agent to exercise the functions of the Owners Corporation. The Tribunal found that the management of the strata scheme was not functioning satisfactorily for the purpose of s237(3)(a) of the SSM Act.

At [93] the Tribunal held that the requirement in s 237(3)(c) has also been satisfied in that the Owners Corporation has failed to perform one or more of its duties.

At[94] the Tribunal found that the requirements of s237 were satisfied for the following reasons:

(1) Due notice of the AGM of 22 May 2019 was not provided to all lot owners.

(2) There was no quorum at the AGM of 22 May 2019.

(3) The strata manager (PSMG) failed to prepare a 10 year capital works plan in advance of the AGM or at all so that there is presently no capital works plan in place.

- (4) The strata manager failed to provide a copy of the proposed renewed strata management agency agreement in advance of the AGM so that lot owners could study and consider it before the AGM.
- (5) The strata manager incorrectly minuted the resolution of the AGM that there would be no increase in strata levies and stated in the minutes that the AGM had agreed that levies would be raised. That was not the case.
- (6) Lot owners whose levies were not paid up to date at the time of the AGM (and were therefore “unfinancial”) were appointed to the strata committee when they were ineligible to so serve.
- (7) After the AGM the strata manager sent levy notices for increased levies when no increase of levies was agreed.
- (8) The strata manager was slow to act on noise complaints made by Ms Ho in May 2019, only sending a notice to the premises involved on 27 June 2019.
- (9) Publicity was given within the strata plan to a proposed strata committee meeting that was misguided in that an EGM was to be held to deal with the issues raised. The strata manager stood by when this notice was posted. The Tribunal found that posting the notice was intimidatory and inappropriate and that the strata manager took insufficient steps to have the notice removed from the noticeboard.
- (10) The failure by the Respondents to mediate did not reflect well on the strata manager, particularly as the Tribunal has not found that the preponderance of the submissions of the Applicants were not “groundless, misconstrued, malicious and self-interested” as claimed by the Respondents to the application.
- 9) Five sets of evidence (paper copies, CD-ROM, USB key, emails, online web accounts) have been provided to NCAT and the Respondent. The Applicant received nothing in return.

The Applicant has made extraordinary steps to further simplify the evidence by providing streamlined Statutory Declaration (identical in text to the paper copy sent to NCAT in August 2020) that has online web links to critical references. Easy to follow and understand:

**<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/index.html>**

Of special interest are two links related to Solicitor Adrian Mueller and the fraud we allege happened (false statements to the Tribunal, OLSC, and Fair Trading NSW, false statements in Statutory Declaration to CTTT and District Court that he had prepared for BCS Strata Management, illegal representation of SP52948, earned fees through proceeds of crime – fraudulent insurance claims, and much more):

**<https://www.vk2cot.id.au/NCAT-20-33352/Solicitor-Adrian-Mueller-illegal-representation-CTTT-SCS-12-32675/>**

**<https://www.vk2cot.id.au/NCAT-20-33352/Solicitor-Adrian-Mueller-illegal-representation-CTTT-SCS-12-50460/>**

Those activities are of criminal nature, and indictable offences do not have expiration date.

Both the Tribunal and all six parties for the Respondent have been provided with secure web site access since October 2020 and previously since 2015.

The Applicant emphasises secure web site logs show that none of the Respondents ever attempted to view files or video evidence on the Applicant's website since October 2020.

- 10) NCAT Procedural Direction in February 2018 is significant in that NCAT has confirmed that the Tribunal is bound by the rules of evidence in only some proceedings including for example enforcement of jurisdiction of a civil panel and matters concerning professional misconduct.

Applicant is led to believe that NCAT is bound to provide procedural fairness to all parties involved in an application. Everyone must have an opportunity to know the case against them, and an opportunity to defend the allegations made or test the evidence before NCAT.

The Applicant does not seek any party to read all documents and evidence, rather it offers it as proof of high standards that everything can be verified if required.

The Applicant believes in "trust through verification".

- 11) Two-months late response by the Respondent, through Solicitor Adrian Mueller who failed to prove his retainer, came as late as 25 January 2021 and has little substance for any Applicant's response.

