

Order of the Tenancy Tribunal

Unit Titles Act 2010

Office of the Tenancy Tribunal

Tenancy Tribunal at Auckland

Unit Title Address

13H / 135 Victoria Street West, Auckland 1010

Applicant

Full Name		Address
Kazufumi Ikeda	Unit Owner	McLean Law Limited Level 2, 3053 Great North Road, New Lynn, Auckland 0600 callummcleanlaw@gmail.com 13H, Victopia Apartments, 135 Victoria Street West, Auckland Central, Auckland 1010

Respondent

Full Name		Address
Body Corporate 346799	Body Corporate	Price Baker Berridge 87 Central Park Drive, Henderson, Auckland cbaker@pbb.co.nz

Order of the Tribunal

The Tribunal hereby declares:

1. Kazufumi Ikeda was elected as the seventh member of the body corporate committee following the vote at the Annual General Meeting held on 17 August 2017.

(Sections 78 (1) (a) and 85 Residential Tenancies Act 1986 and sections 171(3A) Unit Titles Act 2010)

2. The application for all other orders are dismissed.

Reasons:



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

1. Victopia Apartments is a large body corporate complex comprising 203 residential apartments. The applicant Kazufumi Ikeda has been the owner of a principal unit since 2005.
2. On 17 August 2017 Victopia Apartments held their annual general meeting (AGM) where the unit owners of the body corporate voted for a Chairperson and the body corporate committee ('Committee').
3. The applicant Mr Ikeda has brought an application challenging the validity of the election of the body corporate Committee at the AGM. The applicant seeks an order to be elected as a member of the Committee or, alternatively, that the body corporate hold an Extraordinary General Meeting (EGM) to elect a seventh member.
4. Mr Ikeda was represented by Counsel Mr McLean and the body corporate was represented by Counsel Mr Baker at the hearing.

Factual background

5. Body Corporate Administration (BCA) manages the large complex under an agreement with the body corporate. Since 2005 Mr Ikeda has served on the body corporate committee 8 times with the last being in 2016-2017. He is part of a vocal minority group seeking more accountability in regard to spending by the committee. Historically Mr Ikeda, together with 2 other unit owners Qiming Pan and Weiqun Huang, form part of a small group of 4 owners who did not participate in the leaky building litigation against the Council.
6. At each AGM the body corporate, by special resolution, delegates to the committee all powers and duties to the extent possible under section 108 UTA and all the duties of the chairperson. In previous years the committee number was 10 members however the number reduced over the years with only 8 members being elected in 2016. The applicant maintains that certain employees of BCA and some members of the Committee have acted in various ways to ensure he was excluded from the body corporate committee in 2017.
7. On 20 July 2017 BCA issued a Notice of Intention to hold an annual general meeting and attached a Nomination and Proposed Resolution Form. The Notice advised that the AGM would take place on 17 August 2017 and that nominations for Chairperson and body corporate committee must be received by 4pm on 31 July 2017. The Notice of Intention was also accompanied by a letter from Paula Beaton, General Manager of BCA, proposing that the committee be made up of 8 members.
8. On 31 July 2017 Mr Ikeda emailed the nomination forms for himself and Mr Pan for the chairperson and himself, Mr Pan and Ms Huang for committee before the deadline of 4pm to Glen Kwok, owner and sole director of BCA. The nominations forms stated that they were to be emailed to Jay Moodley at BCA.
9. BCA issued a Notice of annual general meeting in early August with an accompanying undated agenda and postal vote form. This (first version) agenda did not record Mr Ikeda or Mr Pan's nomination for Chairperson and did not record Mr Ikeda, Ms Huang and Mr Pan's nomination for committee. The accompanying Postal vote forms did not list Mr Ikeda, Mr Pan and Ms Huang's as nominees for Chairperson and/or the committee.



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

10. Subsequently lawyer Doug Cowan, on behalf of the applicant, sought an explanation from BCA as to the reasons the nominations of Mr Ikeda, Mr Pan and Ms Huang were missing from the agenda and postal vote form.
11. Mr Kwok attended the hearing with Mr Baker, Counsel for the body corporate, and explained that the incorrect email at BCA used by Mr Ikeda was the likely reason these nominations were missing from the first agenda but corrected in a new version of the agenda(put this somewhere else)
12. In an undated amended (second version) agenda, sent out by BCA shortly after 4 August 2017, Mr Ikeda and Mr Pan are recorded as nominees for the position of Chairperson and the applicant, Ms Huang and M Pan are recorded as nominees for the committee. The agenda records a proposal to appoint "up to 7 unit owners" for the committee with a quorum of 4 members, being a reduction in the committee number from 8 to 7 members.
13. The AGM held on 17 August 2017 was chaired by Paula Beaton from BCA from the outset. Jacqui Turner was elected chairperson for the body corporate. A resolution was passed to appoint up to 7 members for the committee with a quorum of 4 persons. BCA provided voting forms for the committee vote listing the 10 nominated members together with instructions to "please choose up to seven of the following". The body corporate held a ballot to appoint the committee and it was announced that the outcome of the ballot was a tie for the 7th position between Mr Ikeda and Ms Huang.
14. Doug Cowan held a proxy for unit owners Ms Huang and Wang Qi at the AGM. Following the declaration of a tie for the 7th position on the committee, Doug Cowan stood to advise that Ms Huang's nomination for the committee was withdrawn.
15. Jacqui Turner and Glen Kwok together with other members of the committee at the front desk voiced their disapproval and advised they would not accept Ms Huang's withdrawal.
16. At this point in the meeting, Jacqui Turner and the committee had a short discussion and announced that a 'show of hands' would be conducted on the question of whether Mr Ikeda or Ms Huang would take the 7th position on the Committee. The 'show of hands' from people at the meeting was in favour of Ms Huang.
17. The AGM minutes record the following at paragraph 7:

Resolution 5 – Appointment of committee members:

A ballot was conducted to determine the Committee. It was clear that 6 names were ahead of nominations but there was a tie for 7th place between Kas Ikeda (Unit 13E) and Weiqun Huang (unit 8M). A show of hands determined that Wei Huang be appointed and a late application to withdraw the nomination was not accepted by the owners present.

It was resolved by the Body Corporate by ordinary resolution that the committee is to comprise: Yana Hay, Chaofeng Yang, Jacqui Turner, Darius Koper, Vilingi Young, Ina Lawrence and Weiqun Huang.

18. Paragraph 25 of the AGM minutes, headed 'Announcement of the Committee', lists the 6 successful members from the ballot and states:
"And a tie for 7th between KS Ikeda and Weiqun Huang.



B Harvey, Adjudicator

At that point, Doug Cowan attempted to withdraw Ms Huang's nomination. However it was considered that this should have been done before the ballot was conducted.

When questioned earlier, it was understood that Doug Cowan would assist Ms Huang in the committee business.

On a show of hands there were 14 in support of Mr Ikeda and a multitude signifying a clear majority for MS Huang's nomination

This was carried and Weiqun became the seventh successful nominee"

19. Mr Cowan gave evidence that Mr Kwok requested a formal resignation from Ms Huang following the meeting and invited Mr Ikeda and Mr Cowan to the first committee meeting.
20. On 25 August 2017 Mr Ikeda attended the first committee meeting with Mr Cowan at the request of Mr Kwok. Mr Cowan handed over Ms Huang's letter of resignation from the Committee dated 24 August 2017. At the meeting Mr Kwok informed Mr Ikeda and Mr Cowan that the committee would reduce to 6 members and Mr Ikeda would not be part of the committee for 2017 as the number had not fallen below the quorum.

The orders sought

21. The applicant challenges the validity of the committee election at the AGM by advancing the following arguments:
 - (a) BCA and certain members of the committee of the body corporate acted in breach of the Unit Titles Act 2010 (UTA 2010) and Unit Title Regulations 2011 (UTR 2011) at the AGM by failing to accept Doug Cowan's withdrawal of Ms Huang's nomination for committee and undertaking a vote for 7th place on the committee by a 'show of hands';
 - (b) The vote for the committee at the AGM on 17 August 2017 was not a valid on the basis that many of the proxies were invalid and many of the votes counted were ineligible in breach of the UTA 2010 and UTR 2011.
22. Following disclosure of source documents relating to the vote to the applicant's Counsel, Mr McLean broadened his request for orders. These amended orders included a request for approximately 20 'restrictions and guidelines' in respect of the actions of body corporate staff and the building manager. These additional orders were to restrain BCA and members of the committee from future behaviour such as prohibiting Mr McDonald from exercising his pre-completed proxies. The applicant argued there are considerable conflicts of interest between members of the committee, Mr McDonald the building manager or his company and BCA.
23. I decline to make any further order in respect of future events or conduct. These amended orders were never part of the original application and, with the exception of Mr McDonald's proxies, were not raised at the hearing. The original application before the tribunal concerns the process for the election of the committee which extends to the actual vote count and the validity of votes counted (or discounted) under the law.

Proxies under the UTA 2010

24. Proxy voting is tightly prescribed under section 102 UTA 2010 and Regulation 14 UTR 2011.

Dated at Auckland on Wednesday 27-Jun-2018


B Harvey, Adjudicator

25. Any eligible unit owner "may exercise the right to vote either by being present in person or by proxy". The appointed proxy "is entitled to attend and be heard at a body corporate meeting as if the proxy was the eligible voter". The proxy is appointed "by notice in writing signed by the eligible voter" (Section 102(1) - (3) UTA).
26. Under regulation 6 the Notice of the AGM must "set out the procedure for unit owners who wish to vote by proxy or by post" and include a proxy appointment form. The Notice of the AGM must also set out an agenda including the text of any proposed resolutions and the names of the candidates for election. The Notice of AGM is issued at least 2 weeks before the date of the annual general meeting (or at least 3 weeks before in the case of a parent unit tile development).
27. Proxies must be appointed for each individual general meeting and will expire at the end of the general meeting (or the end of any adjourned general meeting). The proxy appointment can be revoked at any time before it expires (regulation 14(1) - (3) UTR 2011). The proxy appointment form (Form 11) must be delivered in the manner required by the body corporate at the start of the general meeting, or delivered before the first vote if the proxy is appointed during a general meeting (regulation 14(4)-(5)). Where the principal unit is owned by more than 1 person, all joint owners must sign the proxy form and one of the owners can be appointed as proxy (section 102(4) UTA).
28. Proxies under the UTA 2010 are for specified meetings of which the unit owner has knowledge in advance of the issues to be discussed and set out in the agenda.

