Civil and Administrative Tribunal

New South Wales

Case Name:	Hoare and Ors v The Owners-Strata Plan No 73905
Medium Neutral Citation:	[2018] NSWCATCD 45
Hearing Date(s):	27 April 2018
Date of Orders:	28 August 2018
Decision Date:	28 August 2018
Jurisdiction:	Consumer and Commercial Division
Before:	G. J. Sarginson, Senior Member
Decision:	(1) The application for orders under s 232 of the Strata Schemes Management Act 2015 is dismissed. (2) The application for the appointment of a compulsory strata manager under s 237 of the Strata Schemes Management Act 2015 is dismissed. (3) Any application for costs by the respondent under s 60 of the Civil and Administrative Tribunal Act 2013 is to be made in the following manner: (a) The respondent is to file and serve written submissions (not exceeding 4 pages) on or before 14 days from the date of this decision. The submissions are to include whether or not the respondent consents to the issue of costs being determined on the papers. (b) The applicant is to file and serve written submissions in reply (not exceeding 4 pages) on or before 14 days thereafter. The submissions are to include whether or not the applicant consents to the issue of costs being determined on the papers. (c) Subject to the submission of the parties, the Tribunal will determine the issue of costs on the basis of the written submissions received and without a further oral hearing, in accordance with s 50 (2) of the Civil and

Administrative Tribunal Act 2013.

Catchwords:

STRATA SCHEMES---Orders sought to direct owners corporation to obtain advice and take action on various issues---Whether breach established---Whether exercise of discretion by Tribunal to make orders sought established.

STRATA SCHEMES - Appointment of compulsory strata manager - Whether criteria under s 237 (3) Strata Schemes Management Act 2015 established.

Legislation Cited:

Civil and Administrative Tribunal Act 2013
Environmental Planning and Assessment Act 1979
Judiciary Act 1903 (C'th)
Local Government Act 1993
Residential (Land Lease) Communities Act 2013
Strata Schemes (Freehold Development) Act 1973
Strata Schemes Management Act 1996
Strata Schemes Management Act 2015
Strata Schemes Management Regulation 2010
Strata Schemes Management Regulation 2016

Cases Cited:

Bischoff v Sahade [2015] NSWCATAP 135
Burns v Corbett; Burns v Gaynor [2018] HCA 15
Estens v Owners Corporation SP 11825 [2017] NSWCATCD 63
Felcher v The Owners-Strata Plan No 2738 [2017] NSWCATAP 219
Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59; 220 CLR 472
Johnson v Dibbin; Gatsby v Gatsby [2018] NSWCATAP 45
Noon v The Owners-Strata Plan No 22422 [2014] NSWSC 1260
Queensland v Australian Telecommunications Commission [1985] HCA 25; (1985) 59 ALR 243
Redland Bricks Ltd v Morris [1970] AC 652
The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207
The Owners-Strata Plan No 37762 v Pham [2006] NSWSC 1287
Walsh v The Owners-Strata Plan No 10349 [2017] NSWCATAP 230

Category:	Principal judgment
Parties:	Applicant: S. Hoare; D. Cummings; V. Stephens; S. Miles; S. Burton; J. Burton; A. Grana; Y. Grana; G. Grana; R. Grana; C. Muscillo; G. Callow; M. Nicholson; L. Nicholson; D. Mullholand; A. Ruigrok; P. Ruigrok; J. O'Dwyer; R. Egan; P. James; L. James; J. Robertson; L. Robertson; D. Robertson; J. Chan; F. Chan; N. Gibbons; A. Harvey Respondent: The Owners-Strata Plan No 73905
Representation:	Applicant: Mr S Hoare and Mr D Robertson Respondent: Mr I McKnight, Solicitor Solicitors: Clarke Kann Lawyers (Respondent)
File Number(s):	SC 17/38442
Publication Restriction:	Nil

REASONS FOR DECISION

Background and Procedural History

1 The dispute involves a large strata scheme located at Kingscliff NSW known as 'Mantra on Salt Beach'. The strata scheme is a stratum development that relevantly comprises of strata plan SP 73905 and a registered Strata Management Statement. The stratum development includes a mixture of commercial and non-commercial Lots.

2 The strata plan and Strata Management Statement were registered on 25 November 2004. Mantra Australia (NSW) Pty Ltd ('Mantra') is the owner of Lot 214 in SP 73905 and was referred to in the submissions of the parties as the "operator". 'Mantra on Salt Beach' offers short term accommodation; conference facilities; and wedding reception facilities. Mantra also has a "caretaker agreement" with the owners corporation.

3 Proceedings were filed in the Tribunal on 4 September 2017. A directions hearing occurred at the Tribunal on 26 October 2017, when directions were made that included the filing and serving of evidence, and the matter was set down for hearing at the Tribunal on 22 January 2018. On 22 January 2018 the

proceedings were adjourned, with further directions. The matter was listed for hearing at Tweed Heads on 27 April 2018. A large number of persons attended the hearing.

4 Of the listed applicants in the proceedings, Mr Hoare, Mr Robertson; Mr Callow; Ms Cummings and Ms Burton attended the hearing.

5 The application sought orders that can be put into two categories. The first category is the appointment of a compulsory strata manager under s 237 of the *Strata Schemes Management Act 2015* ('the SSMA 2015').

6 The second category is a series of orders under s 232 of the SSMA 2015 that can be summarised as follows:

(i) The Tribunal direct that a "by-law notice" be sent by the owners corporation to Mantra that: (a) it is exceeding its special privileges under by-laws 54 and 55; (b) that Mantra has failed to comply with a resolution passed at the 2012 annual general meeting of the owners corporation that functions are to be held within the "commercial premises of the scheme" until the owners corporation grants a licence to otherwise use the common property.

(ii) A "direction" be given to the owners corporation to "prepare a formal and authorative case to Tweed Shire Council" to clarify that the Development Approval granted for the strata scheme gives Lot owners "the right to self-use; leases through off-site agents and letting through the on-site operator"; and "no time limits have been registered on the strata certificates of any of the Torrens title registered apartment Lots". The submission to Tweed Shire Council "is to be prepared in consultation with the legal representative of the owner of Lot 168.

(iii) The strata committee members elected at the annual general meeting of the owners corporation in 2015 "be issued with special levy notices to recoup the scheme (sic) expenses it invalidly incurred to pursue baseless legal claims for private benefit".

(iv) The strata committee of the owners corporation "be directed to leave the common property storage cages in place until such time as the owners at a general meeting agree on a remedial course of action".

(v) The Tribunal direct that a "by-law notice" be sent by the owners corporation to Mantra to "stop using common property to store its goods and chattels" and "it has failed

to co-operate with a 2012 AGM resolution to have this matter addressed".

(vi) The Tribunal direct that a "strata management statement dispute notice" be given "to the Retail Owner" to bring "the operation of the loading dock 'shared facility' into line with DA conditions 93, 95, 101 and 105".

(vii) The Tribunal direct that a "notice be sent to all owners clearing the air on the false by-law 3.1.1 breach notices initiated by the committee (sic)".

(viii) The Tribunal direct that a "notice" be sent by the owners corporation to Mantra to "rectify illegal signage placed in the common property basement area that contravenes the by-laws regarding exclusive use car park allocations".

7 At the hearing on 27 April 2018, Mr Hoare and Mr Robertson appeared for the applicant. Mr Hoare filed the application in the Tribunal, asserting it was on behalf of himself and the other applicants. Mr Hoare is not a Lot owner or occupant of the strata scheme although he was previously a Lot owner and transferred ownership of the Lot to his daughter, Ms Grainger. Mr Hoare stated that he was "assigned" the right to appear by the owner of Lot 168, Ms Grainger. Mr Robertson stated he was the owner of Lot 10.

8 Mr Knight, Solicitor, appeared for the respondent ('the owners corporation'). No order had been made on 27 October 2017 or 22 January 2018 that the respondent be granted leave to be represented.

9 Mr McKnight opposed Mr Hoare and Mr Robertson appearing on the basis they had no standing because: (i) Mr Hoare was not an "interested person" within the meaning of the SSMA 2015; and (ii) Lot 10 was owned by a company of which Mr Robertson was a director, and there was no proper authority that Mr Robertson was authorised to represent the company in the proceedings as Lot owner.

10 Mr Hoare and Mr Robertson opposed the respondent having leave to be legally represented in the proceedings. The Tribunal granted leave for Mr Hoare and Mr Robertson to appear for the applicant, and Mr McKnight to appear for the owners corporation.

11 There was no dispute that Mr Callow, Ms Burton and Ms Cummings were Lot owners in the strata scheme. They orally informed the Tribunal at the hearing

on 27 April 2018 that they wished for Mr Hoare to represent them in the proceedings. Each had previously provided a document to the Tribunal asserting that they sought that Mr Hoare take the role as a "lead applicant". Mr Hoare referred to himself as the "lead applicant".

12 In describing himself as the "lead applicant", Mr Hoare appears to be under a misapprehension that the SSMA 2015 allows for representative proceedings. Unlike s 71 (2) of the *Residential (Land Lease) Communities Act 2013*, for example, there is no provision of the SSMA 2015 that allows for representative proceedings.

13 In respect of Mr Hoare and Mr Robertson appearing, rather than entering into a lengthy debate about whether or not Mr Hoare and/or Mr Robertson had standing, the Tribunal approached the issue from the perspective of the grant of representation under s 45 of the *Civil and Administrative Tribunal Act 2013* ('the NCAT Act').

14 The granting of leave for Mr Hoare and Mr Robertson to appear as representatives of the applicant does not constitute a finding that either Mr Hoare or Mr Robertson fall within the definition of an "interested person" under 226 of the SSMA 2015. Nor does the granting of leave to represent Lot owners in these proceedings mean that either or both Mr Hoare and Mr Robertson will be granted leave to represent Lot owners in any future proceedings.

