



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners-Strata Plan No 14593 v Soares

Medium Neutral Citation: [2019] NSWCATAP 35

Hearing Date(s): 23 January 2019

Date of Orders: 6 February 2019

Decision Date: 6 February 2019

Jurisdiction: Appeal Panel

Before: The Hon F Marks, Principal Member
D Charles, Senior Member

Decision: (1) Order No 1 made in proceedings SC 18/26649 is varied by deleting it and substituting therefor;
1 Consequent upon the finding made by the Appeal Panel that the Owners Corporation is in breach of section 106 of the Strata Schemes Management Act 2015 it shall undertake forthwith the following works in the rear yard of the property at 617 New South Head Road Rose Bay namely the laying of concrete pavers measuring 450 x 600 mm over a compacted sand and cement base from the rear doors of lots 1 and 2 over all that part of the common property shown in a plan in the form produced by the parties to these proceedings at the appeal hearing on 23 January, 2018 and marked with cross-hatching, up to the laundry door.

(2) Order No 2 made in proceedings SC 18/26649 is varied by deleting it and substituting therefor;
2 (a) The Respondent, The Owners – Strata Plan No 14593 is ordered within 14 days hereof to seek at least two tenders from persons or entities for the work of cleaning, gardening, mowing and general maintenance of the common property of the Owners Corporation and for the work of managing the rubbish and recycling bins

used for the collection, disposal and storage of garbage materials, recycling materials and garden waste in and about the common property of the Owners Corporation and to award a contract for such work to commence within a further 14 days. In so doing the Owners Corporation may, at its discretion, utilise the services of the strata manager for this purpose.

(b) No such tenders shall be sought from, and no such contract shall be awarded to any person or entity in which or in relation to which Stephen Hempton has any interest of any kind or any entitlement to receive any share of the income derived from the contract, whether directly or indirectly

(c) The Owners Corporation shall terminate the existing contract with Stephen Hempton in terms such that the termination of services will coincide with the commencement of the new contract

(3) The Tribunal notes, and to the extent necessary orders and directs that no part of the legal costs incurred by the appellant in these appeal proceedings should be levied against the respondent owners of lots 1 and 2.

Catchwords:

STRATA – family interest with majority control of strata scheme – responsibilities, obligations and duties of an owners corporation in respect of common property – variation of orders made at first instance – order for maintenance and repair of common property adjacent to the minority interest’s lots – order for contractor (not connected with majority interest) to clean common property

Legislation Cited:

Civil and Administrative Tribunal Act
Strata Schemes Management Act 1996
Strata Schemes (Freehold Development) Act 1973

Cases Cited:

The Owners – Strata Plan No 37762 v Dinh Phuong
Dung Pham and anor [2006] NSWSC1287
Walsh v The Owners – Strata Plan No 10349 [2017]
NSWCATAD 230
Owners-Strata Plan No 43551 v Walter Construction

Group Limited [2004] NSWCA 429

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners-Strata Plan No 14593 (Appellant)
Mia Soares(First Respondent)
Jordao Soares (Second Respondent)
Alexander Girshkin (Third Respondent)

Representation: Solicitors:
Jane Crittenden Lawyer (Appellant)
M Soares (Self Represented)(First Respondent)
J Soares (Self Represented)(Second Respondent)
A Girshkin (Self Represented)(Third Respondent)

File Number(s): AP18/45465

Publication Restriction: N/A

Decision under appeal:

Court or Tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 26 September 2018

Before: S McDonald, Senior Member

File Number(s): SC18/26649

REASONS FOR DECISION

Background

1 These appeal proceedings have their genesis in an Application brought before this Tribunal by Mia Soares and Jordao Soares who are the owners of lot 2 in a six unit apartment block. Alexander Girshkin owns lot 1 and he was later joined as a party to the proceedings. The owners of lots 1 and 2 are the respondents in these appeal proceedings. The remaining 4 owners of the apartment block are Yolande Lucire and her three sons, John Lawrence Hempton, Stephen Hempton and Dr David Hempton. We shall hereafter refer to the owners of

these 4 lots collectively as “the Hempton family.” The respondent to that application was the appellant in these proceedings, The Owners-Strata Plan No 14593 which is the owners corporation and owner of the common property associated with the apartment block for the purpose of the legislation which governs the care, maintenance and use of the common property, namely the *Strata Schemes Management Act 2015* (“the Act”). The Application was filed on 13 June, 2018.