Did Doug Cowan have legal authority to withdraw Weiqun Huang's nomination for the committee during the AGM?

The arguments

29. Counsel for the applicant argues that Mr Cowan, as proxy for Ms Huang, validly withdrew her nomination for the committee at the AGM and this should have been accepted by BCA and the chairperson. The request to withdraw the nomination came after the ballot but before the 'show of hands' poll took place for the 7th position. The applicant says the AGM minutes incorrectly records the order of events in respect of the committee vote. Counsel argues Doug Cowan's actions effectively withdrew Ms Huang's consent for nomination to the committee, such consent being necessary under regulation 24(3)(b) UTR 2011. Counsel maintains the right to be heard at a meeting "as if the proxy were the eligible voter" is not constrained under section 102(3) and should be construed as wide enough to include withdrawing consent to stand in a position.
30. At the hearing Mr Cowan gave evidence regarding the reason for the delay in withdrawing Ms Huang's nomination until after the outcome of the ballot. He advised that he mistakenly believed she was at the meeting but only learned at the AGM that she in fact now resided in Dubai. Upon realising these facts at the AGM, Mr Cowan attempted to withdraw her nomination.



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

31. Furthermore, the applicant argues that the decision to undertake a 'show of hands' was instigated by chairperson Jacquie Turner and not by the 'owners present' as a group as recorded in the minutes of the AGM . Counsel further submits that there is no ability under the UTA 2010 or the UTR 2011 for a vote by hands between two nominees.
32. Counsel for the body corporate submits that Mr Cowan was acting under a proxy granted by the owner of Unit 8M at the AGM and this enabled him to exercise a vote on her behalf but did not extend to withdrawing a nomination to be a committee member. In Counsel's submission *"Mr Cowan had no power to withdraw the nomination for Unit 8M from the committee – the request was a nullity"*.
33. Counsel further submits that since there was no valid withdrawal of Ms Huang nomination, following the completion of the vote, she was appointed to the committee by resolution. Subsequently Ms Huang's letter dated 24 August 2017 confirming her resignation was in fact a notice of resignation in writing under regulation 25(2) UTR 2011. Regulation 25 (4) provides that where the resignation of the committee member reduces the membership of the committee below the number required for a quorum, the committee must issue a notice to hold an extraordinary meeting under Regulation 7. As the committee was reducing to 6 members and not below the quorum of 4, in his submission, there was no necessity to elect or add any new members.
34. Neither party cited any cases in support of their submissions.

Findings

35. I have reached a similar conclusion to Counsel for the body corporate on this point. Section 102 UTA 2010 is directed towards proxies having the *"right to vote"*. The proxy held by Mr Cowan authorised him under section 102 UTA to *"attend and be heard at a body corporate meeting as if the proxy were the eligible voter"*. This gives the proxy the right to speak about a proposed resolution which the eligible members will vote on. Proxies under the UTA are confined to voting rights and speaking rights at a general meeting. I am not persuaded that the words *"be heard"* at the meeting extend to the action of withdrawing Ms Huang's nomination for the committee. Furthermore, this was not a situation where Mr Cowan acted for Ms Huang pursuant to a different authority such as a power of attorney.
36. I have reached the opinion that Mr Cowan had no legal authority to withdraw Ms Huang's consent to stand for the committee at the AGM.

Order to disclose source documents in respect of the vote for the committee

37. Following the 'show of hands' vote for the seventh position on the committee, Mr Cowan asked to view the voting tally for the committee. A copy of the handwritten tally sheet was presented at the hearing. The left hand-side is numbered 1 to 11 with no names. The numbering on the list appears to correlate with the listing of the candidates on the voting form. Mr Ikeda is listed at number 8 and Ms Huang at number 9. The sheet records Mr Ikeda with 27 votes plus 4 and a total 31 written at the right. Many of the numbers have been written over correcting totals including Mr Ikeda's total vote. There is no breakdown at the time between of the different types of votes (postal, proxy or vote in person at meeting).