15 However, the Tribunal is satisfied that Mr Callow; Ms Cummings and Ms Burton are Lot owners and are "interested persons" within the meaning of the SSMA 2015 who have standing to bring the proceedings.

16 During the course of proceedings, Mr Hoare primarily made submissions on behalf of the applicant, but on occasions Mr Robertson made submissions. The Tribunal was satisfied that Mr Robertson had standing to be heard as a director of a company that was the owner of a Lot, or in the alternative as a co-representative of the applicant with Mr Hoare.

17 At the hearing, neither party sought to question witnesses. Rather, each party made submissions to supplement the written submissions and documents that had been admitted into evidence. There was a copious amount of documents

filed by both parties for the Tribunal to consider, exceeding in total over 700 pages combined.

18 In this decision, the use of the phrase “strata committee” incorporates both the executive committee of the owners corporation (under the *Strata Schemes Management Act 1996*-‘the SSMA 1996’) and the strata committee of the owners corporation (under the SSMA 2015).

Documents of the Applicant

19 The applicant filed and served documents upon which it relied dated 10 November 2017; and documents in “reply” to the respondent’s documents dated 1 March 2018. The documents in “reply” contain written submissions prepared by Mr Hoare.

20 Relevantly, the documents of the applicant were as follows:

21 Written outlines of submissions, setting out the “outcomes sought” and reasons for the orders sought. The submissions refer to ‘Points of Claim’ but are not in the recognised form of Points of Claim in the Tribunal.

22 A chronology of events.

23 A copy of the special privileges by-law in favour of Mantra (By-laws 54 and 55).

24 A copy of By-law 56, which refers to the ‘Strata Management Statement’.

25 A copy of a 1 page extract of the registered strata plan showing the position of Lot 214.

26 Extracts of ss 112; 142; and 144 of the SSMA 2015.

27 Extracts from the Mantra website, including wedding ceremony information.

28 A letter from Mr Hoare as “strata agent for Lot 168” to the Secretary of the owners corporation dated 25 July 2014 referring to “serious issues impacting on title rights” of Lot owners; and attaching a “consultation paper”. In essence, the “consultation paper” asserts that the original Development Approval in 2002 containing a “no permanent occupancy” provision was “null and void because no “hotel rooms” had been constructed, and a subsequent “DA amendment” that created a “monopoly arrangement with an on-site letting agent” was also

invalid. Mr Hoare stated that it was his "intention to put a Resolution to the next AGM to appoint and empower a special task group to act on behalf of the OC".

29 Minutes of a Tweed Shire Council meeting on 23 April 2003.

30 A copy of a Notice of Valuation of Land dated 1 July 2011 for The Owners-Strata Plan 73905 identifying the zone as "residential".

31 A Certificate of Title in respect of Lot 168 of strata plan SP 73905.

32 An unsigned undated document without any identifying features purportedly referring to the "lending practices of Westpac" regarding Mantra properties.

33 An extract from the High Court of Australia website summarising the decision in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; 220 CLR 472.

34 A letter from Ms S. Grainger to the Secretary of the owners corporation dated 20 January 2015 stating that she was appointing her father, Mr Hoare, "to be my representative for all legal dealings with the owners corporation".

35 A Motion considered at the annual general meeting of the strata scheme in 2015 prepared by Mr Hoare on behalf of Ms Grainger that the owners corporation "exercise its rights to fair and legal treatment by the on-site operator" in regard to: (a) "misinformation" about the "residential rights" of Lot owners; (b) "fulfilment of the Corporations Act disclosure statement/commitment that all owners under the management agreement will receive a pooled return"; and (c) "standard form contract provisions that are at odds with the national 'fair contract law reforms' introduced in 2011. Further, the resolution states that Mr Hoare should be appointed as the "main proponent" to have discussions with Mantra.

36 An extract of minutes of the annual general meeting of the strata scheme on 20 February 2015 regarding debate involving Motion 10.

37 A letter form Hickey Lawyers acting on behalf of Mantra to Mr Hoare dated 6 February 2015. The letter states that misleading information potentially constituting injurious falsehood and negligent misstatement had been posted by Mr Hoare on 'The Hub' (a web forum where Lot owners in the strata scheme

could view material) and that Mr Hoare retract the information and publish an apology.

38 A letter from Mr Hoare to Hickey Lawyers dated 15 February 2015 denying that the information was misleading and stating that he would refer the Solicitor acting for Mantra to the Law Society of NSW Ethics Committee.

39 A series of emails involving Mr Hoare; Mr Teys (a Solicitor acting for Mantra) and Ms Ferris of BCS Strata Management (the strata manager of the strata scheme) regarding issues including whether a strata committee meeting of the owners corporation in March 2015 was valid.

40 A letter from Mr Teys of Block Lawyers to Mr Hoare dated 24 August 2015 asserting that Mr Hoare had stated at an extraordinary general meeting of the owners corporation on 12 September 2014 that the "committee was corrupt" and that such comments were defamatory. The letter sought an apology or legal action would be taken.

41 A letter from Mr Teys of Block Lawyers dated 24 August 2015 to Ms Grainger asserting that the strata committee had an "anti-harassment policy" which Mr Hoare had breached, and that Ms Grainger should consider not appointing Mr Hoare as a proxy.

42 A letter from A Backhouse and Associate lawyers acting on behalf of Mr Hoare to Block Lawyers dated 27 August 2015. The letter denies any defamatory conduct by Mr Hoare and asserts that Mr Leys insulted Mr Hoare at the extraordinary general meeting on 12 September 2014. The letter asserts that:

> "There are two bones of contention between our respective clients-the residential title rights of owners and a long list of unresolved accountability issues. The former matter is likely to be resolved as a result of proceedings in the NSW Land and Environment Court (Case No 15/10156). The other matters should be resolved by your client pursuant to the dispute resolution provisions of the NSW Strata Scheme Management Law". (sic)

43 A document headed "presentation-EGM 12 September 2014" which in handwriting at the bottom of the document asserts it is the "text" of what Mr Hoare stated at the extraordinary general meeting on 12 September 2014, and that the document was "tabled" at the meeting. The document refers to "Motion 2" being "illegal" and not in accordance with strata legislation. The applicant's

documents did not contain a copy of the Motion, or the minutes of the extraordinary general meeting on 12 September 2014. However, it appears that the Motion was in respect of a proposed contract between the owners corporation and Mantra that Mantra act as the "caretaker" of the strata scheme.

44 An ASIC media release dated 18 February 2016 in respect of Mr Teys of Block Lawyers being disqualified from managing companies for a 5 year period.

45 An advice on evidence from Mr Cosaro SC dated 12 January 2013 to the owners corporation regarding the validity of an easement for the use of part of common property as a storage cage letting business in favour of Lot 3.

46 A copy of part of the registered strata plan, where Mr Hoare has written on the document with arrows: "storage cage area intended for exclusive use rights of Lot occupants" and "storage cage area intended for bike storage".

47 A copy of a Motion that Mr Hoare asserted was put forward by him unsuccessfully at a "committee meeting" and an extract of the minutes of the meeting. The minutes relevantly state:

> "**13. Illegal Easement Over the Exclusive Use Storage Cage Area of the Common Property (Motion requested by Steve Hoare Lot 168**):
>
> 13.1 That the Strata Committee discuss the illegal easement over the exclusive use storage cage area of the common property. Action sought:
>
> That the committee acknowledge its negligence in failing to act on the 12 January 2013 expert advising from Franco Cosaro SC and decide to act forthwith to have the easement cancelled".
>
> **LOST**"

48 A copy of the Strata Management Statement of the strata scheme registered on 25 November 2004.

49 A copy of a Motion that Mr Hoare asserted was put to a strata committee meeting on 5 May 2017 and an extract of the minutes of the meeting, with handwritten comments by Mr Hoare. In essence, the Motion (which states it was requested by Ms Ellison, the owner of Lot 132) seeks that the strata committee "read the file documentation going back 11 years concerning representations about the on-going failure to operate the loading dock 'shared facility' in line with development consent conditions/local government regulations/public health law/the Building Code of Australia" and take

measures to “bring the operation of the loading dock into compliance” with “objective measures. The Motion was lost. The document contains handwritten assertions by Mr Hoare that the strata committee failed to understand the Motion and did not act in good faith.

50 Correspondence between Ms Sternberg (a Lot owner) and Tweed Shire Council in March 2015 regarding whether or not the loading dock area behind an area of retail shops and adjacent to Ms Sternberg’s Lot was being used in a manner compliant with Development Approval and Council regulations.

51 An email from Mr Hoare to Ms Sternberg dated 25 March 2015 containing recommendations of Mr Hoare as to what measures Ms Sternberg should take regarding the position of Tweed Shire Council in response to Ms Sternberg’s complaint.

52 A copy of the Tweed Local Environmental Plan 2000.

53 An email of Mr Hoare to Ms Ferris of the strata manager (BCS Strata Management Pty Ltd) dated 6 April 2016.

54 A letter of the strata manager of the strata scheme dated 1 September 2016 to an unidentified Lot owner that relevantly states:

> “We have been advised by the owners corporation executive committee that your Lot is believed to be permanently occupied or permanently let. This is in breach of By-Law 31.1 (as attached).
>
> By-Law 31.1 clearly states that:
>
> “Subject to By-Law 31.2 and By-Law 31.5, all lots shall only be used for tourist resort accommodation purposes”.
>
> If your lot is permanently occupied or let this will need to cease or further action may be taken.
>
> …”

55 A letter from Mr Hoare to the Secretary of the owners corporation dated 9 September 2016, that relevantly asserts that the letter dated 1 September 2016 “sails perilously close to a breach of Sections 43 (4) and 49 (1) of the *Strata Schemes Management Act 1996*” regarding Lot owners “indefeasible title rights” and that Lot 168 is not permanently occupied or let.