- 2 In that Application the applicants sought orders seeking that the Owners Corporation be directed to carry out certain work to a part of the common property adjacent to lots 1 and 2, that cleaning services be put out to tender by the Owners Corporation, that certain levies fixed by the strata committee be varied and that the strata committee be reconstituted to counter the extent of the influence created by four members of the one family in effectively controlling its constitution and activities.
- 3 In a Decision given on 26 September, 2018 a Member of this Tribunal made orders dealing with two of the matters which were the subject of the application, and declined to deal with the others. The respondent has sought leave to appeal and to appeal from that decision. Accordingly, these appeal proceedings are confined to a consideration of those two matters only. We shall deal with each of them in turn.

The common property adjacent to lots 1 and 2

- 4 Before dealing with this matter, it is appropriate to set out some of the history which relates to it. The narration which follows is based upon matters referred to in the Decision under appeal and in documentation made available to the Tribunal for the purpose of the original hearing and which was also before us. We note that neither party took issue with the accuracy of that material as it concerns the determination of these appeal proceedings.
- 5 At the rear of lots 1 and 2 there was an outside area which consisted partly of concrete and extended into a grass area, all of which is part of the common property. Balconies to lots 3, 4, 5 and 6 were constructed over this area some considerable time ago and the concrete was damaged during construction. No rectification work was carried out and complaints were made by the owners of

lots 1 and 2 that this area was dangerous to walk on. Some rubber matting was placed over the area, which was said to collect water and create dampness. Furthermore, the overhanging balconies affected the ability of grass to grow in the area.

- 6 The minutes of an Annual General Meeting of the Owners Corporation conducted on 10 February 1999 referred to a proposal for work to be carried out on “proposed verandahs” to units 3, 4, 5 and 6 at the cost of the owners. The minutes state; “It was also resolved to pave an area at rear for units 1 and 2 – with paving bricks. The area to be paved is 20 sq metres.” This latter area is the common property which is the subject of this aspect of the proceedings between the parties. The minutes of an AGM of the Owners Corporation on 26 October, 2002 resolved to give permission to the owners of lots 3, 4, 5 and 6 to repair and extend their balconies, at their own expense, and that these owners “would assume responsibility for the maintenance of these balconies in the future.” There was a further resolution that the Owners Corporation would “pay for pavers and their laying expense for lots 1 and 2. Choice of pavers with this common area in front of lots 1 and 2 to be the choice of the owners of lots 1 and 2.” At an Annual General Meeting of the Owners Corporation held on 22 July, 2006 it was resolved that paving to the rear area of lots 1 and 2 “would be laid after the doors are installed to the rear of units 1 and 2, as discussed previously.” At an Annual General Meeting of the Owners Corporation held on 28 August, 2014 there was discussion concerning “concrete partial rear yard and path to laundry.” The minutes state that “S Hempton to provide scope of works for quotation purposes. Owners of Lots 1 and 2 to revert with pavers suggestion for these works.” Minutes of an Annual General Meeting of the Owners Corporation on 3 March, 2015 include a “progress update” which referred in part to; “Pavers/Concreting at rear of premises. This matter is urgent. Mr S Hempton will urgently submit a plan and commence concreting works by 31 March, 2015. Paving works will be delayed until Unit 1 renovations.....have been completed.” Plans which appear to be attached to those minutes indicate an area of 20 m² to be paved which is located underneath an area shown as a balcony and another area where “concrete must be removed.”

- 7 We add for completeness that by decision dated 10 April, 2014 a Strata Schemes Adjudicator dealing with proceedings between the owner of lot 2 and the Owners Corporation made an order for the compulsory appointment of a new strata manager based inter alia on a finding that the “management structure” of the Owners Corporation was not functioning satisfactorily.
- 8 It appears that subsequently there were proceedings between the parties in this Tribunal which were determined by an adjudicator by the making of orders on 23 March, 2015. We do not appear to have a copy of the adjudication or those orders. However, there were subsequent proceedings in which the Hempton family were applicants and the Owners Corporation was respondent culminating in the making of consent orders on 15 July 2015 setting aside the orders made on 23 March 2015. Order number 4 provided that the applicants “agree that the works approved by the compulsory manager and in the meeting of 3 March 2015 will proceed as approved.”
- 9 Mr Stephen Hempton forwarded an email communication to the managing agent with copies to the respondents on 16 November 2015 stating “Regarding the tiles in the back, the Executive Committee and owners are planning to get legal advice. The owners upstairs are not interested in tiling the back and feel that since more than 10 years have passed and no by-laws were made, we feel that we are not obliged to continue. The deals were made with previous owners and seeing a by-law was not lodged within 2 years that the balconies are now common property.” We observe that not only did the Strata Committee determine that it would not adhere to the works to the area adjacent to lots 1 and 2 previously approved, but it determined that the balconies would become common property, and thus to be maintained at the expense of the Owners Corporation as a whole rather than at the expense of the owners of the 4 lots as originally agreed.
- 10 The appellant’s managing agent wrote to the Strata Committee on 21 December, 2015 asking that it take action to redress the problem, and noting that the Owners Corporation had previously resolved to commence installing paving in the affected area by resolution dated 3 March, 2015, but to defer that work until renovations then being undertaken with respect to lot 1 had been

