CITATION:	*Moule v Dinah Beach Cruising Yacht Association* [2021] NTLC036
PARTIES:	Ann Marie MOULE
	V
	Dinah Beach Cruising Yacht Association
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	2020-02911-LC
DELIVERED ON:	8 December 2021
DELIVERED AT:	Darwin
HEARING DATE(s):	2 March 2021
DECISION OF:	Greg Macdonald

CATCHWORDS:

Originating Application - Associations Act 2003 – s109 - oppressive or unreasonable - expulsion - application for reinstatement of membership.

REPRESENTATION:

Applicant:	self-represented
Respondent:	self-represented

Decision category classification:	B
Decision ID number:	036
Number of paragraphs:	50

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-02911-LC

BETWEEN:

Ann Marie MOULE
Applicant

AND:

Dinah Beach Cruising Yacht Association
Respondent

REASONS FOR DECISION

(Delivered 8 December 2021)

JUDGE GREG MACDONALD

1. In February 2020 Ms Ann Marie Moule (Applicant) had been a member of the Dinah Beach Cruising Yacht Association (Respondent) for over 16 years, having been accepted as a member of the Respondent in December 2003. Following a written complaint of harassment and threatening behaviour made on 17 February 2020 by two senior members in relation to the Applicant's conduct, on 19 February 2020 the Management Committee (MC) for the Respondent voted unanimously to revoke the Applicant's membership.

2. That expulsion was against the background of the MC having previously imposed a "*permanent good behaviour bond*" on the Applicant on 22 October 2019, for unauthorised use or misappropriation of another member's property in that year. An essential condition of that bond was; "*…any further incidents or behaviour not in the best interest of the Association will warrant a reconsideration of your membership tenure*".

3. Following being advised of the expulsion, on 2 March 2020 the Applicant provided 'a requisition in writing' to the Respondent seeking to appeal the MC's decision through a Special General Meeting (SGM).[1] The appeal to an SGM concluded on 30 March 2020, and was conducted predominantly electronically by use of email through a 'Mail Chimp' facility due to an extant Covid-19 public health direction prohibiting any SGM taking place 'in person'. The MC also established an 'absentee vote system' for those members for whom the Respondent had no known email addresses.

4. The outcome of the electronic voting at the SGM was 66 votes of "yes" to the question; "*Do you vote to confirm the expulsion of Ann Moule (DBCYA senior member 3884)?*", and 18 votes of "no" in response to the proposition; "*By clicking No you are voting to lift the expulsion of Ann Moule*". The formulation or style of the poll of

[1] The Applicant's 'requisition' was not before the court, but was accepted and acted on by the Respondent.

absentee members is unclear, however 7 of those votes were to confirm the expulsion, and 2 to lift it.

5. On 14 August 2020 the Applicant lodged an Originating Application with the Local Court, seeking reinstatement of her membership of the Respondent.[2]

Jurisdiction and Issues

6. On 14 August 2020 the Applicant commenced proceedings in the Local Court by filing an Originating Application supported by Affidavit deposed 13 August 2020, the relief sought being; "*reinstate* (sic) *of my membership*" by reliance on s 109 of the *Associations Act 2003* (Act). Section

7. 109 of the Act relevantly provides;

> ***109 Oppressive or unreasonable acts***
>
> *(1) An application to the **Local Court** or Supreme Court for a particular order or orders specified in subsection (2) may be made by a member of an incorporated association or **former member expelled** from the association (provided the application is made within 6 months after the expulsion) who believes that:*
>
> *(a) the **affairs** of the association are being conducted in a way that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member (**the oppressed member**) or in a way that is contrary to the interests of the members as a whole; or*
>
> *(b) an **act or omission**, or a proposed act or omission, by or on behalf of the association was or would be **oppressive** or **unfairly prejudicial** to, or **unfairly discriminatory** against, a member (also **the oppressed member**) or was or would be **contrary to the interests** of the members as a whole; or*
>
> *(c) the constitution of the association contains provisions that are oppressive or unreasonable; or*
>
> *(d) the expulsion of the member was **oppressive or unreasonable**.*
>
> *(2) For subsection (1), the orders are as follows:*
>
> ...
>
> *(b) an order regulating the future conduct of the association's affairs;*
>
> ...
>
> *(e) an order restraining a person from engaging in specified conduct or from doing a specified act;*
>
> *(f) an order requiring a person to do a specified act;*
>
> ...