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

38. During the hearing the applicant argued there were multiple errors in the vote count for the committee. In support of this submission, counsel pointed out the numerous inaccuracies in the AGM minutes particularly in respect of the attendance list and the list of proxies. Three of Mr Ikeda's five proxies were missing from the minutes.
39. Mr Baker argued that the evidence regarding the irregularities in the AGM minutes should not be the basis for suspicion on the eventual vote. He argued that the tribunal should not make any order requested by the applicant based on suspicion when the actual source voting papers were available from BCA. Counsel suggested at the hearing that the actual source documents (postal, proxy and votes in person) behind the final ballot be examined by the applicant's counsel. Mr Baker suggested that both Counsel meet to examine the evidence regarding the vote and, where agreement is reached, would file a joint memorandum. Mr Kwok from BCA was agreeable to this happening.
40. At the hearing, Mr McLean opposed a review of the actual vote and requested that the tribunal make an inference drawn from the irregularities on the minutes of the AGM.
41. Taking into account the submissions of counsel and the suggestions by Mr Baker, the tribunal issued an order dated 28 March 2018 requiring the parties meet to examine all the source documentation relating to the vote count for the election of the committee at the AGM and to file joint or separate memoranda.
42. There was no agreement between the parties following an examination of the source documentation. In fact the parties became increasingly polarised regarding the evidence and its apparent results.
43. Further orders were sought for discovery of documentation relating to the eligibility of certain voters. The matter became more protracted and eventually final lengthy submissions were received from both parties on 12 June 2018 following a lengthy disclosure process.

Committee vote

Applicant's submissions

44. Counsel for Mr Ikeda submits there are numerous breaches of the UTA 2010 and UTR 2011 in respect of the voting at the AGM. The applicant argues BCA employ a number of 'strategies' to ensure that only certain unit owners are voted on the committee and that their actions have created an unfair and undemocratic process. Counsel submits:
 - a. Certain nominations for the committee are not named on the agenda sent out with the Notice of Intention to hold an annual general meeting;
 - b. In some cases BCA do not send a proxy form to certain unit owners. Instead they argue that BCA has permitted Graeme McDonald to send an email with a pre-completed proxy form with his name entered as proxy. They say Mr McDonald collected 32 proxies in this manner giving him considerable voting power to select the chairperson and committee members, particularly if the committee size is restricted to a smaller number;
 - c. That Mr McDonald has a clear conflict of interest being the building manager, letting agent, committee member and holder of a large number of proxies. Mr McDonald's



company owns a number of principal units and he has served on the committee. The committee has entered into a management contract with Aruba Management (Victopia) Limited to manage the entire complex and operates an on-site letting agency. Graeme McDonald is the sole director of this company.

45. Counsel, in their lengthy submissions, categorised the alleged breaches in the voting process in the following way:
- (a) Owners whose votes were not counted due to non-payment of levies but had paid;
 - (b) Owners whose vote was counted but had outstanding levies;
 - (c) Owners who were supplied pre-completed proxy forms with Graeme McDonald's name and who gave Mr McDonald their proxy;
 - (d) Owners who gave Mr McDonald their proxy by email;
 - (e) Owners who gave their proxy by email to BCA;
 - (f) Proxy forms that were not signed by all owners of the unit;
 - (g) Voting forms that were not signed by the owners;
 - (h) Voting forms that were not signed by all the directors of the company owner of the unit;
 - (i) Some postal voters being provided incorrect voting forms that do not list all nominations for committee.

46. Multiple documents were provided to the tribunal including the register of unit owners, the actual voting forms, the postal votes disclosed, copies of levies, proxies, and debtor analysis. Counsel provided a schedule of unit owners for each of the alleged breach category specified.

The respondent's submissions

47. Counsel for the respondent submits that a review of the source documents conclude that Mr Ikeda came in 8th equal with Ms Morgan (not Ms Huang) (after Hay, Koper, Turner, Yang, Young, Lawrence and McDonald) and consequently he was never entitled to be part of the committee. A retrospective vote tally was provided for the tribunal.
47. Counsel submits that the ledger for each owner on the revised table established which owners were "paid up" and eligible to vote.
49. In a final updating submission on 12 June 2018, Counsel for the body corporate argues that the question of the final vote count of the 2017 committee is "no longer alive and is moot". The committee held its last meeting on 7 June 2018 and no further committee meeting will be held before the annual general meeting scheduled for 1 August 2018. Counsel argues that the Tribunal must decline to make any determination as there is no standing. The Tribunal was referred to the case of *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478.

Who can vote at an AGM?

Dated at Auckland on Wednesday 27-Jun-2018



B Harvey, Adjudicator

50. Section 96 UTA 2010 sets out the requirements for a unit owner to vote at an AGM:

96 Voting: eligibility

(1) A person eligible to vote at a general meeting of the body corporate (eligible voter) is a person who is of or over the age of 16 years and—

(a) whose name is entered on the register of owners of principal units as—

(i) the owner of a principal unit; or

(ii) the representative of that owner; or

(b) who is the nominee of a company the name of which is entered on the register of owners of principal units as the representative of the owner; or

(c) who is a subsidiary body corporate representative.

(2) For subsection (1)(a)(ii), a person is a representative of the owner of a principal unit if—

(a) the person is a guardian, trustee, receiver, or other representative of the owner, and is authorised to act on the owner's behalf; or

(b) the person is authorised by law to administer, manage, or control the property of the owner.

(3) An eligible voter may not vote unless all body corporate levies and other amounts that are from time to time payable to the body corporate in respect of his or her unit have been paid.