completed. At that time those renovations had been completed. Subsequently, on 29 February 2016 the Strata Committee (of which the owners of lots 1 and 2 were not members) met. An item on the agenda was the seeking of quotations for the paving of the area in dispute.

- 11 The matter came up again for consideration at an Extraordinary General Meeting of the Owners Corporation on 10 May 2016. One of the business items considered was a motion to the effect that “.. the motion passed at the Annual General Meeting held 10 February, 1999 where it was resolved to pave an area at the rear of units 1 and 2 – with paving bricks and the area to be paved is 20 m² is hereby recorded as having been passed by way of a special resolution.” That resolution was defeated, and it may be assumed at the instigation of the Hempton family.
- 12 Ms Soares as owner of lot 2 brought an application to the Tribunal under the former *Strata Schemes Management Act 1996* (the “1996 Act”) which was determined by Adjudicator G A Kinsey, on 1 November, 2016. It appears from reasons for decision that the applicant sought an order that the paving works should use concrete rather than cement. The owner of lot 1 submitted that reinforced concrete should be used as a base for a tiled surface and asserted that this would give a better result than compacted sand. The Adjudicator said that it was not clear whether the dispute related to “alterations or additions” to the common property and thought that the applicant should seek advice about the application of section 65A of the 1996Act. This required, in effect, that a special resolution be passed at a general meeting of the Owners Corporation for the purpose of “improving or enhancing the common property” if action was proposed to “add to”, “alter” or “erect a new structure on” the common property. The Adjudicator accepted submissions made by Ms Crittenden that all owners should be given an opportunity to vote as to whether the work was to be carried out using pavers or tiles laid over a sand and cement substrate, or reinforced concrete and said that the matter should be determined by a special resolution under section 65A of the 1996Act. The application was dismissed accordingly. As will be seen, the Adjudicator erred in taking this position, as did Ms Crittenden in advancing it.

- 13 On 24 October 2017 the owners of lots 1 and 2 wrote to the managing agent requesting an Extraordinary General Meeting to deal with a number of matters including the use of reinforced concrete in the construction of the area. There is no evidence that either a general meeting of the Owners Corporation or a meeting of its Strata Committee has, since 1 November, 2016 ever approved any work to be undertaken with respect to the area of common property the subject of this part of the proceedings currently before the Appeal Panel. Indeed, since the determination of the Adjudicator on 1 November 2016 the Owners Corporation and its Strata Committee have taken the view that no authorisation for the carrying out of any works can be determined in the absence of a special resolution, and no such special resolution will ever be passed because of the preponderance of the voting control exercised by the Hempton family.
- 14 An Annual General Meeting of the Owners Corporation was held on 28 June, 2018. At that meeting the owners of lots 1 and 2 sought to have a special resolution passed to the effect that the work should be carried out by use of pavers on compact sand and cement in accordance with drawings proposed by the Strata Committee meeting on 25 February 2016 and referred to in the 2015 proceedings before the Tribunal. The minutes of that meeting indicate that the motion proposed was defeated by 4 votes to 2.
- 15 The applicants sought mediation, which the Owners Corporation declined. The Application came on for hearing before a Member of this Tribunal who delivered comprehensive reasons for decision on 26 September, 2018 when determining to make, relevantly for current purposes, the following order;

The Respondent, The Owners – Strata Plan No 14593 is to obtain quotes forthwith to commence “the works” previously referred to in the minutes of meeting of the AGM of SP 14593 dated 3 May 2015 and also referred to in Order#4 of the Tribunal dated 15 July, 2015 in SCS 15/40100 to ensure that the works relating to paving an area of 20 square meters at the rear of SP14593 as per the plan referred to at pp. 16 and 26 of the Applicants’ first bundle of documents is accomplished as soon as possible. Such work is to commence no later than 2 months from the date of this order and is to be completed no later than 3 months from the date of this order. The budget for such work is to be up to \$6000 and any specification or criteria in respect of the works is to be determined either by agreement between the owners of lots 1, 2 and 5 or, if they cannot agree, by majority decision of those three lot owners.