[2] On the basis of the Affidavit evidence provided to the Court, other than that the SGM appeal occurred slightly beyond the 21 days prescribed by sub-rule 35.5 of the Respondent's Constitution, all relevant time limits appear to have been complied with. Section 109 of the *Associations Act 2003* prescribes a 6 month period within which to seek relief of the Local Court.

(h) an order that the member expelled be reinstated as a member of the association;

(i) an order consequential on or ancillary to an order mentioned in paragraphs (a) to (h).

*(3) Subject to subsections (4) and (5), the Court may make the orders the Court **considers appropriate if**, on the hearing of the application, it is **satisfied** in relation to a matter specified in subsection (1).*

…

*(5) The **Local Court** may only make an order referred to in subsection (2)(b), (c), (e), (f), (g), (h) or (i).*

…

(8) A copy of an order must be filed by the applicant with the Commissioner within 14 days after it is made.

Maximum penalty: 100 penalty units.

*(9) For this section, a breach of the constitution of an incorporated association by the committee of the association **may be** regarded as constituting action that is oppressive to members of the association.*

(**emphasis** added)

….

8. Section 14 of the *Local Court Act* also provides relevantly that; "*The Court's civil jurisdiction also includes any other jurisdiction that … is conferred on the Court by another Act*".

9. Section 109 was enacted in 2003 and has parallels with ss 232 and 233 of the *Corporations Act 2001 (Cth)*.[3] For reasons set out below, I consider it is ss 109(1)(d) and (2)(h) which may operate in this proceeding, with the relevant focus of those sections being "*oppressive or unreasonable*". The *Corporations Act* contains no "*unreasonable*" criterion, although various decisions concerning ss 232 and 233 are instructive and, in relation to the meaning of "*oppressive*", are in my view binding.[4] The one decision of the Supreme Court of the Northern Territory located concerning the operation and effect of s 109, *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15 at paragraphs [39] to [46], including in relation to "*oppressive*", is also binding.

10. Despite that the terms of s 109(1)(a) and (b) may apparently be apt to the Applicant's situation and complaint, I consider s 109(1)(d) to be the sole provision activated in the circumstances.[5] I reach that conclusion due to s 109(1)(d) being

[3] Modifying the law concerning curial supervision and intervention in relation to voluntary associations, beginning with the decision in *Cameron v Hogan* (1934) 51 CLR 358.

[4] Particularly statements of principle of Brennan J in *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 at 472.

[5] Such that issues concerning whether the decisions of the MC and Respondent were either "*unfairly prejudicial to*" or "*unfairly discriminatory against*" the Applicant are not expressly relevant. Likewise, the potential for issues traditionally raised in judicial review proceedings at general law is significantly reduced, because "*contrary to the interests of the members as a whole*" is irrelevant.

specifically and particularly directed to the situation of "*expulsion*" of a member[6], and because there would otherwise be some duplicity through the use of the term "*oppressive*" in paragraphs (d) and the alternatives of (a) and (b). Lastly, due to the role which 'unfairness' has been found to inform the term "*oppressive*" in analogous Commonwealth legislation and the Act, the specific subject of paragraph (d) is most apposite to the decisions complained of.[7]

11. Correlative relief is provided for by s 109(2)(h) where an expulsion is proven to be "*oppressive or unreasonable*", being "*an order that the member expelled be reinstated as a member of the association*". Were it not for the inclusion of s 109(1)(d) in the Act, s109(1)(b) would apply.[8]

12. An application under s 109 is conditioned on a 'belief' held by an applicant and s 109(1) contains no express requirement that the necessary belief be reasonable or objectively held. However, a positive exercise of the court's discretion to make an order under s 109(2) could not ensue in any situation where the relevant belief were purely subjective, rather than objectively founded.[9]