(4) In the case of an eligible voter who is a subsidiary body corporate representative, the eligible voter may not vote unless all body corporate levies and other amounts that are from time to time payable to the body corporate by the subsidiary body corporate have been paid.

(5) An eligible voter whose interest in his or her unit is subject to a registered mortgage must, if required by that mortgage, obtain the consent of the mortgagee before exercising a vote.

(6) The payment of any body corporate levies and other amounts that are from time to time payable to the body corporate by the owner of a principal unit and that are disputed by the owner does not affect the right of that owner to dispute the payment if the sole purpose of making the payment was to exercise that owner's entitlement to vote.

51. Each of the categories of alleged breaches raised by the applicant are examined.

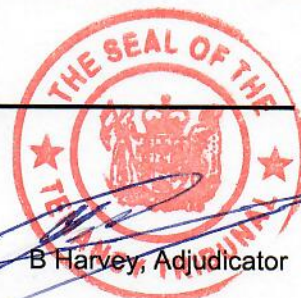
Owners whose vote was counted but had outstanding levies

52. Counsel provided a schedule of 11 owners who allegedly had their vote counted but had not paid all their levies.

53. I have reviewed the debtor analysis (printed 28 May 2018) for each owner listed on schedule and checked whether their vote was counted under BCA's document headed 'Ballot votes - Victoria Post AGM Audit'. The evidence establishes that each of the 11 owners (except one) had not paid their last levy due on 18 July 2017 for the period 25 May to 25 September 2017.

54. Mr Baker's revised voting table seems to accept there was an error in the AGM ballot in that 10 votes should not have been counted for non-payment of levies, with the exception of owner

Dated at Auckland on Wednesday 27-Jun-2018


B Harvey, Adjudicator

Justine Girgin (owner of units 8B and 4B). Mr Girgin's vote for unit 8B was not counted at the AGM and also not counted on the body corporate revised table. However the evidence indicates levy payments for 8B were credited to 4B and therefore I accept that this unit owner was eligible to vote for both units. Both Ms Girgin's votes were for Mr Ikeda which means the applicant was short counted one vote.

55. Mr Ikeda (unit 13H) is also part of this group. He disputes that he owes levies based on a previous tribunal order dated 9 May 2017. Incomplete evidence was provided on this matter.
56. After considering all the evidence, I find that at least 10 owners were disqualified from voting at the AGM but still had their vote counted in breach of section 96(3) UTA 2010.

Owners whose votes were not counted due to non-payment of levies but who had paid

57. Counsel says there are 6 owners whose votes were not counted on the basis of their levies being unpaid but in fact they had paid.
58. The vote by owners of Unit 4P (Lao & Ou) was excluded at the AGM for non-payment of a charge of \$49.47 dated 8 September 2016 in relation to "Translation – brief of evidence – English to Traditional and simplified Chinese". This charge did not relate to their operational levy which was fully paid and correspondence provided from the owner to the tribunal indicates they were unaware of this outstanding amount and dispute the charge. There is insufficient evidence to make any findings about this allegedly disputed translation fee.
59. There are other irregularities raised by counsel in this category. These include;
 - (a) The levy statement provided for unit 1H and 6P were dated 26 April 2018 (for levy 25 May to 25 September 2017) and clearly not the original statement or at least had been recently recreated;
 - (b) In the case of unit 10M (Pan) there is an allegation that BCA transferred money (\$983.25) from his operating account into a Remedial account on 24 August 2016 without his authorisation. Mr Pan's statement shows that he paid his operational levies on time but that there was an outstanding invoice for some remedial work.
60. The patchy incomplete nature of the evidence provided on this group is insufficient to make any conclusive findings. The allegation that BCA can transfer of money between accounts without authority from an owner, impacting on unit owner's eligibility to vote, is something owners can raise themselves with BCA or at a the body corporate general meeting.

Proxies given by email

61. Under section 102(3) UTA 2010 a proxy must be appointed by notice in writing signed by the eligible voter.
62. An email proxy does not comply with the requirements under 102 (3) UTA 2010 as it does not contain the signature of the eligible voter or voters.
63. I find that the following email proxies were invalid under the law and should not have been counted in the ballot:
 - (a) 8 owners who gave their proxy to Mr McDonald by email; and
 - (b) 2 proxies given to BCA (Paula Beaton) by email.



Proxy forms not signed by all owners of the unit

64. Section 102 (4) UTA provides that "if there are 2 or more eligible voters who own 1 principal unit and they are jointly entitled to exercise 1 vote and wish to do so by proxy, that proxy must be jointly appointed by them and may be 1 of them.
65. The rules in respect of the signing of proxies are included in the notes on Form 11 Proxy appointment form which state;
"4 If the unit owner is a body corporate or an unincorporated body, the representative (recorded in the registers of unit owners) of the unit owner must sign the form.
5 If the unit is owned by more than 1 person, every owner must sign the form.
6 If the unit is owned by more than 1 person, one of the unit owners may be appointed as proxy."
66. I find at least 8 proxies were only signed by one joint owner however multiple owners were recorded on the register of owners. There are also 2 more proxies which were not signed by the owner (but another person) in breach of section 102(4) UTA. These 10 proxies were defective and should not have been counted in the vote.