- 16 In his reasons for decision the Member first set out the history of the matter, in terms which are similar to those which we have recited above. The Member also referred to the “significant animosity” between the respondents to these appeal proceedings and the Hempton family in the way in which the Owners Corporation was managed. He said, in part, that “This seems to be exacerbated by Units 1 and 2 being locked into a strata plan in which they are not represented on the Executive Committee and do not have the voting power to pass any resolution which could impact favourably upon their lots.” The Member suggested that the management of the Owners Corporation had become “dysfunctional.”
- 17 The Member observed that for some considerable time the only controversy between the parties was whether the works were to be carried out using pavers or tiling. He noted that the Owners Corporation said that a special resolution was required to specify the precise nature of the surface cover, although it consistently refused to allow any special resolution to be passed.
- 18 The Member referred specifically to section 65A of the 1996 Act. The parallel provision in the Act, which now applies, is section 108, which is in the following terms;

108 Changes to common property

- (1) Procedure for authorising changes to common property An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.
- (2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.
- (3) Ongoing maintenance A special resolution under this section that authorises action to be taken in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.
- (4) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.
- (5) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless:

(a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and

(b) the owners corporation makes the by-law.

(6) The by-law:

(a) may require, for the maintenance of the common property, the payment of money by the owner at specified times or as determined by the owners corporation, and

(b) must not be amended or repealed unless the owners corporation has obtained the written consent of the owner concerned.

(7) Sections 143 (2), 144 (2) and (3) and 145 apply to a by-law made for the purposes of this section in the same way as they apply to a common property rights by-law.

Note. A new by-law or other changes to the by-laws for a strata scheme must be approved by a special resolution of the owners corporation (see section 141).

19 After doing so, the Member said that section 65A of the 1996 Act could not require a special resolution “for every aspect of the specification required to undertake the work.” On this basis he determined that he should make an order “in favour of the Applicants” and then said that he had consulted with the parties at the conclusion of the hearing about the proper form of the order, and thus made the order in the form set out above. If this is correct, we are surprised that the appellant has sought to appeal this order.

20 In support of the appeal, Ms Crittenden solicitor for the appellant submitted that;

(1) the Member erred in excluding the owners of lots 3 4 and 6 from exercising a right to vote upon any decision to alter the common property and had no grounds to do so. Nor was there any statutory entitlement to do so.

(2) the only power to order the appellant to carry out repairs to common property was that referable to the duty to maintain it in good and serviceable repair as referred to in section 106 of the Act, which is in the following terms;

106 Duty of owners corporation to maintain and repair property

(1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

(3) The circumstances of these proceedings fell within section 108 of the Act, because the work to be carried out was an alteration or addition to the common property because of the use of either concrete or pavers to finish off the surface.

21 Ms Crittenden appropriately conceded that if the work to be carried out was required pursuant to the duty to properly maintain common property and keep it in a state of good and serviceable repair, then it was appropriate that an order be made. Indeed, as will be seen, Ms Crittenden was able to obtain sensible agreement from her clients that the work would be attended to.

22 It is abundantly clear to us by reference to the sorry history of this matter that the poor state of the common property which the owners of lots 1 and 2 have had to endure for many years has created a need to maintain it and keep it in a state of good and serviceable repair. Photographs which were evidence in the proceedings graphically depict the poor condition of the area. The evidence which we have set out is clear as to how the area came to be in a state of disrepair following the construction of the balconies which extended over it. It is

equally clear that what is sought to be done is to repair and maintain the area so as to keep it in a state of good and serviceable repair. This matter obviously falls for determination under section 106 of the Act.

- 23 The jurisdiction and power of this Tribunal to make orders dealing with disputes under the Act are described generally in sections 229 and 232 which are in the following terms;

229 General order-making power of Tribunal

The Tribunal may, in any proceedings before it under this Act, make any one or more of the following orders or other decisions:

- (a) an order or decision that provides for any ancillary or consequential matter the Tribunal thinks appropriate,
- (b) an interlocutory decision within the meaning of the Civil and Administrative Tribunal Act 2013.