13. The nature of the jurisdiction provided by s 109 may be characterised as a legislated review. The court is not concerned with reviewing the underlying merits of any decision and is not to substitute its discretion for discretion exercised in good faith by the management committee of an association[10], but noting that some concepts from judicial review are incorporated into the scheme of the Act. For example, s 39 of the Act expressly obliges any management committee of an association to observe "*the rules of natural justice*" when determining any dispute between members, or itself and a member. It may also be noticed that s 109(9) provides that a breach of the constitution of an association "*may be*" regarded as constituting action that is "*oppressive*".[11]

14. Although the court must not consider the merits of the decision sought to be reviewed, the subject matter of s 109(1)(d) does require consideration of the circumstances of a decision to expel, in terms of process applied and the express provisions of the Act and Respondent's Constitution.[12]

15. Although it is my conclusion that s 109(1)(a) and (b) are inapplicable to the Applicant's Application, each of those paragraphs and paragraph (d) include the criterion of "*oppressive*" (noting that there is also no express reference to "*unfairly*" in (d)). To some extent, s 109 should be construed contextually as a whole. That is, the phrase "*oppressive or unreasonable*" ought not be read as alternatives, but different elements or aspects of 'unfairness'. The proposition set down by his Honour Justice Brennan in *Wayde v New South Wales Rugby League* (1985) 180 CLR 459 at 472, being; "*… if* [the MC] *exercise a power – albeit in good faith and for a purpose within the power – so as to impose a disadvantage, disability*

[6] Despite that an alternative approach may be available; *Graham v Deputy Chief of Air Force* [2004] FCA 1377.
[7] See *Wayde v New South Wales Rugby League Ltd* (supra), and *Shew & Ors* at [8] above.
[8] Sections 232 and 233 of the *Corporations Act 2001 (Cth)* contain no equivalent of s109(1)(d).
[9] As to "*belief*", albeit in the context of objective or reasonable context, see *George v Rocket* (1990) 170 CLR 104 at 115.
[10] *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15 at [45], and the authorities cited therein.
[11] Those provisions bear some analogy to principles in administrative law, despite the approach applied to domestic and private associations, starting with *Cameron v Hogan* (1934) 51 CLR 358.
[12] The Respondent's Constitution is Attachment 2.1 to the third Affidavit.

or burden on a member that, according to ordinary standards of reasonableness and fair dealing is unfair, the court may intervene …", is relevant to the proper interpretation and application of s109(1)(d).

16. It is also important to observe that the Respondent's Constitution empowers the MC and, ultimately, the membership of the Respondent, to lawfully and properly admit and expel members. Any expulsion of a member would be attended by an inevitable degree of prejudice and discrimination, and "*oppressive or unreasonable*" must be interpreted and applied in that context. A good deal more than the inevitable and natural consequences of any adverse decision must be proven to enliven the discretion provided by s109.

17. Lastly, in my view the inclusion of the term "*unreasonable*" in s 109(1)(d) was not intended by Parliament to be in the *Wednesbury* sense. That is, it is not necessary to demonstrate manifest illogicality of a decision or that no reasonable MC or members' body could have reached the decision that they did.[13] Ultimately, the High Court's statements in *Wayde* concerning unfairness would appear to be the surest guide, including due to the interpretive approach referred to above, and the provisions of s 109(9) concerning "*oppressive*".[14]

The evidence and hearing

18. Each of the Applicant and Respondent were self-represented, with procedural preparation and directions, and the hearing on 2 March 2021 and subsequent consideration, being attended by more than the usual challenges affecting legal disputes conducted on that basis. Various programming orders and directions were made leading up to the hearing of 2 March 2021, such that the evidence in chief was in Affidavit form. That included directions made on 24 February 2021 requiring the parties to provide any further documents or other evidence in their possession by way of Affidavit concerning a range of matters touching upon the process applied and complied with in relation to the Applicant's expulsion. The Respondent complied diligently with those directions, through its General Manager Ms Wendy McCallum (GM)[15]. However, the Applicant did not file and serve any further material in response to the directions prior to hearing, and her Affidavit sworn 11 March 2021 was not responsive to the issues raised by the directions.