Yet again, the Respondent failed to comply with Tribunal's order that "the parties must attempt to submit their documents by their compliance date".

- 12) On 21 October 2020, with due diligence to avoid costs for all parties, the Applicant sent a repeated request to Solicitor Adrian Mueller to provide evidence of his retainer to represent SP52948:

a) That he had been approved to represent SP52948 strata committee and Waratah Strata Management at legally convened general meeting.

b) That all owners and the Applicant had been provided with signed Standard Costs Agreement at any time since 5 September 2019 (more than a year ago).

c) Provide NCAT with files that he illegally obtained in the past that would help prove the Applicant's statements.

No response has been received, and no SP52948 owner has any detailed knowledge of his alleged legal representation.

No SP52948 owner has any information about details of NCAT case 20/33352.

- 13) The Applicant's lawyers (O'Brien Criminal & Civil Solicitors) still have not received any response to official letter dated 24 April 2020.

On 24 April 2020 O'Brien Criminal & Civil Solicitors sent legal letter with demand of access to SP52948 strata files (including those required for Police Event E65804633) to Executive Committee Secretary, who forwarded it to Waratah Strata Management:

<https://www.vk2cot.id.au/NCAT-20-33352/NCAT-20-33352-Lot-158-annotated-Statutory-Declaration-with-web-links/Police-Event-E65804633/Lot158Letter24April.pdf>

All Applicant's demands were left unanswered, in spite of statement to owners in minutes of EC meeting dated 7 May 2020:

"Legal advice regarding Lot 158, including acceptance of barrister fee proposal - Subject to amendments required to the content of the costs agreement, the strata manager is instructed to sign the costs agreement under common seal for and on behalf of the Owners Corporation. The

barrister is also to be requested to respond to the letter received from O'Brien Criminal & Civil Solicitors on behalf of Lot 158."

Not only owners were deceived by such statements in the minutes of the meeting, but as well, strata manager and solicitors failed to comply.

14) Selective items related to legal representation of SP52948 by Solicitor Adrian Mueller (since 2012 he deliberately acted in non-compliance with CTTT/NCAT directions four times so far):

a) Legal Services Commissioner v Yakenian [2019] NSWCATOD [98], about a solicitor of Fairfield in western Sydney, neighbour of Cabramatta and Villawood. He was referred to the NSW Legal Services Commissioner by District Court Judge, her Honour Wass DCJ.

The defendants' solicitor requested particulars of Mr Yakenian's builder client's statement of claim and said the defendants would provide defences within a reasonable time after the particulars were given. They invited the solicitor to advise them if he had any difficulty with this course. He did not do so. There was also talk of a security for costs application.

On the basis of admissions made by the practitioner, the Tribunal of three members found that the solicitor had breached each of the following rules:

A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgements called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable. (Rule 17.1)

A solicitor must not deceive or knowingly or recklessly mislead the court. (Rule 19.1)

A solicitor must not knowingly make a false statement to an opponent in relation to the case. (Rule 22.1)

b) In Sadlo v Viceroy Gilead Pty Ltd [2013] NSWCTTT 559 (at [10]):

"[10] ... the [respondent] opted to be represented by a lawyer. It had no obligation to do so. The tasks involved in providing evidence, and making submissions at the hearing could have been undertaken by an employee or officer of the [respondent]. The [applicants] should not be obliged to pay an expense the [respondent] had no obligation to incur."

c) In Rodney v Stricke (No 2) [2020] NSWSC 1126 (24 August 2020):

A solicitor has been ordered to "personally pay" the costs accrued from a delay in court proceedings, citing administrative oversight and COVID-19 restrictions.

The decision is the result of a guilty plea in a case where the solicitor represented himself, but the NCAT waved it through without much apparent anxiety about the implications of their findings and issued him with a fine of \$7,500, plus costs.

A strata solicitor with over 15 years' experience has agreed to personally pay the costs of a delayed appeal proceeding, explaining to the Supreme Court of NSW that his firm experienced "administrative delay" amid changed COVID-19 working conditions.