Proxies not signed by the representative of the owner

67. Under section 96(1) UTA 2010 a person may vote at a meeting where their name is "entered on the register of owners of principal units" as a "representative of that owner". A person is a representative of a principal unit owner if –
(a) the person is a guardian, trustee, receiver, or other representative of the owner, and is authorised to act on the owner's behalf; or
(b) the person is authorised by law to administer, manage, or control the property of the owner."
68. The body corporate must maintain a register of owners with an on-going obligation on the unit owner to update the body corporate in writing of any changes to the information on the register (section 85(1) and (2) UTA 2010).
69. Regulation 4 UTR provides that the name, contact details and preferred method of contact of any representative or agent of the unit owner must be set out in the register. Where the unit owner is a corporation, the register must provide details of a director or representative. A unit owner is a trust details of all the trustees must be set out in the register. (Regulation 4(1)(f)-(i) UTR).
70. I have reviewed the register of owners. There are approximately 16 companies on the register which do not record any director or representative. There appears to be one trust on the register that does not record the name of any trustees and one deceased estate without any representative recorded.
71. After reviewing the evidence, there are two proxies which were only signed by one director of the owner company (and there are at least 2 directors) and there is no representative named on the register for this owner. There are also 6 units with multiple trustees recorded on the register however only one trustee has signed the proxy appointment form. These proxies do



not meet the requirements under the law and their proxy vote should not have been counted at the AGM.

Proxies given to Graeme McDonald under pre-completed form

72. Mr McDonald is the director of Aruba Management Victopia Limited. The committee, under its delegated powers, has entered into a contract with Aruba Management Victopia Limited to manage the complex. McDonald's company owns a number of principal units and he has been a member of the committee. I understand Mr McDonald also operates an on-site business as a letting agent for overseas and other owners.
73. I have examined an email from Mr McDonald dated 10 August 2017 and an email from Justine Girgin dated 24 July 2017 (forwarding an email from Karen Deane from Victopia Apartments Rentals enclosing the pre-completed proxy).
74. On 10 August 2017 Graeme McDonald, Property Manager for Victopia, emailed a number of unit owners seeking their proxy at the AGM. The email state:
*"As in the past as per our management agreement with you as your property manager I have had your proxy to vote should you be unable to attend the AGM yourself.
The AGM is fast approaching and we have been advised that we require your signature on the proxy form in order to act on your behalf this year."*
75. Mr McDonald held 32 proxies at the AGM. The applicant submits that Graeme McDonald collected approximately 24 proxies from owners by sending them a pre-completed proxy form by email with his name already entered as proxy. Eight of the 24 are deemed invalid as they were in an email and not signed by the owner.
76. The applicant is concerned Mr McDonald seeks proxies from overseas owners and misleads the owners by suggesting, as property manager of the building, they are legally required to appoint him as their proxy. The applicant alleges that BCA did not send proxy appointment forms to certain owners and instead allowed Mr McDonald to send a pre-completed proxy form in his email. The applicant alleges that the Mr McDonald collects proxies to vote for Chairperson Jacqui Turner.
77. Under section 85 Residential Tenancies Act 1986 (RTA) the tribunal must take the substantial merits and justice of the case into consideration in all decisions.
78. Taking into account the substantial merits and justice of this matter as required under section 85 RTA, I have reached the opinion that these pre-completed proxies should not be counted for the following reasons;
 - a. Proxy forms must be sent by the body corporate with the Notice of annual general meeting. The pre-completed proxy forms were not sent out by the body corporate in breach of the process set out in regulation 6(5) UTR 2011;
 - b. I am satisfied BCA were aware Mr McDonald collected proxies from overseas and other owners in this way and do not appear to have taken any effective steps to prevent this behaviour;



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey
B Harvey, Adjudicator

- c. I am concerned about the unfair and misleading manner in which these proxies were obtained, particularly in respect of overseas owners. In his email Mr McDonald purports to "require your signature on the proxy form" to act on their behalf "as per our management agreement with you";
79. Having reached this view, I accept that individual owners, not wishing to engage in management issues in the complex, may of course appoint Mr McDonald as their proxy at the AGM using the blank proxy appointment form provided by BCA.
80. There is an additional important reason, in my opinion, for excluding these pre-competed proxies. Mr McDonald's proxies were never counted in the ballot for the committee at the AGM. The reasons they were never counted in the vote is uncertain however, as suggested by Counsel, it may have been that they were not handed up in time for the actual vote count.

Voting forms that were not signed by the owners

81. The applicant says there are approximately 6 voting forms which have been signed by a person who is not an owner and the person has not been appointed proxy. I have viewed the source documents for this category and I am persuaded that at least 4 of these votes appear invalid.

Voting forms not signed by all directors or nominee of the company owner

82. Section 96(1)(b) UTA allows a person who is the nominee of a company, the name of which is entered on the register, to vote at a general meeting.
83. In almost all cases the register of owners does not record a representative or nominee of a company. I have reviewed the evidence and find there are at least 6 voting forms from companies, signed by a single director, and which have multiple directors and no nominee or representative recorded on the register (and no proxy).