56 An email from Mr Martinez of Finn Foster APB to Ms Lynch of BCS Strata Management Pty Ltd dated 7 December 2016 referring to “two queries”

regarding insurance. The email indicates there were attachments from Hickey Lawyers "re storage easement", but it is unclear what queries the email is responding to.

57 A copy of a Motion that Mr Hoare asserts was put to the strata committee meeting on 5 May 2017; the minutes in respect of the Motion; and Mr Hoare's handwritten comments on the document. Relevantly, the Motion states:

> "**12. Negligent/Illegal Conduct of the Office Bearers (Motion requested by Steve Hoare Lot 168)**:
>
> 12.1. That the Strata Committee discuss the negligent/illegal conduct of office bearers. Action sought:
>
> That the committee copy to all owners the supressed 7 December 2016 email advice from the Insurer and the various supressed replies from affected owners/legal representatives in relation to its illegal By law 31.1 breach letters.
>
> That the committee copy to all owners the supressed legal advice of 27 August 2015 regarding the false defamation allegations and improper threats made at the 2015 AGM.
>
> **LOST.** The committee discussed the Motion and instructed the strata manager to ensure that the above two documents are on the hub for all owners to access"

58 A copy of the decision of the Tribunal by Member Ringrose in *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63.

59 A copy of a Motion that was put to the strata committee meeting on 5 May 2017 requested by Ms Burton, owner of Lot 126, regarding car parking areas; the minutes in respect of the Motion; and Mr Hoare's handwritten comments on the document. The Motion relevantly sought:

> "Removing all the illegal designated 'DISABLED' spaces
>
> Installing new signage throughout the basement to align with Schedule 1 and Sheets 24 to 29 of Plan 'A' of the By-laws.
>
> Determining who was responsible for the current illegal signage and assigning the costs of removing 'Disabled' signage from the responsible party.
>
> That disabled parking spaces be designated as per the Building Code of Australia requirements next to the disabled ramp in front of the promenade".

60 The Minutes of the meeting in respect of this Motion state:

> "**LOST.** The committee have received from Council the approved plans for construction along with correspondence confirming that plans are correct. The committee can confirm that the approved number within these documents show more than the suggested 1 disable park to 100. Upon a review of the car park, it was found that there were 2 additional disable car parks that are not

> required. The committee resolved to convert them to normal car spaces and the building manager was asked to get quote for this work.
>
> With respect to the suggestion that each unit car space is numbered, the Committee discussed this and believe that it is not a solution to the problem as it will be extremely difficult to police due to lots being in the pool and outside the pool along with the problem of owners storing their vehicles in their car parks and guests letting additional vehicles into the car park in peak times. It would be impossible to locate the owner of the offending vehicle and request they remove it. The committee has investigated the process of removing unauthorised vehicles in the past and have found it very difficult to do so".

61 A Motion put to the annual general meeting of the strata scheme on 24 February 2013 that the strata committee adopt a "code of ethics".

62 A document entitled "Circular to Owners" dated 21 March 2014 by the strata committee, signed by Mr Cassidy (chairperson); Mr Heech (Secretary) and Ms McKeen (Treasurer). The document asserts that it is to correct "factually incorrect statements" of Mr Hoare regarding the annual general meeting on 24 February 2013 and "correct any misassumptions that Owners may have prior to the 2014 annual general meeting. The document then goes on to assert that the executive committee is "working for the benefit of Owners" and should be re-elected.

63 Documents from Mantra in 2012 offering strata committee members a complimentary 1 night accommodation at various Mantra properties and an invitation to the Chairman's Lounge at Metricon Stadium for a Gold Coast Suns AFL game.

64 An email from Mr Lynch of Mantra to Lot owners dated 9 February 2015 regarding the upcoming annual general meeting of the owners corporation on 20 February 2015, criticising the actions of Mr Hoare and supporting the current strata committee.

65 A letter from Mr Heech, secretary of the executive committee of the owners corporation "regarding the upcoming 2017 AGM" to be held on 3 March 2017 sent to Lot owners. The letter is critical of the actions of Mr Hoare and asserts that the current strata committee should be re-elected.

66 A Motion which Mr Hoare asserts was placed on the agenda of the strata committee meeting on 11 December 2015 regarding the engagement of Block Lawyers and explaining why no action had been taken on the advice given by

Mr Cosaro SC; together with Mr Hoare's written comments on the document asserting the strata committee had failed to act with due diligence. The Motion attached a two page "Statement of Concerns" regarding the conduct of the strata committee.

67 An email of Mr Hoare to the strata manager dated 9 December 2013 attaching a table with 8 "unresolved executive committee issues" listed.

68 Extracts from the Minutes of the 2015 and 2017 Annual General Meetings of the owners corporation, with handwritten comments by Mr Hoare.

69 A table setting out what Mr Hoare asserts is the provisions of the SSMA 2015 and legal principles that the strata committee has allegedly failed to comply with.

70 A fee proposal for appointment as compulsory strata manager by Curtis Strata dated 31 August 2017 (attached to the application filed with the Tribunal on 4 September 2017.

Documents of the Respondent

71 The respondent filed documents on 16 January 2018. At the hearing, leave was granted for the respondent to rely upon a further document, being the minutes of the strata committee meeting on 18 January 2018.

72 Relevantly, the documents of the respondent were as follows:

73 A written outline of submissions dated 12 January 2018.

74 A title search on Lot 168 in the strata scheme.

75 The registered strata plan of SP 73905.

76 The registered Complex and Strata Management Statement of SP 73905.

77 Registered Change of By-Laws in respect of SP 73905.

78 A title search of common property of SP 73905.

79 Extracts from the Tweed Local Environmental Plan 2014.

80 The amended Development Consent issued by Tweed Shire Council on 18 August 2006.

81 A letter from Mr Garry Smith, Acting Director of Planning and Regulation of Tweed Shire Council to Mantra dated 13 May 2008 regarding whether residential occupancy was permitted under the Development Consent approved by the Council.

82 A letter from Mr Lindsay McGavin, Manager of Development Assessment of Tweed Shire Council dated 4 December 2014 to the strata manager regarding the approved use of the site under the Development Consent approved by the Council.

83 Advices from Mr McKnight of Clarke Kann Lawyers to the strata manager dated 7 September 2017 and 11 September 2017 regarding the scope of By-law 54.

84 A letter from Ms Joanne Kay, Acting Team Leader Development Assessment of Tweed Shire Council to Mantra dated 23 June 2016 regarding the type and number of car parking spaces required under the Development Consent approved by the Council, including disabled parking.

85 Financial accounts of the owners corporation for the period 1 January 2015 to 31 December 2015.

86 A costs agreement of Clarke Kann Lawyers addressed to the owners corporation dated 22 February 2016.

87 Minutes of the annual general meetings of the of the owners corporation for the years 2012 to 2017.

88 Minutes of strata committee meetings for the period from 27 April 2012 to 18 January 2018 .

89 An extract of minutes a Tweed Shire Council meeting dated 4 September 2014.

90 Registered easement over common property of SP 73905 dated 1 September 2006.

91 A copy of the advice of Mr Cosaro SC dated 12 January 2013.

92 A letter of Clark Kann Lawyers dated 3 February 2017 to the owner of Lot 3 (the Lot the subject of the registered easement) putting the Lot owner on notice

that the owners corporation intended to dismantle the wire storage cages constructed in the area of common property subject to the easement if a resolution was passed at a general meeting; and that 28 days would be given for items of value to be removed from the cages.

93 A letter from Hickey Lawyers, acting on behalf of the owner of Lot 3, to Clarke Kann lawyers dated 16 February 2017 putting forward an offer to settle the dispute about the wire storage cages.

94 A letter from Clarke Kann Lawyers dated 18 April 2017 responding to the letter from Hickey Lawyers.

95 Email correspondence between Mr Hoare and Mr Harlum of Ray Group (the owner of Lot 3 at the relevant time) regarding Mr Hoare using the wire cages for his personal storage in February 2011.

96 Building Managers Report dated November 2017 of Mantra (authored by Mr S. Robertson, General Manager; Mr S. Torbet, General Manager; and Mr D Fitzgerald, Maintenance Manager.

97 Various tax invoices of Teys Lawyers to the owners corporation in the period from 2012 to 2014.

98 Income and Expenditure Statement of the owners corporation prepared by the strata manager for the period 1 January 2017 to 31 December 2017.

99 Points of Defence including submissions of Mantra.

100 Statutory declaration of Mr Phillip Heesch (the current Secretary of the strata committee of the owners corporation) dated 12 January 2018.

101 Statutory declaration of Mr Cliff Cassidy (the current Chairperson of the strata committee of the owners corporation) dated 12 January 2018.

Application of Legal Principles to the Issues in Dispute

Jurisdiction of the Tribunal

102 As discussed previously, the respondent raised the issue at the commencement of the proceedings as to whether or not Mr Hoare and Mr Robertson had standing to bring proceedings.

103 Section 226 of the SSMA 2015 states as follows:

"**226 Interested persons**

(1) The following persons are ***interested persons*** for the purpose of making an application to the Tribunal under this Act:

(a) the owners corporation,

(b) an officer of the owners corporation,

(c) a strata managing agent for the scheme,

(d) an owner of a lot in the scheme, a person having an estate or interest in a lot or an occupier of a lot,

(e) if the strata scheme is a leasehold strata scheme, the lessor of the scheme.

(2) The ***interested persons*** for the purpose of making an application to the Tribunal under this Act relating to a strata scheme for a part strata parcel also include the following:

(a) the owners corporation or a strata managing agent for, an owner of a lot in, a person having any other estate or interest in a lot in, or an occupier of a lot in, any other scheme affecting the building,

(b) any other person for the time being bound by any strata management statement for the building."