Strata Specialist Lawyers director Colin Cunio was assisting his client in an application for appeal against the owners corporation and members of a strata committee during February through to May, just as the COVID-19 pandemic was worsening. Mr Cunio admitted it was his fault that the appeal was not lodged in time and explained that the administrative oversight took

place during the time the firm had to relocate the office to their homes in order to comply with new social distancing restrictions.

In April, after the deadline had passed, the owners corporation solicitor informed him that the time had lapsed and demanded payment of costs. The opposing solicitor told the Supreme Court that a "senior and competent solicitor", like Mr Cunio, should have been "aware that a responsibility for the matter was not absolved" amid the brief.

It was not [the client's] fault that the summons was not filed in time," read documents from the decision. "While this is a borderline case, in the exercise of my discretion, this is my view that an extension of time to file a summons should be granted on the basis that the client's solicitor will personally pay the [owners corporation's] costs".

Then the Tribunal found that the solicitor had dishonestly 'made a false or misleading statement to the Court through silence that there were no communications between the parties' lawyers relating to the preparation of defences by the defendants'. Though it did not say so, the Tribunal effectively found the solicitor to have perjured himself.

15) Solicitor Adrian Mueller was aware of submission to Office of Legal Services Commissioner when he was advised by Waratah Strata Management in email on 21 June 2019 about complaint against him. In it, Waratah Strata Management said:

"We advise that your advice is being funded jointly by the OC, Waratah Strata Management, and building manager and therefore your advice should be on behalf of all 3 parties. We do however provide you with the attached email from Lot 158 which states that he lodged a complaint against you with the Office of Legal Services Commissioner. Please advise whether there is a conflict of interest for you in acting on this matter based on the complaint. If yes, please suggest how we should proceed ...

On a related issue, we received from BCS at the change of strata managers a USB of their archive records. In April 2018, we provide that USB to the Police who were investigating a complaint lodged with them by Lot 158. Unfortunately, the Police lost the USB (We have correspondence to support that fact) We have 4requested on a number of occasions for BCS to provide us with a copy of that USB (which we assume they will still have in their archive records), with no response. Please advise whether you have any connection with BCS management that may assist in having a copy of that USB provided" .

Currently, Solicitor Adrian Mueller has conflict of interest and is not acting for SP52948 but to defend own benefits and interests of small group of owners.

The Applicant has a genuine concern that the Solicitor will not be impartial and as a result may not deal with the matter in a fair and balanced way.

The test for determining whether a judge (read: any person) should disqualify himself or herself by reason of apprehended bias is objective: "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 89 ALJR 609. See also *Chamoun v District*

Court of NSW [2018] NSWCA 187 per Gleeson JA at [39] (citing Tarrant v R [2018] NSWCCA 21) for discussion as to the four discrete elements required for the “double might” test.

- 16) Solicitor Adrian Mueller is fully aware that he is listed as person-of-interest in the following cases which now have irrefutable evidence of his involvement in fraud with personal benefits from proceeds of crime (fraudulent insurance claims and illegal representation of SP52948 in the past), which still need to be followed through:

Police Event E65804633

Office of Legal Services Commissioner case 56561

He personally provided advice to the Respondent and prevented the Applicant’s Motions at AGMs requiring him to co-operate with the Police and Office of Legal Services Commissioner since 2017.

- 17) In "elizabeth-bay-road-pty-ltd-v-the-owners-strata-plan-no-73943" case, the following was stated:

"Provided that the owners corporation promptly (and after full disclosure) cured the action by approving or ratifying the executive committee’s decision to commence proceedings by passing a s80D resolution at general meeting the NSW Court of Appeal’s decision could be used as authority to defend a strike out motion by the defendant. ... The consequences, as they affect the progress and course of legal action commenced without prior compliance with s 80D, emerge from extensive case law examined by Campbell JA (with whom Giles and Macfarlan JJA agreed) in *Doulaveras v Daher* [2009] NSWCA 58; 253 ALR 627. The conclusion expressed by Campbell JA (at [150]) was as follows:

It is a clear abuse of the process of the court for someone to bring litigation, supposedly in the name of a particular person, when there is no authority from that particular person to bring the litigation. A court will deal with an abuse of process of that kind once it is established that a supposed plaintiff has not given authority for the litigation to be brought. The appropriate way of bringing that sort of abuse of process to the attention of the court, and establishing the facts underlying it, if there is any doubt about them, is usually by a notice of motion seeking to strike out the statement of claim or to stay the action. However, if in the course of litigation it becomes clear to the court that its process is being abused in this way, it will act of its own motion to bring the abuse to an end. It may be that the abuse comes to the attention of the court only in the course of a final hearing, either incidentally as evidence emerges, or as a result of the counsel appearing before the judge agreeing either expressly or by their conduct to litigate the question of whether the action is authorised, and the judge not intervening to require that issue to be decided before the rest of the case proceeds. What is in substance happening then, though, is the argument of a motion challenging the retainer, not the deciding of an issue that can properly be raised by a defence in an action."

- 18) The Respondent failed to comply with Direction Hearing to provide to the Applicant and the Tribunal a copy of all documents on which the Respondent seeks to rely at the hearing by 20 November 2020.

We notified NCAT in email dated 30 November 2020 with Subject:

"RE: SUMMARY NSW Civil & Administrative Tribunal - SC 20/33352 – Lot 158 vs The Owners - Responded failed to comply with Directions Hearing 29Nov2020"

For that reason, due to lack of any information, by repeatedly denying us the fair process, it was not possible for the Applicant to provide to the Respondent and the Tribunal a copy of documents in reply on which the Applicant seeks to rely at the hearing and the Applicants' outline of submissions by 18 December 2020.

19) The Respondent failed to provide to the Applicant and the Tribunal, the Respondent's outline of submissions by 22 January 2021, which only arrived as late as 25 January 2021, again denying the Applicant the ability to comply with Tribunal's direction to the Respondent to provide to the Applicant and the Tribunal the Respondent's outline of submissions by 22 January 2021.

20) At AGM 2020, four companies were disallowed by the Respondent to compete for building management contract, in spite of advance notices and favourable offers, both in financial terms, and quality of services.

The Applicant wishes to draw the Tribunal's attention to 2009 NSW Supreme Court case *Yedway Pty Ltd v Owners Corporation of Strata Plan 62871* [2009] NSWSC 8 (3 February 2009) – caretaker agreement terminated for 'misconduct' under the agreement.

Body corporate terminated a caretaking agreement pursuant to clauses that the manager engaged in misconduct in carrying out or failing to carry out the functions required under the contract, and the Manager failed to carry out contractual duties, and persisted in the failure for 14 days or more after the body corporate, by written notice, required the Manager to carry out the duties:

Most Caretaking Agreements allow the Body Corporate to terminate the Agreement if:

- (a) the Manager is convicted of an indictable offence involving fraud and dishonesty; and
- (b) the Manager is convicted of an offence involving an assault; and
- (c) the Manager engages in misconduct, or is grossly negligent, in carrying out or failing to carry out the functions required under the contract; and
- (d) the Manager fails to carry out contractual duties, and persists in the failure for 14 days or more after the Body Corporate, by written notice, requires the Manager to carry out the duties,
- (e) the Manager carries on a business involving the supply of services to the Body Corporate, or occupiers of lots, without holding a licence or other authority requirement by law, or
- (f) the Manager transfers, or accepts the transfer or, an interest in the contract without the Body Corporate's approval.

In a 2009 NSW Supreme Court case, the Body Corporate terminated a Caretaking Agreement pursuant to sub-clauses (c) and (d) above. The Body Corporate did not rely on any instance of "gross negligence" but primarily relied on its contention that there was "misconduct" on the part of the Manager which was caught by sub-clause (c).

Counsel for the Manager submitted that "misconduct" pursuant to sub-clause (c) refers to conduct that is in some sense reprehensible or illegal, such as stealing. It was pointed out on behalf of the Body Corporate, however, that illegal conduct such as stealing is likely to fall within sub-clause (a), while another form of illegal conduct is covered by sub-clause (b).