Postal votes

84. Postal voting forms must accompany the Notice of annual general meeting.
85. As discussed, BCA failed to include Mr Ikeda, Ms Huang and Mr Pan in the first version of the agenda of the Notice of annual general meeting (undated but sent approximately 3 August 2017) and they were missing from the accompanying postal vote forms.
86. BCA sent a new undated agenda and new postal vote form including the names of Mr Ikeda, Mr Pan and Ms Huang sometime shortly after 3 August 2017.
87. It is mandatory requirement under section 103(2) UTA for the postal vote to be in the prescribed form (Form 12).

Dated at Auckland on Wednesday 27-Jun-2018



B Harvey
B Harvey, Adjudicator

88. The applicant alleges that BCA circulated at least 3 different versions of the postal vote to unit owners and that some owners were never provided with the updated postal form with the names of all candidates. The applicant says they have viewed three versions of the postal vote form.
89. BCA supplied only one postal vote form to the applicant (for Unit 11P) which has missing pages for the list of nominees for chairperson and only 4 nominees listed for the committee. Mr Ikeda and the other 2 unit owners appear to be missing from the postal vote form. Unit 11P postal vote was counted in the post audit vote sheet but should be considered invalid on basis that the postal vote does not provide the full list of candidates. I note that 11P is not listed on Mr Baker's revised table.
90. Ms Stokes (unit 8A) emailed her postal vote to Jay Moodley on 15 August 2017 voting for Mr Ikeda, however this postal vote was not counted by BCA. The postal vote recorded the full list of candidates in this case (including a vote for the applicant). Ms Stokes' email to BCA was provided however it is unclear on the evidence the reason her vote was not counted.
91. I have also viewed a postal vote form emailed to BCA on 15 August 2017 from unit 4B and 8B (Girgin). The postal vote does not list Mr Ikeda as a candidate for chairperson or for the committee. The postal vote is the incomplete version that was replaced after the new agenda was sent out some weeks earlier. In any event, this postal vote was not counted as Ms Girgin subsequently appointed a proxy to attend the meeting.
92. I am unable to reach a finding there were 3 different versions of the postal vote circulated to owners. However, the evidence in the case of Justine Girgin (4B and 8B) and unit 11P demonstrates that the incomplete postal vote form (omitting Mr Ikeda, Mr Pan and Ms Huang) was being used by owners and in at least one case was accepted by BCA at the AGM. I also accept there was also a lack of clarity as to the reasons Ms Stokes' postal vote was discounted. The extent to which, if any, other unit owners posted the old incomplete postal vote in advance of the AGM cannot be ascertained on the evidence.

BCA's reasons for discounting votes for Mr Ikeda

93. The applicant argues BCA unfairly discounted several votes for Mr Ikeda. One example cited by the applicant is unit owner 1B who appointed Mr Ikeda as proxy. Mr Ikeda voted as proxy for unit 1B (Jodie Burton) at the AGM however BCA discounted the vote as the voting sheet, produced by BCA specially for this unit owner, was not signed and dated. The attendance list and proxy form indicated that Mr Ikeda would be voting as proxy for unit owner 1B. I accept the submission that BCA could have asked Mr Ikeda to sign the form and that discounting this vote appears harsh and unreasonable.
94. Wai Leon and Noeline Lo (Unit 10E) voted for Mr Ikeda however their voting form was not counted on the basis that it was handed in late. Mr Leon and Ms Lo are recorded on the attendance list of the AGM. There is insufficient evidence to reach any finding regarding the actions of BCA on this particular vote.

Mootness - should the tribunal decline to grant relief?



95. The 2018 AGM is scheduled for 1 August 2018. The committee have finished meeting for the year according to Mr Baker. In an updating memorandum dated 12 June 2018 counsel for the body corporate submits that the Tribunal must decline any determination as "the issue is no longer alive and is moot". The case of *Maddever v Umawera School Board of Trustees* [1993] NZLR 478 was mentioned in support of this submission.
96. *Maddever* involved judicial review proceedings brought by parents of a former student against the Board of Trustees in respect of their decisions pursuant to the Education Act 1989. The High Court dismissed the application on various grounds and expressed the view that it would be futile to grant relief after three years had passed since the incident, the student had left the school and a new board of trustees had been elected. The court referred to the doctrine of mootness developed in American constitutional law. The Court referred to a New Zealand example of mootness in *Turner v Pickering* [1976] 1 NZLR 129 where relief was refused on the basis that, since the proceedings had been commenced, events had occurred which rendered the outcome of the case irrelevant.
97. I am not persuaded the declarations sought should be refused on the grounds of futility or mootness. Mr Ikeda lodged this application in September 2017 following the AGM. The committee composition is largely the same and the applicant is still an owner in the complex. I am of the view *Maddever* has little value or relevance to this case which examines the legality of a vote at an AGM in respect of a large body corporate.