19. Had the parties been legally represented in the proceeding a number of aspects of the events over the period 17 February to 30 March 2020 could possibly have attracted scrutiny under ss 39 or 109(1) and (9) of the Act. For example, the nature and extent of prior notice provided to the Applicant for the meeting of 19 February 2020, including 'particularisation of charge' and foreshadowed possible adverse action. Also, whether the Applicant had adequate opportunity to seek and obtain advice and, perhaps, support or advocacy, prior to that meeting and the ensuing decision to expel being made under sub-rule 35.1 of the Respondent's Constitution. Any counsel for the Applicant would also have likely considered

[13] See *Goodluck v City of Darwin* [2021] NTSC 86 at [22] and *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 87.
[14] Also noting *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15 at [40] to [45].
[15] Affidavit of GM McCallum sworn 1 March 2021.

whether possible issues arose through any involvement of the GM at the MC meeting[16], and whether any irrelevant considerations affected the MC decision to expel.[17] Lastly, whether any of the MC who invoked sub-rule 35.1 were emailed to participate in the online SGM and in fact voted at that meeting.[18] None of those possibilities have been the subject of the court's consideration in determining the proceeding.

20. The Applicant's Originating Application of 14 August 2020 was supported by an Affidavit sworn 13 August 2020. The Applicant also filed and served further Affidavits in the proceeding sworn 22 January 2021, 28 January 2021, 11 March 2021 and, although not ultimately taken into account, 5 October 2021. Other than to provide some relevant contextual background by the Affidavit of 13 August 2020, with one exception, the Applicants affidavit evidence was of marginal relevance. The Applicant's Affidavits comprised mostly subjective complaint and matters which might engender sympathy for her predicament but, with one qualification, did not generally bear upon the question of 'oppression or unreasonableness' provided by s 109(1)(d) of the Act.

21. The Respondent's Affidavits were sworn and then filed on 2 February 2021, 4 February 2021, 1 March 2021 and 15 March 2021, which I will refer to as the first, second, third and fourth Affidavits. The first, third and fourth Affidavits were sworn GM McCallum on behalf of the Respondent, with the second being from the Respondent's Commodore, Ms Joy Eggenhuizen.[19] The paragraphs of the first Affidavit were not numbered, however it is the evidence from the last paragraph on the second page through to the end of that Affidavit, including attachments O through to V inclusive, which is most relevant.[20] The whole of the content of the third Affidavit, including attachments 2.1 through to 2.12, is also particularly relevant.

22. At hearing on 2 March 2021 all Affidavits were 'read' with the parties having opportunity to then cross examine in relation to any aspect. The Respondent did not seek to cross examine the Applicant, and the Applicant's question(s) of the Respondent's representative simply went to their rationale for use of her name 'on the internet'. The oral evidence was of no additional assistance in determining the issue posed by s 109(1)(d).

23. Much of the factual background to the expulsion, and the decision to take that course, was not in dispute. That includes that the Applicant did write and deliver the concerning note comprising the second folio of Attachment O to the first Affidavit, and that the notices and advice deposed to in the first and third Affidavits were provided by the Respondent to the Applicant. I consider it is also clear, including due to the Applicant's prior indiscretions, that consideration by

[16] Noting there is no evidence of GM McCallum having been involved in any of the discussion at the meeting, and that proof *actual* bias due to the domestic or private status of the Respondent would be required in any event; *Maloney v NSW National Coursing Association Ltd* [1978] 1 NSWLR 161

[17] Attachments Q, R and T to the first Affidavit document the MC's decision and considerations taken into account.

[18] The principle of necessity would be unlikely to rescue the outcome of any poll, had MC members also voted at the SGM.