The Judge accepted that "misconduct" in sub-clause (c) must be given a wider meaning.

The Judge looked at two cases dealing with misconduct – one by a solicitor and the other by a medical practitioner. In both these cases, the question of misconduct was judged according to whether the individual's conduct failed, to a substantial degree, to measure up to the standard of professional conduct adopted or approved by practitioners of good repute and competency. The Judge stated that he could see no difficulty in applying such a standard to a Property Manager or a Building Manager.

Accordingly, the Court decided that, in this case, it needed to ascertain if there was misconduct by the Manager in carrying out, or failing to carry out, the functions required by the Manager under the contract. The Court said that the standard of behaviour on the part of a Manager of good repute and competency in or about these particular functions will be shaped very likely by the nature of the functions. The Judge further said that the question whether “misconduct” occurred should be approached by reference not only to an isolated incidence or event but also to the general and continuing pattern or behaviour.

21) Over the last 15 years, SP52948 never had properly conducted tenders for:

Building management contracts

Strata management contracts

Elevator maintenance and upgrades

Building painting

10-Year Capital Works Fund

By ensuring “fresh resources” are installed to manage SP52948, 218 owners will enjoy cheaper, more efficient and reliable services, and allow all owners to be treated equally.

22) The Applicant approached the following members of the committee and parties to act as witnesses or provide evidence to NCAT and none of them replied, or even acknowledged the requests. They were given ample opportunities to respond with evidence:

Letter of demand to Pica Group managers (parent company of BCS Strata Management) on 2 October 2020

Letter of demand to Mr. Stan Pogorelsky (ex-EC Chairperson and current EC member, who is alleged to be unfinancial due to unpaid full levies since 1999) on 2 October 2020

Letter of demand to Mr. Moses Levitt (current EC member, who is alleged to be unfinancial due to unpaid full levies since 2001) on 2 October 2020

Letter of demand to Mr. Jeffery Wang (current EC member) on 2 October 2020

Letter of demand to Mrs. Maureen McDonald (long-term ex-EC member) on 2 October 2020

Letter of demand to Mr. Robert Crosbie at Waratah Strata Management on 2 October 2020

Letter of demand to Mr. Upali Aranwela (long-term ex-EC Treasurer, who is alleged to be unfinancial due to unpaid full levies since 1999) on 3 October 2020

Letter of demand to Mrs. Lorna Zelenzuk (ex-EC Chairperson and EC member, who is alleged to be unfinancial due to unpaid full levies since 1999) on 3 October 2020

Letter of demand to Mr. Peter Friede on 3 October 2020

Letter of demand to Ms. Joanne Hessink (ex-EC member) on 3 October 2020

Letter of demand to Mr. Robert Lev on 3 October 2020

Letter of demand to Mr. Peter Yeend on 3 October 2020

Letter of demand to Mr. Thomas Karolewski (ex-Treasurer and current EC member) on 3 October 2020

Letter of demand to Mrs. Genelle Godbee (current EC member) on 3 October 2020

Letter of demand to Mr. John Gore (current EC member) on 4 October 2020

Letter of demand to Mr. Francis Tso Yuan Chow on 4 October 2020

Letter of demand to Mr. Stuart Greene at Waratah Strata Management on 5 October 2020

Letter of demand to Mr. John Ward (ex-EC Treasurer and EC member) on 6 October 2020

Letter of demand to ex-EC Chairperson on 6 October 2020

Letter of demand to Mrs. Marianna Paltikian (current EC Secretary) on 8 October 2020

Repeated letter of demand to Pica Group managers (parent company of BCS Strata Management) on 2 November 2020

Repeated letter of demand to Pica Group CustomerCare as per their public assurances to offer assistance on ProductReview website on 20 December 2020

Final letter of demand to Pica Group CustomerCare as per their public assurances to offer assistance on ProductReview website on 13 January 2021

Letter of demand to Solicitor Adrian Mueller one day before AGM 2020 on 21 October 2020