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.

24 For completeness, we note also the provisions of sections 240 and 241 of the Act;

240 Tribunal may make order of another kind

The Tribunal may deal with an application for an order under a specified provision of this Act by making an order under a different provision of this Act if it considers it appropriate to do so.

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.

25 It is not necessary for the purpose of the resolution of this particular matter that we discuss the nature and extent of the jurisdiction and powers set out in the provisions above in any detail. What is required is that there be a complaint or dispute about the operation, administration or management of a strata scheme.

(See generally Rothman J in the Supreme Court of NSW in *The Owners – Strata Plan No 37762 v Dinh Phuong Dung Pham and anor* [2006] NSWSC1287 at [78] and following. We observe that by reason of the provisions of section 240 we are entitled, if it be necessary, to determine this aspect of the appeal proceedings by reference to the provisions of section 106 rather than section 108 of the Act. In addition, we refer in general terms to the principles established by decisions of this Tribunal, and particularly at Appeal Panel level, such as *Walsh v The Owners – Strata Plan No 10349* [2017] NSWCATAD 230.

- 26 During the course of the proceedings we expressed concern that the parties had failed to reach agreement concerning the materials to be used and the relevant specifications in repairing the common property over a very long time. We ask the parties to give sensible consideration to reaching some agreed position. Although representatives of the appellant were not present during the course of the hearing, Ms Crittenden was able to obtain instructions that if we were to find that this aspect of these appeal proceedings was governed by section 106 of the Act, as we do, the following order should be made, namely;

In light of order 1 made by the Appeal Panel in these proceedings, the Owners Corporation consents to do the following works in the rear yard of the property being undertaken forthwith:

the laying of concrete pavers measuring 450 x 600 mm over a compacted sand and cement base from the rear doors of lots 1 and 2 over all that part of the common property shown in the plan annexed to these orders and marked with cross-hatching, up to the laundry door.

- 27 We note that firstly, the reference to “order 1” is a reference to a finding which we shall make to the effect that the appeal with respect to this particular matter is governed by the provisions of section 106 of the Act. Secondly, we note that the respondents to the appeal agreed to accept the making of an order embodying the appellant’s proposal set out above.
- 28 As we have explained, the appeal with respect to this matter is based firstly on an assertion that section 108 of the Act applies. We have rejected that argument for the reasons set out above.
- 29 The second basis for the appeal with respect to this matter concerns the manner in which the Order was framed. We readily acknowledge that section

229(a) of the Act permits the making of an order that provides for an ancillary or consequential matter. We also acknowledge the difficulty faced by the Member in framing an order which would have the effect of designating and defining a mechanism which would enable the necessary work to be carried out, including an appropriate description and/or specification. Indeed, this is a difficulty which will often be confronted by the Tribunal in dealing with matters of this kind. No doubt the difficulty in creating a description and specification led the Member to ultimately make provision for agreement between the owners of 3 nominated lots. This nomination has in turn been raised as one of the bases upon which the appeal is brought.

30 In our opinion the relevant order should be framed in a manner so that it is, in effect, self-executing and thus avoid problems which may arise in asking persons who have obviously been in an acrimonious relationship to seek agreement. Fortunately, we do not need to explore this matter further because, as we have said, the parties have reached sensible agreement. However, it is arguable that the manner in which the order was framed gives rise to such uncertainty that it should be set aside. To this extent we grant leave to appeal and allow the appeal with respect to so much of the decision of the Member concerning this matter as is reflected in the manner in which the relevant order was framed.

31 In determining the appeal we shall vary Order 1 made by the Member on 26 September, 2018 so as to reflect the agreed position between the parties. We make the following order;

Consequent upon the finding made by the Appeal Panel that the Owners Corporation is in breach of section 106 of the Strata Schemes Management Act 2015 it shall undertake forthwith the following works in the rear yard of the property at 617 New South Head Road Rose Bay namely the laying of concrete pavers measuring 450 x 600 mm over a compacted sand and cement base from the rear doors of lots 1 and 2 over all that part of the common property shown in a plan in the form produced by the parties to these proceedings at the appeal hearing on 23 January, 2018 and marked with cross-hatching, up to the laundry door.