[19] The Commodore's Affidavit annexed the Respondent's current Constitution

[20] While noting that earlier evidence in the first Affidavit concerning the Applicants prior indiscretions while a member are relevant to the Respondents action in expelling the Applicant from the Association.

the MC of her membership was appropriate in all the circumstances. The MC and, subsequently, the senior financial members comprising the Respondent, acted in good faith in relation to the issues raised by sub-rules 35.1 and 35.6(d) of the Constitution. It is also my conclusion that clause 36B of the Respondent's Constitution, *Grievance and Disputes*, did not immediately apply to the incident which arose on 17 February 2020. That incident precipitated the MC meeting of 19 February 2020, however the primary issue for consideration was whether the Respondent had breached the 'permanent good behaviour bond' and, if so, what further action may be required.

24. Following the hearing on 2 March 2021, two weeks were provided to the Parties for any written submissions. Written submissions were effectively a further affidavit from the Applicant filed 11 March 2021 and a document affirmed by the Respondents Commodore on 15 March 2021.

25. It is patently clear from both the Applicant's Affidavit material and her oral evidence to the court on 2 March 2021 that she is particularly disadvantaged in written expression, and has definite mental health issues and a querulous or defiant demeanour. The Applicant was, in my estimation, incapable of objective insight in relation to her behaviour, or of properly engaging with the issues in dispute. It is also clear that the person who has been primarily responsible for the Respondent's management and interaction with the Applicant over the past five years is the Respondent's GM. On the evidence before the court I consider that the GM has acquitted that onerous responsibility with tolerance, humanity and tact, while at the same time seeking to communicate clearly to ensure adequate understanding by the Applicant.

26. The first Affidavit initially sets out history of the Applicant's membership with the Respondent, together with aspects of contrary behaviour over time. That included an MC decision on 22 May 2017 expelling the Applicant for misappropriating another member's water containers. That expulsion was appealed to an SGM held 18 June 2017, with the result of expulsion being lifted.[21] In addition, on 22 October 2019 the MC considered whether to expel the Applicant for removing another member's generator from club premises and converting it to use on her vessel. On that occasion the MC imposed conditions on the Respondent's ongoing membership, including a "*permanent 'good behaviour' bond*".[22]

27. The more contemporaneous events culminating in the Applicant's expulsion from the Respondent by its MC, and ultimately by an SGM, were also set out in the Affidavit material filed. On 17 February 2020 senior members of the Respondent lodged a written complaint with the Respondent's MC concerning harassing and threatening behaviour by the Applicant in relation to them.[23] That behaviour comprised a note written by the Applicant and left on the steps of the two members' boat at the hard stand site of the Respondent's premises.[24] An MC

[21] Attachments J, K, and M of the first Affidavit refer.

[22] Attachment N of the first Affidavit refers.

[23] Attachment 0 of the first Affidavit sworn 2 February 2021, which included a note written by the Applicant.

[24] The note read; "*To* [the 2 named members] *I told you to go and see* [a named former member, who was on remand at DCC]. *But you did not go. So I think its in your best interest to go and see him next Sunday and if you don't Dinah Beach will know all about* [one of the addressees] *and so all of Darwin*. *So you better go*".

meeting was held on 17 February 2020 at which the senior members' complaint and annexed note from the Applicant were tabled and discussed. Further action recorded in the meeting minutes was "*Committee members will meet with senior member in question to discuss the matter and determine outcome*".[25]

28. The Respondent's GM orally informed the Applicant of a proposed meeting with the MC on 19 February 2020, which the Applicant acknowledged and then attended 5:30pm that date. At that meeting the MC raised their concerns with the Applicant, to which she sought to provide an explanation. The MC then reminded the Applicant that from 22 October 2019 she was on a 'good behaviour bond' and that her recent actions "*will warrant a reconsideration of the membership*", following which the Applicant left the meeting. Although the MC did not put to the Applicant the risk that they may decide to expel her from the Respondent, that likelihood would have been apparent to an ordinary member. The MC then put a motion to itself, namely; "*That due to repeated conduct not in the best interest of the Association, Ann Moule's membership is revoked immediately, in line with the DBCYA Constitution*", which passed unanimously.[26] The Applicant was advised of that decision and action, both verbally and in writing and was advised that she had 14 days within which to appeal that decision to an SGM, consistent with the Respondents Constitution.[27]