104 Mr Hoare is not currently an owner of a Lot in the scheme, nor an occupier of a Lot. He submitted that he has an "interest" in Lot 168 because he had been "assigned" the right to appear in the proceedings by his daughter who is the owner of Lot 168. According to the letterhead on documents by Mr Hoare in the applicant's documents, he is a financial manager and resides in the Australian Capital Territory.

105 It is unnecessary to make any finding as to whether the owner of Lot 168 had complied with the appropriate formalities of assigning an interest in a Lot, or whether taking proceedings in the Tribunal is an interest in the Lot. For reasons set out previously, the approach was taken that a number of the other applicants to the proceedings were Lot owners, and the Tribunal was prepared in the circumstances of the matter to grant leave for Mr Hoare to appear as a representative of Mr Callow; Ms Cummings and Ms Burton under s 45 of the NCAT Act, to facilitate the resolution of the real issues in dispute in the proceedings.

106 The Tribunal has also granted Mr Robertson leave to appear as representative of the company which owns Lot 10, for reasons previously discussed.

107 In the Points of Defence and submissions of Mantra the issue was raised that the Tribunal did not have jurisdiction to hear any application by Mr Hoare by reason of the High Court decision in *Burns v Corbett; Burns v Gaynor* [2018] HCA 15 ('*Burns v Corbett*') on the basis that Mr Hoare is a resident of a Territory (the Australian Capital Territory). However, this is a moot point for the following reasons:

(a) The Tribunal granted Mr Hoare leave to appear as a representative of other Lot owners, and no issue was raised that Mr Callow; Ms Cummings and Ms Burton are not residents of NSW.

(b) The Tribunal has made no finding that Mr Hoare has standing to bring proceedings under s 226 of the SSMA 2015.

(c) The principles in *Burns v Corbett* deal with "persons" who are residents of different States, and do not extend to a person who is a resident of a Territory taking action against an owners corporation of a registered strata scheme in NSW.

(d) The Appeal Panel of the Tribunal in *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45 held that the Tribunal is a "court of a State" for the purpose of Chapter III of the Constitution and s 39 of the *Judiciary Act 1903* (C'th) in the context of determining disputes under the Residential Tenancies Act 2010, and the same principle is applicable to the Tribunal determining disputes under the SSMA 2015.

108 Section 232 of the SSMA 2015 states:

> "**232 Orders to settle disputes or rectify complaints**
>
> (1) **Orders relating to complaints and disputes**
>
> The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:
>
> (a) the operation, administration or management of a strata scheme under this Act,
>
> (b) an agreement authorised or required to be entered into under this Act,
>
> (c) an agreement appointing a strata managing agent or a building manager,
>
> (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,
>
> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
>
> (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) **Failure to exercise a function**

For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) **Other proceedings and remedies**

A person is not entitled:

(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

(4) **Disputes involving management of part strata parcels**

The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if:

(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or

(b) any of the parties to the dispute fail to consent to its determination by the Tribunal.

(5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

(6) **Disputes relating to consent to development applications**

The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the *Environmental Planning and Assessment Act 1979* relating to common property of the scheme.

(7) **Excluded complaints and disputes**

This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject-matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter."

109 Section 241 of the SSMA empowers the Tribunal to make orders similar to mandatory and prohibitory injunctions:

241 Tribunal may prohibit or direct taking of specific actions

The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

110 The power of the Tribunal to make orders to settle complaints or disputes involving the statutory criteria set out in s 232 (1)(a)-(f) of the SSMA 2015 has been considered by the Appeal Panel of the Tribunal in *Walsh v The Owners-Strata Plan No 10349* [2017] NSWCATAP 230 ('*Walsh*'). The Appeal Panel in Walsh held that:

(a) The "complaint or dispute" must be in respect of one or more of the statutory criteria set out in s 232 (1) (a)-(f) of the SSMA 2015 and is not a power that is enlivened by 'any dispute' within a strata scheme, or "a general supervisory function to oversee the owners corporation" (Walsh at [32], citing *The Owners-Strata Plan No 37762 v Pham* [2006] NSWSC 1287);

(b) The Tribunal has no power under s 232 of the SSMA to simply make a declaration that there has been a breach, or a failure to comply, with the provisions of the SSMA 2015. For example, the Tribunal has no power to make an order that an owners corporation "instruct and ensure" a strata managing agent comply with its statutory obligations (*Walsh* at [60]-[61]).

111 For the Tribunal to make orders under s 232 and s 241 of the SSMA 2015, the applicant must establish that:

(a) The "complaint or dispute falls within s 232 (1) (a)-(f) of the SSMA 2015; and

(b) The Tribunal should exercise its discretion to make an identified type of order that will resolve the "complaint or dispute". In this regard, the Tribunal must be satisfied that it should exercise its discretion to make an injunctive order that will rectify the identified breach (or restrain the breach from continuing) and will achieve the outcome of a party complying with its obligations under the SSMA 2015 (or, if relevant, the *Strata Schemes Management Regulation 2016*). Further, the order must be sufficiently clear that the party knows "exactly in fact" what it is required to do (*Redland Bricks Ltd v Morris* [1970] AC 652 at 666; *Queensland v Australian Telecommunications Commission* [1985] HCA 25; (1985) 59 ALR 243).

112 The Tribunal now considers the various orders sought under s 232 of the SSMA.

The Tribunal direct that a "by-law notice" be sent by the owners corporation to Mantra that: (a) it is exceeding its special privileges under by-laws 54 and 55; (b) that Mantra has failed to comply with a resolution passed at the 2012 annual general

meeting of the owners corporation that functions are to be held within the "commercial premises of the scheme" until the owners corporation grants a licence to otherwise use the common property

113 By Law 54, relevantly provides that Mantra have "special privileges" to use; maintain and keep in good repair common property as set out in a table as follows:

First Column- Lot	Second Column- Area	Third Column- Purpose for which area may be used	Fourth Column- Obligations of Owner/Occupier to Maintain
Lot 214	Area SP 1 shown on Plan "B"	Uses associated with functions including temporary use for conferences, displays and other uses of like nature.	To keep area clean and tidy including repairing any damage resulting from owner/occupiers use of the area.
Lot 214	Area SP 2 shown on Plan "B"	Erection and maintenance of a concierge desk, bell desk.	To keep area clean and tidy including repairing any damage resulting from owner/occupier's use of the area.
Lot 214	Area SP 3 shown on Plan "B"	Erection and maintenance of a concierge desk, dell desk, sales desk, temporary displays	To keep area clean and tidy including repairing any damage resulting from owner/occupiers

		associated with a function, conference.	use of the area.
Lot 214	Area SP 5 shown on Plan “B”	Uses associated with functions including temporary use for conferences, displays and other uses of a like nature.	To keep area clean and tidy including repairing any damage resulting from owner/occupier’s use of the area.
Lot 214	Area SP 5 shown on Plan “B”	To use toilet facilities when area SP 4 being used by the owner and occupier that has the special privilege of area SP 4.	To keep area clean and tidy including repairing any damage resulting from owner/occupiers use of the area.

114 “Plan B” of the registered strata plan referred to in By-law 54 identifies various areas of common property. In respect of SP 4, an area of 1054 sq. mtrs is identified adjacent to, and including, the tennis courts.

115 By-law 55.1 relevantly provides that Mantra will have the special privilege in respect of the whole of the common property to conduct a business of the sale and letting of properties, and that no other owner or occupier shall be entitled to carry on a letting business on common property. By law 55.2 relevantly provides that Mantra may display signs offering Lots in the strata scheme for lease or sale, on parts of the common property agreed to by the strata committee. By-law 55.3 makes clear that Lot owners may let or sell their Lot

using their own real estate agent. By-law 55.4 provides that Mantra will be responsible for the maintenance and repair of signage.

116 It is unclear from the submissions of the applicant as to whether the applicant is submitting that the special privileges By-laws are invalid, and that Mantra cannot use any area of common property without a licence; or whether the applicant is submitting that the special privileges By-laws are valid, but Mantra is using the common property in a manner inconsistent with the special privileges By-laws.

117 The respondent submitted that the owners corporation had taken advice from Clarke Kann Lawyers regarding the interpretation of By-laws 54 and 55 in September 2017, and there had been discussions between Mantra and the strata committee regarding the use of common property. The respondent submitted that there was no evidence that Mantra had been using common property in a manner outside the scope of the special privileges By-law.

118 The Tribunal is not satisfied that the applicant has established that By laws 54 and 55 conferring special privileges on Mantra are invalid. In *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207, McColl JA referred to the following principles when interpreting the validity of special privileges By law in favour of a Lot owner under s 58 of the *Strata Schemes (Freehold Development) Act 1973* as follows (at [71]-citations omitted):

> "71 The following propositions emerge from the foregoing discussion:
>
> 1. By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: *Bailey*;
>
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cp, *Parkin, Lion Nathan;*
>
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: *NRMA*; *Lion Nathan*.
>
> 4. By-laws may be characterised as either delegated legislation or statutory contracts: *Dainford*; *Re Taylor*; *Bailey*; *North Wind*; *Sons of Gwalia;*

> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: *Lion Nathan*;
>
> 6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors *inter se*: *Parkin*; *Lion Nathan*.
>
> 7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf *NRMA* (at [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Cia. Naviera S.A.,* but due regard must be paid to the statutory context in so doing;
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: *Re Taylor*; 9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: *Lion Nathan*."

119 In respect of By-laws 54 and 55, Mantra is a Lot owner, and pursuant to s 52 of the *Strata Schemes Management Act 1996* ('the SSMA 1996', which was the relevant legislation in force at the date of registration of the exclusive use By laws were registered in November 2004), the owners corporation had the power to make such By-laws. By laws 54 and 55 contain provisions regarding the maintenance, upkeep and good repair of common property, in accordance with s 54 of the SSMA 1996.