The cleaning contract

32 The original Application asked the Tribunal to resolve a dispute pursuant to the provisions of section 232 of the Act by requiring that “the cleaning services to be tendered to an experienced and qualified professional.” It was alleged that

the cleaning services provided, by implication, to the Owners Corporation were currently performed by Stephen Hempton, who was described as being a member of the strata committee, and who was alleged to have “no proven experience in providing cleaning services” and as providing a poor service.

- 33 The Application annexed copies of email communications between the then applicants and the three Messrs Hempton as well as the strata manager dating from December 2017. They stated generally that the cleaning services were of a poor standard and alleged that garbage bins used by units 1 and 2 (as opposed to the bins used by the other units) were not being brought out to the street for rubbish collection. Requests were also made that the Strata Committee and strata manager provide them with “the scope of services and cleaning schedule” which was contracted to Stephen Hempton.
- 34 There was in evidence before the Tribunal a number of email communications from the owner of lot 2 to S Hempton and J Hempton as well as the strata manager, some of which have photographs attached. They may be summarised as follows;
- (a) 8 December 2017 at 12:09 pm stating that the garbage bins had not been returned to the building. This elicited a response from J Hempton that he generally wheeled his bins in and asked that the applicant do so. He said that “perhaps the cleaner is sick;
 - (b) 14 December 2017 attaching photographs depicting the mess in the back yard left after it had allegedly been cleaned;
 - (c) 28 December 2017 stating that a garbage bin had not been taken to the street in time for it to be collected;
 - (d) 3 January 2018 stating that the garbage bins used by units 1 and 2 had not been taken out to the street and complaining about the poor cleaning of the common property;
 - (e) 11 January 2018 complaining again of the failure to move the bin at the rear of the premises to the street for collection;
 - (f) 27 April 2018 again complaining of the failure to bring out the bins from the rear of the premises;
 - (g) 16 May 2018 again complaining of the failure to bring out the bins from the rear of the premises.
- 35 There is no evidence of any further replies received to any of these email communications.

36 In his reasons for decision the Member noted that based on evidence given in the proceedings before him, the Strata Committee determined on 11 November 2016 to terminate the services of an existing cleaning contractor and to retain a member of that committee, Stephen Hempton to provide cleaning services. The Member noted that there was no information contained in the minutes of that meeting concerning any tender process. He found that there was a conflict of interest in awarding such a contract to a member of the committee, particularly as there was no indication of any forewarning to unit holders about what was intended to occur. The Member said that “in the circumstances where there was no, or no adequate disclosure or forewarning of the awarding of this contract to unit holders, and in circumstances where there appears to be a conflict of interest in the awarding of the contract and concerns about the quality of the service, Mr Hempton should be replaced with a professional, arm’s-length contractor at similar price to conduct the cleaning, gardening and maintenance services at SP14593.” He observed that this could be facilitated through the services of the strata manager.

37 The Member made the following order;

The Respondent, The Owners – Strata Plan No 14593, via its strata manager, is to retain a professional contractor within a budget of \$550pcm excluding GST to undertake the cleaning, gardening, mowing, general maintenance and to manage the rubbish/recycling bins of SP14593 within 1 month of the date of this order in order to replace the services of Mr Steven Hempton, the owner of lot 5, who currently undertakes those tasks

38 The submissions of the appellant in support of the appeal against this order are to the following effect;

- (a) the strata manager was not a party to the proceedings;
- (b) the Tribunal had no evidence of any functions delegated to the strata manager or restrictions thereon;
- (c) there was no consent by the strata manager to the exercise of any such functions as required by section 237 (4) (b) of the Act;
- (d) there was no evidence that the strata manager held an agent’s licence as required by the Act;
- (e) no finding had been made that the scheme was not functioning or functioning satisfactorily as required by section 237 (3) of the Act;

- (f) The order was beyond power because it was not limited as to duration;
- (g) there was no basis for the removal of Stephen Hempton particularly as he had been appointed the cleaner of the common property at an AGM on 28 June 2018;
- (h) There was no requirement at law for any tender to be submitted or any preclusion of a member of the strata committee or lot holder from being contracted as a cleaner, nor from voting on the awarding of such a contract.