29. On 2 March 2020 the Applicant provided a letter to GM McCallum which was then forwarded to all members of the MC that day, and treated as an appeal against the MC decision under sub-rule 35.4 of the Respondent's Constitution.[28]

30. An SGM was then called for 30 March 2020 to consider the appeal, with the Applicant being advised by SMS text on 6 March 2020 that the SGM appeal had been fixed for 5:15pm on 30 March 2020, and that the necessary notice was to be published in the NT News the following day.[29] However, public health declarations as a result of C19 then intervened, resulting in the Respondent deciding to conduct the SGM appeal electronically online. The Applicant was orally advised of the new proposed course on 23 March 2020, together with an invitation to present her case on appeal in writing. The Applicant then provided the Respondent with a written document on 24 March 2020.[30] In response, on 25 March 2020 the MC provided its written statement to the Applicant, together with an oral invitation to adjust her statement if she wished. That offer was not availed of.[31]

---

[25] Attachment P to the first Affidavit refers.

[26] Attachment Q to first Affidavit refers.

[27] Paragraph 3 of the third Affidavit (noting attachment 2.3 is in fact dated 2 March 2020, and refers to a letter received, rather than delivery of the expulsion letter). Sub Rule 35.4 refers.

[28] That letter does not appear to have been provided in evidence by either the Applicant or Respondent, but is referred to in Attachments 2.3 and 2.4 to the third Affidavit.

[29] Attachments 2.5, 2.6 and 2.8 of the third Affidavit, with the advertisement noting that the issue for the SGM was; "*For the purpose of a member expulsion appeal as per DBCYA Constitution clause 35. Lifting or confirmation of expulsion determined by secret ballot vote*".

[30] Attachment S to the first Affidavit.

[31] Paragraph 5 of the third Affidavit and first paragraph of second page of the fourth Affidavit.

31. On considering the evidence, some disjuncture in relation to what written advice the Applicant had provided to the MC and Respondent was apparent.[32] Attachment S to the first Affidavit, which is undated but which has had "*Received from Ann Moule 24 03 2020*" inserted, is said by the second paragraph on the third page of the first Affidavit to be the Applicant's "*defence statement*". Paragraph 4 of the third Affidavit then refers to "*a handwritten note*" provided by the Applicant on 2 March 2020, in the context of Attachment S, being emailed by GM McCallum to the MC that day. There would appear to be 2 documents missing from the evidence, being an email of 25 February 2020[33] and either the Applicant's letter of appeal or defence statement.

32. Noting the Applicant's onus of proof, but also her capacity, it is most unlikely she would have copies of documentation authored by her at the time. Having regard to the affidavit evidence, particularly the relevant paragraph of the first Affidavit, I am content to conclude that Attachment S is the Applicant's "*defence statement*". Regardless of the nature or date of the document, it is some evidence of Applicant's capacity, including for insight.[34]

33. It may be noticed that sub-rule 35.6(d) provides that; "*the members present shall vote by secret ballot on the **question of whether the expulsion should be lifted or confirmed***" (**emphasis** added). That formulation, and the order of consideration, reflects the proposition that the affairs and business of any incorporated association are generally or primarily conducted by a management committee, but that decisions concerning admission and expulsion of members are ultimately matters for the membership of the Association as a whole.

34. On 26 March 2020 the Respondent created an on-line facility with the *Mail Chimp* platform, which facilitated membership participation in the SGM by email and a capacity to vote "yes" or "no". The Respondent's written submissions sworn 15 March 2021 recorded the question put to the SGM as; "*Do you vote to confirm the expulsion of Ann Moule (DBCYA senior member 3884)*?" The question put was in fact slightly more nuanced being; "DO YOU VOTE TO CONFIRM THE EXPULSION OF ANN MOULE (DBCYA SENIOR MEMBER 3884)? BY CLICKING NO YOU ARE VOTING TO LIFT THE EXPULSION OF ANN MOULE". That motion was followed by "YES" and "NO" hyperlinks.[35]

35. The poll results were 66 votes "yes" and 18 votes "no", with absentee votes totalling 7 versus 2 respectively.[36] The results of the SGM vote were communicated to the Applicant by email on 26 March 2020, with the email being opened on 9 May 2020.