120 By-laws 54 and 55 are in favour of a Lot owner (Mantra is the owner of Lot 214) and are not a purported special privileges By-law in favour of a non-Lot owner (see *Noon v The Owners-Strata Plan No 22422* [2014] NSWSC 1260).

121 The Tribunal is not satisfied, for the purpose of the order sought by the applicant under s 232 of the SSMA 2015, that By-law 54 or By-Law 55 are invalid although it is ultimately unnecessary to determine this issue as no application had been made for an order under s 150 of the SSMA 2015 that the By-law be declared invalid. The next issue to determine is whether Mantra has been using common property outside the scope of the special privileges By-laws.

122 The Tribunal is not satisfied the applicant has established that Mantra is using common property outside the scope of either By-law 54 or By-law 55.

123 The factual evidence provided by the applicant regarding the use by Mantra of common property was very limited. The applicant relied upon material from the Mantra on Salt website regarding functions, conferences, and wedding receptions (including photographs) and letters of complaint that Mr Hoare had written to the strata manager in 2015 and 2017.

124 In respect of By-law 54, there were no statements from Lot owners (or statutory declarations, or affidavits) identifying the times, dates and places that Mantra was conducting activities on common property outside the scope of By-laws 54 and 55, or the type of conduct involved. There was no evidence of any contemporaneous diary entries setting out such activities. There were no photographs, other than the photographs on the Mantra on Salt website, to demonstrate the area of common property that the functions, conferences, and wedding receptions were being held upon.

125 In essence, the applicant seeks that the Tribunal infer from information on the Mantra on Salt website and the information disseminated by Mantra to the public regarding its wedding reception and conference facilities that the Tribunal should infer that they are being conducted on common property outside the scope of By-laws 54, and in particular on common property areas not identified in Plan B as within the scope of the special privilege By-laws.

126 It is the obligation of the applicant to provide sufficient evidence that Mantra has not been complying with By-laws 54 and 55 (*Felcher v The Owners-Strata Plan No 2738* [2017] NSWCATAP 219 at [24] and [30]). The applicant has also not provided evidence to establish that Mantra was placing signage in positions not agreed to with the strata committee of the owners corporation in breach of By-law 55.

127 In respect to the 2012 annual general meeting to which the applicant refers, the minutes of the annual general meeting show that the owner of Lot 168 proposed a Motion (Motion 13) that:

> "The owners corporation note that he caretaking business has been using common property areas beyond the special privileges granted under paragraph 54 of the By-laws, and request that the caretaker either cease encroaching on its special privileges or negotiate the granting of additional special privileges on just terms acceptable to the owners corporation"

128 However, that Motion was lost. Accordingly, there can be no failure of the owners corporation to comply with a Motion that was not passed at the 2012 annual general meeting.

129 In circumstances where the applicant has failed to prove on the balance of probabilities that Mantra is acting in a manner outside the scope of By-laws 54 and 55, it has failed to establish that the Tribunal should direct the respondent to issue a notice to Mantra under s 146 of the SSMA 2015 requiring Mantra to comply with any By-law.

A "direction" be given to the owners corporation to "prepare a formal and authorative case to Tweed Shire Council" to clarify that the Development Approval granted for the strata scheme gives Lot owners "the right to self-use; leases through off-site agents and letting through the on-site operator"; and "no time limits have been registered on the strata certificates of any of the Torrens title registered apartment Lots". The submission to Tweed Shire Council "is to be prepared in consultation with the legal representative of the owner of Lot 168

130 Mr Hoare, in the applicant's written submissions filed on 10 November 2017, refers to this issue as "defence of apartment (sic) Lot owner title rights".

131 It is unclear from the applicant's submissions and documentary evidence precisely how the applicant asserts the owners corporation or the strata committee have failed to comply with their obligations under the SSMA 2015 (or its predecessor, the SSMA 1996); the SSMA Regulation 2016; or the By-laws of the strata scheme, notwithstanding the table of various provisions of the SSMA that Mr Hoare refers to in the submissions he has prepared for the applicant.

132 Mr Hoare submits that the original Development Approval "called for the construction of a hotel" and the Development Approval granted by Tweed Shire Council prohibited the hotel owner from offering permanent occupancy of any of the "hotel rooms". The developer then sought to "construct a strata tile duplex" and an amended Development Approval was submitted and subsequently approved by the local Council. Mr Hoare asserts that this approval was in respect of the "no permanent occupancy clause" and that Mantra should not have a "monopoly" as the "on-site letting agent".

133 Mr Hoare refers to a "consultation paper" that he prepared in July 2014, which he asserts was not properly considered by the strata committee, or at the 2015

AGM, because of the intervention of Mr Leys, a lawyer engaged by the strata committee. Mr Hoare also claims that the value of Lots has been affected by the "no permanent occupancy" clause and Mantra's "monopoly", and that financial institutions are reluctant to lend to Lot owners in the strata schemes.

134 However, in submissions in reply dated 1 March 2018, Mr Hoare submits that:

> "it is true that a retrospective DA application to change the consent order to "residential" would fail…residential consent is not sought because this would take away owner rights to short stay holiday/hotel lettings".

135 Mr Hoare submits that "the order sought would be used to obtain an authoritative legal opinion on the real facts to be presented to Tweed Shire Council-i.e. the right questions would be put and the key legal facts would be cited". The submissions of Mr Hoare do not clearly state what "legal opinion" is to be obtained, or what is proposed to be done after such legal opinion is obtained and submitted to Tweed Shire Council.

136 Mr Hoare also submits that any By-law restricting Lot use to short stay letting is inconsistent with the principle of "indefeasibility of tile" in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; 220 CLR 472 and the decision of Member Ringrose in *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63.

137 The respondent submits that the strata scheme is zoned within an area designated for a variety of tourist orientated development, and the zoning of the strata scheme would have been clearly known to any purchaser of a Lot in the scheme. Further, By-law 31.2 states:

> "31.1 Subject to By-Law 31.2 and By-Law 31.5, all lots shall only be used for tourist resort accommodation purposes".

138 The respondent submits that By-law 31.1 is a valid By-Law, citing *Casuarina Rec Club Pty Ltd v The Owners-Strata Plan 77971* [2011] NSWCA 159 at [49]-[52] and that a Motion proposing to amend By-law 31.1 at the 2016 annual general meeting of the owners corporation was ruled invalid and accordingly not voted upon.

139 The Tribunal is not satisfied the applicant has established that the Tribunal should direct the respondent to obtain a legal advice to form the basis of a submission to Tweed Shire Council regarding the interpretation of the

Development Consent regarding the strata scheme, or the zoning of the strata scheme.

140 The owners corporation and strata manager has previously corresponded with Tweed Shire Council on this issue and the position of Tweed Shire Council is clear. Mr McGavin, Manager Development Assessment of Tweed Shire Council stated in a letter to the strata manager dated 4 December 2014:

> "As the approval was for a tourist resort, residential use of the abovementioned development would not be in accordance with Development Consent DA 02/1423. A copy of this consent is attached for your information.
>
> The subject site is zoned SP 3 Tourist under Tweed Local Environmental Plan (TLEP) 2014. The objective of this zone is to provide for a variety of tourist-orientated development and related issues. Residential accommodation is prohibited development within this zone".

141 The owners corporation has obtained advice from Clarke Kann Lawyers dated 3 March 2016 on the issues raised by the applicant, in the context of the Motion to amend By-law 31.1. Any dispute regarding the interpretation of the Development Consent and zoning of the strata scheme may ultimately involve proceedings in the Land and Environment Court involving significant costs to the owners corporation, and the risk of a costs order if proceedings are unsuccessful.

142 Although Mr Hoare has made submissions on behalf of the applicant that he disagrees with the interpretation of the terms of the Development Consent and zoning of the strata scheme, Mr Hoare does not have legal qualifications. Mr Hoare, or any Lot owner, may obtain their own legal advice on this issue. Mr Hoare's subjective opinion regarding the terms of the Development Consent and zoning of the strata scheme is insufficient to satisfy the Tribunal that it should compel the owners corporation to expend its resources obtaining advice on the issue.

143 Any application to Tweed Shire Council regarding the interpretation of the Development Consent or zoning of the strata scheme has the difficulty that By-law 31.1 relevantly stipulates that Lots be used for tourist resort accommodation purposes. At the 2016 annual general meeting of the strata scheme, a Motion was put in the following terms:

> "15.1 That the Owners agree to amend By law 31.1 to remove the words "shall only be used for residential purposes"

144 The minutes of the 2016 annual general meeting state:

> "The chair ruled the motion out of order as to the motion is contrary to an existing by-law. The chair ruled that a special resolution is required to rescind the existing by-law 31 and subsequently a special resolution is required for a replacement by-law to be put in place. The chair declared that, notwithstanding the rulings above, short legal advice from Clarke Kann Lawyers to the strata plan (sic) recommends ruling the motion out of order for a number of legal and other reasons. Note: the meeting requested a copy of the legal advice accompany the minutes of this meeting."

145 No order was sought that the ruling of the chairperson at the annual general meeting was invalid under the SSMA 2015 or SSMA Regulation 2016, or seeking a declaration that By-law 31.1 is invalid under s 150 of the SSMA 2015. There is no reason why any Lot owner cannot in the future propose a Motion that must be passed in the form of a special resolution at a general meeting of the strata scheme in accordance with s 141 of the SSMA 2015 that By-Law 31.1 be changed, and the general meeting can consider any such Motion in a proper form, and vote on any proposed amended By-law after consideration of all of the issues, including the issues raised in the Clarke Kann Lawyers advice of 3 March 2016.