- 39 We agree with the submission of the appellant that the Member failed to explicitly particularise the basis for the making of this order in terms of the jurisdiction and power conferred by the Act. In order to found jurisdiction and power as provided by section 232 of the Act there must be a complaint or dispute, relevantly for present purposes, concerning the operation, administration or management of the strata scheme which applies to the Owners Corporation. The respondents complained about the cleaning services being provided by Stephen Hempton, and his failure in particular to deal with garbage bins and to properly clean the common property.
- 40 Although Ms Crittenden submitted that there was no definite evidence provided by the respondents concerning any deficiencies in the cleaning services provided, we disagree. There are a number of continuing complaints made by the respondents and, on the evidence, no attempt has been made to deal with them on behalf of the appellant. We are satisfied that the respondents have made a number of complaints, and in the absence of any evidence to the contrary, that they were justified in doing so. As is clear, there is no suggestion of any kind that the complaints were other than genuine. In the absence of any response of any kind from the appellant, there therefore exists a dispute concerning the nature and extent of the cleaning services being provided to the Owners Corporation. This dispute goes to the manner in which the strata scheme has operated, has been administered and has been managed.
- 41 Furthermore, the effective controlling minds of the Owners Corporation are other members of the Hempton family. Whether and to what extent family loyalties have played a part in the awarding of the cleaning contract to Mr Stephen Hempton is not known in any definitive sense, but there is an apprehension on the part of the respondents that this is the case. That

apprehension is based on their overall relationship with various members of the Hempton family, much of which has been set out above in dealing with the first issue concerning the 20 m² of common property.

- 42 We add to these latter matters, material disclosed in the minutes of the Annual General Meeting of the Owners Corporation on 31 March, 2016 dealing with the election of an strata committee. A motion was put that there be four members of the committee, which was defeated by 3 votes to 2. A further motion was then put that the strata committee consist of 2 persons which was carried by a majority of 3 to 2. Finally it was resolved that JB and S Hempton be elected to that committee. Again, the voting was 3 to 2 in favour of that resolution. We infer that the manner in which the Owners Corporation determined to confine the membership of the strata committee so that it consisted only of members of the Hempton family as indicative of an attempt to exclude the owners of lots 1 and 2 from the operation and management of the strata scheme. If it had been otherwise, the Owners Corporation could have simply made provision for a three-person strata committee and ensured that one of those persons was a representative of either lot 1 or lot 2.
- 43 It is also relevant to have regard to the provisions of the Act as providing assistance in determining the respective responsibilities, duties and obligations of firstly the Owners Corporation and secondly the members of its strata committee concerning matters relevant to the cleaning of common property, including garbage collection and disposal. We first refer to sections 9 and 10 which are in the following terms;

9 Owners corporation responsible for management of strata scheme

- (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
- (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme:
 - (a) the management and control of the use of the common property of the strata scheme, and
 - (b) the administration of the strata scheme.
- (3) The owners corporation has responsibility for the following:
 - (a) managing the finances of the strata scheme (see Part 5),

(b) keeping accounts and records for the strata scheme (see Parts 5 and 10),

(c) maintaining and repairing the common property of the strata scheme (see Part 6),

(d) taking out insurance for the strata scheme (see Part 9).

10 Functions of owners corporation generally

(1) An owners corporation has such other functions as may be conferred or imposed on it by or under this or any other Act.

(2) An owners corporation must not delegate any of its functions to a person unless the delegation is specifically authorised by this Act.

44 We observe that the functions of the Owners Corporation are to be carried out “for the benefit of the owners of lots in the strata scheme”. This must refer to the benefit of each and every owner of a lot. It is not permissible, consistent with the provisions of section 9 of the Act for the Owners Corporation to exclude any one or more lot owners from the services which it is required to provide or to discriminate against any one or more lot owners. Any failure, for example, to exclude services associated with putting out and bringing back garbage bins for particular lots, as has occurred in the circumstances of these proceedings involves a prima facie breach of the provisions of section 9 of the Act.

45 The same obligations are imposed on members of a strata committee by reason of section 37 of the Act which is in the following terms;

37 Duty of members of strata committee

It is the duty of each member of a strata committee of an owners corporation to carry out his or her functions for the benefit, so far as practicable, of the owners corporation and with due care and diligence.

Note. Section 260 provides protection from personal liability for members of strata committees who act in good faith.

46 Accordingly, any member of the strata committee of the Owners Corporation who initiated or participated in conduct of the kind that we have referred to above, would arguably bring the Owners Corporation into a breach of section 10 of the Act, as well as breaching his or her own duty created by section 37.