[32] It is also noted that attachment 2.3 to the third Affidavit is in fact the email sent by GM McCallum to the MC on 2 March 2020 attaching the Applicant's letter of appeal.

[33] There is no doubt the Applicant was provided with a copy of the MC's letter of 21 February 2020, advising of her expulsion from the Respondent.

[34] The document is essentially a disorganised complaint concerning treatment by others, together with a plea in mitigation on the basis of lack of insight and mental health issues.

[35] Attachment 2.11 to the third Affidavit.

[36] Attachment 2.12 to the third Affidavit.

Findings

36. Aspects which the court can be confident of include that, if the Respondent is a "*body established by an Act*", an SGM could have been validly conducted via the Mail Chimp facility.[37] Also, that the small delay beyond the prescribed 21 days in conduct of the SGM appeal should be of no legal consequence in the circumstances of the terms of the Respondent's Constitution. Lastly, that the 84 votes cast from a potential 199 recipients of the Mail Chimp email constituted the 1/10 quorum for any general meeting required by sub-rule 15.3 of the Constitution.[38] The absentee voting system created for senior financial members who did not have email addresses may have contravened the requirement of sub-rule 35.6(d) that "*the members present shall vote by secret ballot …*". However, that could not amount to "*oppressive or unreasonable*" conduct in relation to the Applicant, even by reliance on s 109(9) of the Act. That clause is intended to ensure free and frank polling on sensitive matters, but is predominantly for the protection of voters not appellants.

37. Although perfunctory and conducted without an ability in the Applicant to seek legal advice or support, the MC meeting of 19 February 2020 was not oppressive or unreasonable *per se*. That conclusion is reached on the bases that the respondents MC is responsible for the day-to-day administration and management of the Association, and the requirement to consider the Applicant's situation and status was of some urgency, including due to the MC's duty to the membership of the Respondent as a whole. Lastly, although a final determination, the MC's decision was open to appeal or review on the question of 'lifting or confirmation' by the full membership of the Respondent.[39] It is that body which has plenary decision making power concerning admission and expulsion of members.

38. The SGM was originally called and advertised to take place at a specific time, date and place. At least 21 days was allocated to that process and, had the SGM been conducted as planned, the Applicant would have had adequate opportunity to seek advice and support, and then articulate her position in person to those who chose to attend the SGM.[40]

39. The intervention of the public health directions due to C19 resulted in a significant change in process, detailed at paragraphs [29] to [34] above. The MC was betwixt and between the conflict of the 21 day prescription of sub-rule 35.3 and the force of the public health directions.[41] Noteworthy features of the altered process for the SGM were that on 23 March 2020 the Applicant's capacity to speak to the SGM in person, perhaps with the assistance of a support person, transformed into an invitation to simply present her case to the members in

[37] Section 48A of the *Interpretation Act*.

[38] Attachment 2.12 to the third Affidavit.

[39] There is some support for the proposition that the 'right to be heard' is more easily satisfied (to a lower standard) where a right of appeal exists, despite that s 39 of the Act must apply; see *Twist v Randwick Municipal Council* (1976) 12 ALR 379 at 387-388.

[40] As she had done successfully in analogous circumstances on 18 June 2017.

[41] Although the duration of the C19 directions were not know, an alternative to proceeding to hear and determine the appeal on 30 March may have been to simply pass an adjournment motion under sub-rule 17.1 of the Constitution, adjourning the SGM to a later date. The 'principle of necessity' may well have permitted an adjournment for a significant period.

writing. The Applicant provided Attachment S to the MC the next day, with it being provided by email to the membership on 26 March 2020. Voting at the SGM would appear to have been possible from 1:22pm on 26 March 2020 through to 6:14pm on 30 March 2020, so the SGM was effectively conducted over more than four days.[42] Members were asked the question; "DO YOU VOTE TO CONFIRM THE EXPULSION OF ANN MOULE (DBCYA SENIOR MEMBER 3884)? BY CLICKING NO YOU ARE VOTING TO LIFT THE EXPULSION OF ANN MOULE".