146 The applicant's reliance on *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; 220 CLR 472 ('Hillpalm') and *Estens v Owners Corporation SP 11825* [2017] NSWCATCD 63 ('Estens') is misconceived. Hillpalm involved a dispute where a local Council approved a sub-division of land subject to a condition requiring an easement for access. However, no easement was registered on the title of the land. A further sub-division occurred, and approximately 20 years after the original Council approval, the owner of one of the parcels of land in the sub-division (Heaven's Door Pty Ltd) sought orders that the other owner (Hillpalm Pty Ltd) provide access in the terms of the original Council approval for the sub-division and create an easement, or in the alternative not use the land in a manner inconsistent with the original Council approval.

147 The High Court held by a 3-2 majority (McHugh ACJ; Hayne and Heydon JJ constituting the majority) that, on the particular facts of the case, the terms of the original Council consent did not create a right in rem or a personal right in favour of Heaven's Door Pty Ltd, and as Hillpalm Pty Ltd had purchased land

without any registered easement on the title, Hillpalm Pty Ltd was not in breach of any provision of the Environmental Planning and Assessment Act 1979 in the manner in which it was using its land and was not obliged to give Heaven's Door Pty Ltd access (*Hillpalm* at [50]-[54]).

148 The legal principles that arise in *Hillpalm* do not support a proposition that because Lot owners in the strata scheme may have a registered title without any registered encumbrance by way of a caveat or easement that Lot owners can use their Lots in a manner inconsistent with the Development Approval of the strata scheme; the zoning of the strata scheme; or any provision of the *Environmental Planning and Assessment Act 1979* or the *Local Government Act 1993*.

149 In *Estens*, Member Ringrose held that a special by-law passed by an owners corporation at a general meeting in February 2017 preventing short term occupancies of Lots should be declared invalid under s 150 of the SSMA 2015 because it was inconsistent with the provisions in s 139 (2) of the SSMA 2015 that a By-law "cannot prevent dealing in relation to a Lot". However, Member Ringrose was not considering the original By-laws of the strata scheme, but the amendment of an existing By-law which the Member found had the effect of restricting a Lot owner's ability to use the Lot by entering into short term licence agreements.

150 In this matter, By-law 31 is an original By-law, and Lot owners who have purchased Lots in the scheme have done so knowing of the existence of the By-law. It is only in rare circumstances where an original By-law will be held to be invalid, and a very strong case must be made out (*Casuarina Rec Club Pty Limited v The Owners-Strata Plan 77971* [2011] NSWCA 159 at [52]; and [89]-[90])

151 Ultimately, as no application for an order has been sought under s 150 of the SSMA 2015 regarding By-law 31, it is unnecessary to further consider this issue. However, neither *Hillpalm* or *Estens* provide a basis for making an order that the owners corporation be directed to make a submission to Tweed Shire Council regarding the interpretation of the Development Approval for the strata scheme.

152 Finally, the terms of the orders sought by the applicant are vague and uncertain. No sufficient certainty can be given to the words "prepare a formal and authoritative case to Tweed Shire Council", nor that the "submission… be prepared in consultation with the legal representative of the owner of Lot 168" to form the basis of an injunctive order.

Strata committee members elected at the 2015 annual general meeting be issued with special levy notices to recoup strata scheme expenses it invalidly incurred to pursue baseless legal claims for private benefit.

153 The applicant, in submissions prepared by Mr Hoare, asserts that the owners corporation incurred costs to engage Mr Teys of Block Lawyers to "attack" him at the 2015 annual general meeting of the strata scheme and that the strata committee be directed, by way of the issue of special levies notices, to reimburse the owners corporation for any legal costs spent engaging Mr Teys, including the subsequent allegation that Mr Hoare had made defamatory comments about the strata committee.

154 The respondent submits that Mr Teys had been engaged by the owners corporation to provide advice regarding management rights in the scheme, partly as a result of issues being raised by Mr Hoare. The respondent submits that there was nothing improper in this regard, nor in respect of Mr Teys attending the annual general meeting in 2015 in circumstances where the owner of Lot 168 had tabled a Motion in the following terms:

> "That the Owners Corporation RESOLVE to exercise its rights to fair and legal treatment by the on-site Operator by
>
> Making representations to Mantra Group's ownership to take remedial action in regard to
>
> Misinformation about the residential rights of SP 73905 apartment owners
>
> Fulfilment of the Corporations Act disclosure statement/commitment that all owners under management will receive a pooled return
>
> 'Standard form' contract provisions that are at odds with the national 'fair contract law' reforms in 2011; and
>
> Appointing Steve Hoare as the OC's 'main proponent' to draft these representations and to lead the follow up discussions with Mantra Group's ownership".

155 The Motion proposed by the owner of Lot 168 was ruled out of order at the annual general meeting. The respondent submits that strata committee members did not receive any "private benefit" and that the applicant had not

provided any evidence in support of that assertion. The respondent further submitted that the Tribunal had no jurisdiction under s 232 of the SSMA 2015 to make the order sought.

156 The Tribunal is not satisfied that the owners corporation breached any provision of the SSMA 1996 or *Strata Schemes Management Regulation 2010* in engaging Mr Teys to provide legal advice; attend the 2015 annual general meeting of the strata scheme. Considering the issues raised by Mr Hoare, there was nothing improper about obtaining legal advice. Further, although no legal action was ever taken and Mr Hoare strongly disagrees that his comments about the strata committee were defamatory, the Tribunal is not satisfied that actions of Mr Teys in sending a letters to Mr Hoare and Ms Grainger on 24 August 2015 on behalf of the strata committee constitutes any breach of any provision of the SSMA 1996 or *Strata Schemes Management Regulation 2010*.

157 Further, under s 83 (2) of the SSMA 2015, levies must be issued "in respect of each lot" and the applicant has provided no authorities to establish how the Tribunal has the power to direct the owners corporation to issue a special levy against some Lot owners, but not all.

The strata committee be directed to leave common property storage cages in place until such time as the Owners at a general meeting agree on a remedial course of action.

158 The applicant submits that the owners corporation obtained a legal advice from Mr Cosaro SC dated 12 January 2013 regarding an "illegal easement" in favour of the owner of Lot 3 over common property, which involves the area being used as a storage cage letting business, and has failed to act on the advice.

159 The respondent submits that the easement is in favour of the owner of Lot 3 of the neighbouring strata scheme SP 74283 (Salt Village Pty Ltd). The respondent submits that the advice of Mr Cosaro SC makes clear that although the owners corporation has a reasonably arguable case that the easement may be declared by a Court to be invalid because it deprived the owners corporation of the ownership and possession of common property, the legal issues were complex and the prospects of success uncertain. Mr Cosaro SC

had advised that the owners corporation attempt to negotiate a commercial resolution with Salt Village Pty Ltd.

160 The respondent submits that it has obtained further advice from Clarke Kann lawyers which contained similar conclusions to the advice of Mr Cosaro SC, but added an opinion that the terms of the easement did not provide for Salt Village Pty Ltd to profit from the easement.

161 The respondent submits that it has been involved in negotiations with Salt Village Pty Ltd, as evidenced by correspondence between the Solicitors for the owners corporation and the Solicitors for Salt Village Pty Ltd in 2017, and both the advice of Mr Cosaro SC and Clarke Kann lawyers makes clear that litigation should be a last resort and not embarked upon lightly.

162 The Tribunal is not satisfied that the applicant has established the owners corporation has breached any provision of the SSMA 2015, or any other obligation, in the matter it has dealt with the easement issue. Contrary to the submission of the applicant prepared by Mr Hoare, the advice of Mr Cosaro SC does not provide a "clear way forward" which has been "ignored". The legal advice obtained by the owners corporation makes clear the risks and pitfalls of litigation, and that commercial negotiations should be entered into as a first step. Those negotiations are now occurring, and even if the Tribunal was satisfied that the owners corporation or strata committee were acting in a manner inconsistent with its statutory obligations (and it is not satisfied any such breach has been established) it is premature to make any injunctive orders in any event.

A By-Law notice be sent to the owner of Lot 214 (the Operator) that it has to stop using the common property to store its goods and chattels, and that it has wrongfully failed to co-operate with a 2012 AGM resolution to have this matter addressed

163 The applicant submits that Mantra is using common property to store its goods. The common property in question is the "storage cage area" which the applicant asserts was "intended for bike storage". The applicant further submits that Mantra has "failed to co-operate" with resolutions passed at the 2012 AGM. The relevant resolutions are Resolution 12 and 14.

164 In respect of the use of common property, the minutes of the 2012 annual general meeting of the strata scheme demonstrate that Resolutions 12 and 14 refer to the owners corporation requesting “the incoming committee to investigate and report” on the use of common property. The resolutions passed at the 2012 AGM do not stipulate that any specific action be taken regard Mantra’s use of common property beyond the strata committee “investigating” and “reporting” on the issue.

165 The only evidence provided regarding the use by Mantra of the storage cage area is one photograph. The submissions of the applicant do not specify what By-law the applicant asserts Mantra has breached regarding the use of the storage cage area.

166 The respondent submits that Mantra has not misused the common property area.

167 Mantra, in written submissions attached to Points of Defence (commencing at p 518 of the respondent’s documents), submits that it does “from time to time” store some equipment in the storage cage area, but is entitled to do so in accordance with the special privileges conferred by By-Law 55, as the storage of materials is “directly connected with Mantra conducting its letting business”.

168 The Tribunal is not satisfied the applicant has established that Mantra is using the common property area in the “storage cage area” to store its goods and chattels in breach of any By-law. There are no statements from Lot owners or clear photograph evidence sufficient to establish that goods or chattels in the “storage cage area” are those of Mantra; what is being stored; how long it has been stored for; nor clear identification of which By-law is purportedly being breached.