Conclusions

98. The Tribunal has powers under section 171(3A) UTA 2011 to order any party to do anything to remedy a breach by that party of an obligation arising under the Act and may also restrain a breach of those obligations. The Tribunal may also make any ancillary or consequential orders.
99. The Tribunal's powers are in addition to those set out in the Residential Tenancies Act 1986 (RTA) and part 3 of the RTA applies with necessary modifications and with certain exceptions. Section 85 RTA requires the Tribunal to exercise its jurisdiction taking into account the "substantial merits and justice of the case" and in a manner to ensure the fair and expeditious resolution of disputes.
100. The body corporate model has been likened to a mini democracy where every unit owner has the right to exercise their vote at a general meeting to influence the management of the complex. The right to vote at a general meeting by a unit owner in person, or by proxy or by postal vote is governed by strict rules in the UTA 2010 and UTR 2011. Many body corporate managers, like BCA, assume the role of election moderators at an AGM and must ensure that the process for electing the chairperson and committee is fair, unbiased and legally compliant in accordance with democratic intentions underpinning the UTA.
101. I have reached my findings after carefully examining the submissions of both counsel and hundreds of documents provided by both parties in respect of the committee vote at the AGM. This evidence includes the body corporate register, various revised voting tables provided by both parties, proxy forms, some postal votes, unit owner's statement, BCA ledgers, various emails and other documentation.



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

102. I have reached the conclusion that many of the votes counted at the AGM for the committee were defective and in breach of the UTA 2010 and UTR 2011 in a variety of ways. These breaches included counting votes for unit owners who had not paid their levies, non-compliant proxies, incomplete postal forms and defective voting forms.
103. I have reached the view that some of the actions by BCA leading up to the AGM and in terms of the actual vote counting created an unfair and potentially undemocratic environment. These actions include allowing pre-completed proxy votes from the building manger, failing to ensure that all nominees are listed on postal vote forms, permitting non-compliant proxies to be counted, failing to treat categories of voters in a consistent manner, and failing to properly check the eligibility of voters at an AGM.
104. Furthermore, I make the observation that the revised vote table provided by the body corporate concluded that the vote tally announced at the AGM was inaccurate. As discussed, at the time BCA and the chairperson announced the result of the committee vote at the AGM, it appears Mr McDonald's 32 proxy votes had not been counted. As a consequence, the body corporate passed a resolution at the AGM appointing 7 members to the committee that did not include Mr McDonald. I have reached the finding that Mr McDonald's pre-completed proxies should not be counted in any event as they were most likely unfairly obtained and did not originate from the body corporate. As suggested by Counsel for the applicant, it is possibly Mr McDonald's proxies were still being completed and signed at the time the chairperson declared the result of the committee vote. Mr Baker included Mr McDonald's proxy votes in his retrospective table and argues that Mr Ikeda in fact came in at 8th position. However, at this point I note the inconsistency in BCA's position regarding 'late' votes being counted. Mr Leon and Ms Lo's vote was excluded from the AGM tally and on the retrospective vote table on the basis that it was handed in after the vote tally had been established. In a similar way, there is a strong indication that Mr McDonald's proxy votes were also not provided on time at the AGM to be counted.
105. I accept that the evidence demonstrates that Mr Ikeda was likely short counted on the vote tally. Deducting Mr McDonald's proxies and adjusting the tally to take into account the invalid proxies and the additional votes (for example unit 4B), I conclude that Mr Ikeda should have been appointed as the 7th member of the body corporate committee following the 2017 AGM.
106. I accept there is a degree of uncertainty regarding the exact final vote tally for the committee vote given the large number of invalid proxies and, in this regard, I have considered whether the appropriate declaration is to invalidate the entire vote for the committee. However, from a practical perspective, it is now too late for the body corporate to hold an extraordinary general meeting to undertake a new vote on the committee. I also accept that the applicant never sought an order declaring the committee vote invalid, but merely to be included as the 7th member.
107. The applicant has been largely successful with his application and is entitled to have his legal costs paid. Counsel must file submissions as to costs within 2 weeks.



Dated at Auckland on Wednesday 27-Jun-2018

B Harvey, Adjudicator

Please read carefully

**SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER
PLEASE CONTACT YOUR LOCAL "DEPARTMENT OF BUILDING AND HOUSING" OFFICE.**

**MEHEMEA HE PATAI TAU E PA ANAKI TENEI TAKE, PATAI ATU KI TE TARI "DEPARTMENT
OF BUILDING AND HOUSING".**

**AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU,
FA'AMOLEMOLE IA FA'AFESO'OTA'I LOA LE OFISA O LE "DEPARTMENT OF BUILDING AND
HOUSING".**

Re-hearing:

You make an application to the Tenancy Tribunal for a re-hearing. Such an application must be made within five working days of this order and must be lodged with the Registrar of the Tribunal where the dispute was heard.

The only ground for re-hearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. *Please note that being unhappy or dissatisfied with the decision is not a ground for a re-hearing (see "Right of Appeal" below).*

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.

Enforcement:

Where the Tribunal makes any order and it needs to be enforced, then the party seeking enforcement should apply to Collections Unit at the District Court.

Notice to a party ordered to pay money or vacate premises etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.