40. Despite that clause 35 of the Constitution contemplates any SGM appeal would be conducted in person, neither the "*opportunity to be heard*" provided by sub-rule 35.6(c) nor the natural justice prescribed by s 39 of the Act inevitably demand that an appellant must be permitted to address the SGM orally. However, in the circumstances of the Applicant's apparent limited capacity in writing and her personal challenges and living situation, the reduction of her right to be heard to writing was of particular significance. I consider that restriction at least significantly and seriously reduced sufficient opportunity to say everything which the Appellant could have said in her favour.[43] The effect was that insufficient procedural fairness was accorded to the Applicant, such that s 39 of the Act was not satisfied.

41. Added to this is the departure of the process from the vote being "*on the question of whether the expulsion should be lifted or confirmed*" as provided by sub-rule 35.6(d) of the Constitution. The question put by the Mail Chimp poll was leading or loaded, with the difference between it and the Constitution not simply being semantic. Framing the question in terms of clause 35.6 may have been relatively straightforward, particularly if separate and discrete questions were articulated immediately before the hyperlinks. For example;

    - I vote to lift the expulsion of Ann Moule - **Click Yes**
    - I vote to confirm the expulsion of Ann Moule – **Click No**

42. Despite that both the MC on 19 February 2020 and those of the Respondent's membership who attended the online SGM over the 4 days to 30 March 2020 acted in good faith in casting their votes, the combined effect of the concerns identified with the process applied (as opposed to the effect or impact on the Applicant of expulsion) to confirm the expulsion was unfair in its conduct and consequence. I consider that unfairness amounted to the confirmation of the expulsion being both oppressive and unreasonable in the sense intended by s 109(1)(d) of the Act, including due to s 109(9) being enlivened by the failure to meet the requirement of s 39 of the Act.

43. Regardless of the possibilities referred to in paragraph [18] above, it is not the court's conclusion that conduct of the MC meeting of 19 February 2020 amounted to an "*oppressive or unreasonable*" expulsion. The decision of that meeting remains extant, as does the "*notice of requisition*" provided by the

[42] Attachment 2.10 of the third Affidavit and penultimate paragraph of the fourth Affidavit.
[43] *South Australia v O'Shea* (1987) 163 CLR 378 at 405.

Applicant to the Respondent on 2 March 2020, and accepted as sufficient for the purpose of sub-rule 35.6 of the Constitution.[44]

44. The order sought by the applicant is under s 109(2)(h) of the Act, noting that such orders are discretionary, and that some aspects of the matter certainly militate against exercise of the discretion. The court also has jurisdiction through s 109(2)(i) to make other orders "*consequential on or ancillary to*" such an order, and s 109(3) then broadens jurisdiction to "*make the orders the Court considers appropriate*" in that event.

45. It may be noticed that membership of the Respondent *per se* does not, as a matter of right, entitle a member to access or use all potentially available amenities of the Respondent's premises, including hard stand facilities. The evidence before the court is in fact that the Applicant's previous use of that facility had been problematic, and in 2020 was precluded up until 30 March 2020 by liability and insurance issues.

46. Any reinstatement of the Applicant's membership would, due to the legal effect of such an order, also reinstate the permanent good behaviour bond to which the Applicant was subject from 22 October 2019.

47. If reinstated, the Respondent, including through its MC, would then be obliged to apply the process prescribed by rule 35 of the Constitution to deal with the Applicant's appeal. It may also be that the MC would wish to obtain legal advice on the issues.

Orders

48. The Applicant's membership of the Respondent is reinstated under s109(2)(h) of the Act.

49. The time within which the Respondent may conduct a relevant SGM for the purpose of sub-rule 35.5 of its Constitution is extended to 7 February 2022.

50. Liberty to apply.

Dated this 8th day of December 2021

GREG MACDONALD
LOCAL COURT JUDGE

[44] Being effectively a 'notice of appeal' provided for by sub-rule 35.4, which did not appear to be a document provided to the court.