169 Although Mantra concedes that it does use the “storage cage area” for storage from time to time, there is insufficient evidence provided by the applicant for the Tribunal to be satisfied that Mantra is using common property outside the scope of the special privileges conferred under By-law 55.1.

170 Accordingly, the Tribunal is not satisfied that the owners corporation should be directed to issue a notice of breach of By-law under s 146 of the SSMA 2015 on Mantra.

A Strata Management Statement dispute notice be given to the Retail Owner to bring the operation of the loading dock 'shared facility' into line with DA conditions 93, 95, 101 and 105".

171 The applicant submits that the "loading dock shared facility" is not meeting "local government environmental health rules and DA conditions" and that the "non-compliance has been allowed to go unchecked despite specific owner representations and official advice from Tweed Shire Council that the loading dock is not operating in compliance with the law".

172 The respondent submits that it is unclear who the applicant is referring to in respect of the "Retail Owner" is, but presumes it is the owner of Lot 3 in Strata Plan 74283. The respondent submits that the loading dock is a "shared facility" within the meaning of the Strata Management Statement and the responsibility for its administration and management lies with the building management committee established by the Strata Management Statement.

173 The documents of the applicant contain emails from Lot owners Mr and Ms Sternberg to Tweed Shire Council in February 2015 complaining about the loading dock in respect of noise; hours of use; smell; and the presence of a "waste dump". On 25 March 2015, Mr Bonner of Tweed Shire Council emailed Mr and Ms Sternberg. Mr Bonner stated that he had visited the strata scheme on 12 March 2015 and had discussions with "representatives from Mantra Group and Ray Group" and it was agreed that "some resort units were in close proximity to the loading bay area and could be affected by activities occurring in the loading bay area".

174 Mr Bonner stated that the representatives of Mantra and Ray Group "expressed a willingness to listen and discuss the issues that were raised". Mr Bonner stated that Mr and Ms Sternberg should have further discussions with Mantra and the "body corporate" regarding the issue, and raise conditions 93, 95, 101 and 105 of the Development Approval which "could form a basis of discussing your concerns". Mr Bonner further stated:

> "With regard to the final question raised in your email (re: legality of operation), the operation of the Resort (and loading bay) has development approval and is legal. Whether or not any of the conditions of approval have been breached is a matter of interpretation and if necessary you will need to seek independent legal advice in this regard. If Council investigates further and finds the DA conditions have not been breached, then Mantra may not take actions to reduce the impacts further.
>
> At this point direct negotiations with Mantra and through the Body Corporate (sic) process would seem the most appropriate course of action. Council would be happy to consider this matter further if a breach of the DA conditions exists, once these avenues were exhausted".

175 The statutory declaration of Mr Cliff Cassidy (Chairperson of the strata committee) dated 12 January 2018 states that the issue of the loading dock has been discussed on a number of occasions by the strata committee and the building management committee in respect of complaints by Mr and Ms Sternberg. Mr Cassidy states that Mantra have provided guidelines regarding hours of operations to its suppliers, but other contractors and suppliers also use the loading dock. Mr Cassidy states that the strata committee has requested Mr and Ms Sternberg provide details of times, dates and the contractors involved before it consider taking any further action.

176 The Tribunal is not satisfied the applicant has established that an order should be made directing the building management committee serve a dispute notice under cl 40 of the Strata Management Statement. Cl 40.1 of the Strata Management Statement provides that a party to a dispute "may be the Committee, Members, an Owner or Occupier". "Members" as defined in Cl 2 and 3, may include "retail owners".

177 However, there is little evidence to support the submission of the applicant that there is an ongoing breach of the Strata Management Statement (or any By-law) in respect of the current operation of the loading dock. The applicant has provided no evidence of times, dates, and details of the alleged failure to comply with any provision of the Development Approval of the scheme, or any other statutory obligation. The emails from Mr and Ms Sternberg occurred in 2015, and there is no evidence that any further complaints have been made to Tweed Shire Council subsequently, or any complaints have been made by Lot owners other than Mr and Ms Sternberg. There is no evidence of any action

having been taken by Tweed Shire Council as a result of complaints about the loading dock.

178 There being insufficient evidence of any breach of the Strata Management Statement by "the Retail Owner", the Tribunal is not satisfied that the applicant has proved that the Tribunal should direct the building management committee to issue a dispute notice under cl 40 of the Strata Management Statement.

A notice be sent to all Owners clearing the air on the false By-Law 31.1 breach notices initiated by the Committee

179 In respect of this proposed order, the applicant is referring to the letter of the strata manager to Lot owners dated 1 September 2016, the relevant contents which have been set out previously in this decision.

180 The Tribunal is not satisfied the applicant has established that an order should be made directing the respondent to "clear the air" regarding the notice.

181 As discussed previously, By-law 31.1 was an original By-law of the scheme, and no application has been made to the Tribunal to declare it invalid. In any event, if the owners corporation sought to rely upon the notice of 1 September 2016 to bring proceedings in the Tribunal seeking a penalty under s 147 of the SSMA for failure to comply with the notice, the time period under s 147 (4) of the SSMA 2015 has expired and no action under s 147 of the SSMA can be taken against any Lot owner on the basis of the notice.

182 Further, even if the Tribunal was satisfied that the owners corporation had acted outside its powers to cause the notice to be issued, any order that the owners corporation issue some form of correspondence to "clear the air" is too vague and uncertain to form the basis of any order under s 232 of the SSMA 2015.

That a notice be sent to the owner of Lot 214 (the Operator) to rectify illegal signage placed in the common property basement area that contravenes the By-Laws regarding exclusive use car park allocations.

183 The applicant submits that signage in the car park of the strata scheme "is wholly at odds with the By-laws which clearly allocate on and only one space to each apartment (sic) lot and clearly indicate which space belongs to which apartment (sic) Lot".

184 The applicant further submits that the current signage for car parking "give the place the look and feel of a hotel" and that Lot owners are disadvantaged because there is no identification of the Lot number of each parking space.

185 The applicant refers to a Motion that was put to a strata committee meeting on 5 May 2017. Relevantly, that Motion (put by the owner of Lot 126, Ms Burton) sought that

> 16.1. That the committee discuss the longstanding and systemic breaches of By-law 52 (Exclusive Use-Car Parking Areas) be rectified by:
>
> Removing all the illegal designated 'Disabled" spaces
>
> Installing new signage throughout the basement to align with Schedule 1 and Sheets 24 to 29 of Plan 'A' of the By-laws
>
> Determining who was responsible for the current illegal signage and assigning the costs of the removing ` signage from the responsible party.
>
> That disabled parking spaces be designated as per the Building Code of Australia requirements next to the disabled ramp in front of the Promenade".

186 The Motion also contained an 'explanatory note' by Ms Burton. The Motion was lost and the minutes state as follows:

> "The committee have received from Council the approved plans from construction along with correspondence confirming that the plans are correct. The committee can confirm that the approved number within these documents show more than the suggested disabled park to 100. Upon a review of the car park, it was found that there were 2 additional disable car parks that are not required. The committee resolved to convert them to normal car spaces and the building manager was asked to get quotes for this work.
>
> With respect to the suggestion that each unit car space is numbered, the Committee discussed this and believe that it is not a solution to the problem as it will be extremely difficult to police due to lots being the pool and outside the pool along with the problem of owners storing their vehicles in the car parks and guests letting additional vehicles into the car park at peak times. It would be impossible to locate the owner of the offending vehicle to request that they remove it. The committee has investigated the process of removing unauthorised vehicles in the past and have found it is very difficult to do so."

187 The respondent submits that the car parking spaces in the strata scheme accord with the Development Approval of Tweed Shire Council, and are compliant with the Building Code of Australia. The respondent relies upon a letter from Ms Kay, Acting Team Leader Development Assessment to Mr Triplett, Area Building Manager of Mantra, dated 23 June 2016 that relevantly states as follows:

> "The development of the site was originally approved as the erection of a tourist resort (Outrigger) and 2 lot stratum subdivision DA02/1423. Please note that this development application has been amended on a number of occasions and the current consent is DA02/1423.13.
>
> Condition No 5 of this development consent requires the provision of 382 spaces. These spaces have not been allocated to individual Units (sic) under the strata plan due to the tourist nature of the development.
>
> Condition 54 of the consent relates to disabled car parking requirements and is as follows:
>
> 54. Disabled car parking spaces are to be provided at the rates provided for under Part D3.5 of the Building Code of Australia and constructed in accordance with Australian Standard AS2890.1
>
> …
>
> The requirements listed in the development consent are the only legal obligations imposed on the development by Council."
>
> …"

188 In respect of the By-laws of the scheme regarding car parking, By-Law 52 states:

> "52.1 The owner or occupier for the time being of a lot specified in Schedule 1 shall have the right of exclusive use and enjoyment of the corresponding area shown in the second column of Schedule 1 and identified on the sketch plan attached as Plan "A".
>
> 52.2 The exclusive use area(s) granted under this By-Law are to be used by the owner and occupiers of each lot that has the benefit of the area(s) for the purpose of car parking only.
>
> 52.3 The Owners Corporation shall continue to be responsible for the proper maintenance of and keeping in a state of good and serviceable repair the relevant part(s) of the Common Property which an owner has the exclusive use of under this By-Law provided that the owner shall not litter the area and shall clean and remove any oil spillage from the surface of such area and shall generally keep the area clean and tidy and shall be liable to (at its cost) to repair any damage caused by the owner or occupier's negligent act or omission.
>
> 52.4 The Executive Committee is hereby authorised to transpose exclusive use areas or any part of those areas from one lot to another at any time and from time to time on the written request of the owners of the lots involved. The costs of any new By-Laws required as a result of a transposition of exclusive use areas (including legal costs) shall be paid by the owners of the lots involved."

189 The Tribunal is not satisfied the applicant has established that the owners corporation or the owner of Lot 214 has breached any provisions of the By-laws or the SSMA 2015. Further, the Tribunal is not satisfied the owners corporation is failing to take action to enforce By-Law 52.

190 By-Law 52 refers to the strata plan that identifies Lots and parking areas for Lots, but the By-law does not stipulate that the parking space for each Lot must have an identification number painted on it. Irrespective of the Motion to the strata committee on 5 May 2017 for the strata committee to "discuss" the issue of parking, no Motion has been put forward to a general meeting of the owners corporation to amend By-law 52 to seek that each Lot parking space be numbered to reflect the number of the Lot.

191 There is also no significant evidence that By-law 52 is being breached by reason of non-Lot owners or non-Lot occupants parking in spaces allocated to the owner or occupant of a Lot, and that the owners corporation has failed to take reasonable measures to ensure compliance with the By-law. There are no statements of Lot owners to support that By-law 52 is being breached, or providing details of the times and dates of the breaches. There are no photographs of breaches of By-law 52. There are no letters from Lot owners putting the owners corporation on notice of the breaches, and requesting the owners corporation take action by the issuing of notices under s 146 of the SSMA 2015.

192 In respect of the issue of "signage" in respect of disabled car parking spaces, or where such spaces have been allocated, there is no evidence to support the applicant's submission that the signage or allocation of disabled car parking spaces contravenes the Development Approval of Tweed Shire Council. There is no photographic evidence of the signage or parking spaces. There is no evidence, such as a statement from a Lot owner, that a parking space allocated under the registered strata plan to a particular Lot is being used for disabled parking. There is no evidence that any compliant has been made to Tweed Shire Council regarding the allocation of disabled parking spaces or signage in respect of disabled car parking spaces in the context of any breach of the Development Approval; or that the Council has taken any action in this regard against the owners corporation, such as requesting the owners corporation to change the position of disabled car parking spaces or signage. A mere submission by the applicant prepared by Mr Hoare that the car parking spaces are non-compliant with the Development Approval and the By-laws is insufficient to establish any breach.

Appointment of a Compulsory Strata Manager Under s 237 of the SSMA 2015

193 The applicant seeks the appointment of Mr Austine of Curtis Strata as a compulsory strata manager.

194 Section 237 of the SSMA 2015 states:

> "**237 Orders for appointment of strata managing agent**
>
> (1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation**
>
> The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent:
>
> (a) to exercise all the functions of an owners corporation, or
>
> (b) to exercise specified functions of an owners corporation, or
>
> (c) to exercise all the functions other than specified functions of an owners corporation.
>
> (2) **Order may confer other functions on strata managing agent**
>
> The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise:
>
> (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.
>
> (3) **Circumstances in which order may be made**
>
> The Tribunal may make an order only if satisfied that:
>
> (a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or
>
> (b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
>
> (c) an owners corporation has failed to perform one or more of its duties, or
>
> (d) an owners corporation owes a judgment debt.
>
> (4) **Qualifications of person appointed**
>
> A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must:
>
> (a) hold a strata managing agent's licence issued under the *Property, Stock and Business Agents Act 2002*, and
>
> (b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary

or other officer of the corporation or another person authorised by the corporation to do so.

(5) **Terms and conditions of appointment**

A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

(6) **Return of documents and other records**

A strata managing agent appointed as a consequence of an order under this section must cause a general meeting of the owners corporation to be held not later than 14 days before the end of the agent's appointment and must on or before that meeting make arrangements to return to the owners corporation all documents and other records of the owners corporation held by the agent.

(7) **Revocation of certain appointments**

An order may be revoked or varied on application and, unless sooner revoked, ceases to have effect at the expiration of the period after its making (not exceeding 2 years) that is specified in the order.

(8) **Persons who may make an application**

The following persons may make an application under this section:

(a) a person who obtained an order under this Act that imposed a duty on the owners corporation or on the strata committee or an officer of the owners corporation and that has not been complied with,

(b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,

(c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,

(d) a judgment creditor to whom the owners corporation owes a judgment debt."

195 The applicant submits, on the basis of the written submissions prepared by Mr Hoare, that a compulsory strata manager should be appointed to the strata scheme, due to a litany of alleged improper conduct by the strata committee of the scheme. Such conduct relates to the issues in respect of which the applicant sought specific orders under s 232 of the SSMA. Further conduct identified by the applicant involves broad allegations that the strata committee used owners corporation funds for private benefit; was acting to promote the interests of Mantra rather than Lot owners; had used "legal intimidation" in respect of the 2015 annual general meeting; strata committee members were obtaining benefits from Mantra; and the strata committee had failed to adopt a "code of ethics" passed by way of Motion at the 2012 annual general meeting.

196 The respondent submits that the owners corporation is functioning satisfactorily and that none of the criteria in s 237 (3) of the SSMA 2015 have been established.

197 In respect of the application to appoint a compulsory strata manager, the letter of Mr Austine of Curtis Strata consenting to appointment of as a compulsory strata manager does not attach a copy of his licence, and consequently s 237 (4)(a) of the SSMA 2015 has not been satisfied.

198 However, even if a copy of Mr Austine's strata managing agent licence had been provided, the Tribunal is not satisfied that a compulsory strata managing agent should be appointed to the strata scheme pursuant to s 237 of the SSMA 2015.

199 Appointment of a compulsory strata manager is a serious measure not to be taken lightly, because it removes the democratic process that has been established under the SSMA 2015 for the owners corporation to govern itself. In essence, it places the owners corporation into the hands of an administrator for a period of time.

200 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"

201 The Tribunal is not satisfied that that any of the criteria in *Bischoff* regarding s 237 (3) (a) have been established to the extent of the Tribunal being satisfied that the owners corporation is relevantly dysfunctional, and a compulsory strata manager should be appointed.

202 The Tribunal has articulated in detail previously in this decision why it is not satisfied that the owners corporation is not performing required functions. Rather, the owners corporation and strata committee is functioning adequately. Meetings of the owners corporation and the strata committee are held regularly, and the Tribunal is not satisfied that the owners corporation or the strata committee is acting in contravention or disregard of its legal obligations. The fact that Mr Hoare and some Lot owners are dissatisfied with the owners corporation and strata committee does not establish that the strata scheme is not functioning satisfactorily.

203 The Tribunal is not satisfied that the management structure of the strata scheme is exercising powers or making decisions for an improper purpose, including conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA. The applicant, in the submissions drafted by Mr Hoare, has vociferously asserted that the strata committee “favours” Mantra. However, when the issues and evidence raised by the applicant are analysed, the Tribunal is not satisfied that the applicant has established any improper purpose to decisions made by the strata committee or owners corporation. The applicant has provided little actual evidence to support its claim of bias towards Mantra.

204 The Tribunal is not satisfied that the management structure of owners corporation has failed to take measures which has allowed any Lot owner to breach its obligations under the SSMA 2015, including breaches of By-laws. The Tribunal has set out in detail previously the allegations made by the applicant in this regard, and why the Tribunal was not satisfied the applicant had established any breaches by the owners corporation or strata committee.

205 In respect of the taking of legal action, no legal action has been taken against Mr Hoare, or any other Lot owner. The Tribunal has set out in detail previously why it was not satisfied that the strata committee acted inappropriately in regards to obtaining legal advice, or having a lawyer attend the 2015 annual general meeting. It is irrelevant that the lawyer who was then advising the strata committee (Mr Teys) was subsequently banned as a director by ASIC.

206 The Tribunal is not satisfied that Mr Teys subsequently writing to Mr Hoare making allegations or defamatory conduct or writing to Ms Grainger regarding appointing Mr Hoare as a proxy is the taking of legal action, because no proceedings were instituted. However, even if the writing of such letters was "legal action" the conduct occurred in 2015 and the Tribunal is not satisfied such conduct constitutes a basis to exercise its discretion to appoint a compulsory strata manager. There is also no evidence that the owners corporation has improperly raised levies on Lot owners.

207 Finally, the Tribunal is not satisfied that he applicant has established any of the criteria under s 237 (3) (b)-(d) of the SSMA have been established for the same reasons as have been set out previously.

Conclusion

208 The application for orders under s 232 of the SSMA 2015 and s 237 of the SSMA 2015 are dismissed.

Costs

209 The respondent, in written submissions, seeks an order for costs. It is not appropriate for the Tribunal to consider the issue of costs until the parties have had the opportunity to consider the findings made, and make submissions on the issue of costs. Accordingly, the Tribunal stipulates a timetable for the respondent (as the successful party) to make any application for costs, and the parties to provide submissions on the issue of costs.

Orders

210 The Tribunal makes the following orders:

211 The application for orders under s 232 of the *Strata Schemes Management Act 2015* is dismissed.

212 The application for the appointment of a compulsory strata manager under s 237 of the *Strata Schemes Management Act 2015* is dismissed.

213 Any application for costs by the respondent under s 60 of the *Civil and Administrative Tribunal Act 2013* is to be made in the following manner:

(a) The respondent is to file and serve written submissions (not exceeding 4 pages) on or before 14 days from the date of this

decision. The submissions are to include whether or not the respondent consents to the issue of costs being determined on the papers.

(b) The applicant is to file and serve written submissions in reply (not exceeding 4 pages) on or before 14 days thereafter. The submissions are to include whether or not the applicant consents to the issue of costs being determined on the papers.

(c) Subject to the submission of the parties, the Tribunal will determine the issue of costs on the basis of the written submissions received and without a further oral hearing, in accordance with s 50 (2) of the *Civil and Administrative Tribunal Act 2013*.

G. J. Sarginson

Senior Member

Civil and Administrative Tribunal of New South Wales

28 August 2018

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

Registrar

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