47 Indeed, the nature of the interest of a lot owner in a strata scheme by reference to the functions of an Owners Corporation has been described in the NSW Court of Appeal in *Owners-Strata Plan No 43551 v Walter Construction Group*

Limited [2004] NSWCA 429. Spigelman CJ (Ipp and McColl JJA agreeing) said at [43] and following;

43 In *Carre v Owners Corporation - Strata Plan 53020* [2003] NSWSC 397; (2003) 58 NSWLR 302 Barrett J referred to the words "beneficial interest" in s24(2) and said:

"[28] ...The statute seems clearly enough to proceed on the footing that each proprietor of a lot is to be regarded as the equitable owner of an undivided interest as one of several tenants in common in the estate or interest of which the owners corporation is the legal owner. ...

[29] It is clear from the statutory scheme that an owners corporation is in no sense the beneficial owner of common property. Its ownership is always in a representative capacity identified by the Act as that of 'agent', with the lot proprietors, as the owners in equity of undivided interest of tenants in common, each identified as having a 'beneficial interest'. The restrictions upon alienation and other dealings and the provisions with respect to repair, renewal and replacement proceed on the assumption that common property exists for the benefit of the lot proprietors as a general body. ... As was observed in *Houghton v Immer (No 55) Pty Ltd* (1997) 44 NSWLR 46, by Handley JA (with whom Mason P and Beazley JA concurred), a provision that vests this common property in an owners corporation as 'agent' for lot proprietors makes the proprietors equitable tenants in common."

44 Gzell J said in *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88:

"[7] The notion of an agency in this context is odd. If common property is vested in the owners corporation for the benefit of the lot owners, one would expect the relationship to be that of trustee and beneficiary rather than that of agent and principal. That something more than the relationship of principal and agent was intended by the legislation was clear from the terms of the *Strata Schemes (Freehold Development) Act 1973*, s 24(2) which spoke of the beneficial interest of a proprietor of a lot in the estate or interest in the common property held by the body corporate as agent for that proprietor.

[8] It is not surprising, then, that the nature of the interest of a lot owner in the common property has been described as an equitable interest as a tenant in common with other lot owners (*Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56) and as a proprietary right (*Young v Owners - Strata Plan No 3529* [2001] NSWSC 1135; (2001) 54 NSWLR 60 at 46)."

45 I agree with these observations of Barrett J and Gzell J. It is not appropriate to characterise the statutory role of an owners' corporation solely in terms of an agency at common law.

48 Those proceedings dealt with the provisions of section 24 of the now repealed *Strata Schemes (Freehold Development) Act 1973* concerning dealings with common property. The provisions of that legislation are not relevantly different from those which apply to these proceedings. Accordingly, save for specific

exceptions created by a strata scheme including by-laws, in dealing with common property an owners corporation must regard each and every lot holder as having an interest in that property as tenants in common with every other lot holder.

- 49 The narration of the factual background to these proceedings involving both of the issues before us paints a picture of the Hempton family conducting itself in a manner which is designed to deny to the respondents the benefit of basic entitlements under the strata scheme. It is not necessary that we revisit the long and tortuous path which they were required to pursue in order to have the common property which adjoined their units rectified over many years. It is plain from the documentation to which we have referred that the Hempton family has flexed its representational muscle in a manner designed to frustrate every attempt by the respondents to have the common property repaired and maintained. It is against this background that we come to consider the complaints made by the respondents concerning the poor performance of the cleaning contract awarded to Stephen Hempton. As we have observed, the complaints have not been denied by the appellant. We find that the cleaning contract awarded to Stephen Hempton has been poorly performed against the interests of the respondents.
- 50 It is against this factual background, and these findings that we have regard to the remedy which the Member intended to award to the respondents by reason of the Order which he made. And in so considering the provisions of that Order we have regard also to the statutory context against which these proceedings are conducted, namely, as we have observed, the responsibilities, obligations and duties of the appellant, the Owners Corporation as described in *The Owners-Strata Plan No 43551* referred to above.
- 51 We agree that in all the circumstances the operation, management and administration of the strata scheme by the Owners Corporation has been dysfunctional over a long time as it concerns the interests of the respondents, that the cleaning contract has been poorly performed, that the respondents are justified in their complaints about it, that the dispute between the parties needs to be resolved and that it is appropriate to order a new cleaning contract be

awarded by the Owners Corporation. Furthermore, Stephen Hempton, by reason of the evidence of his poor performance to date should be excluded as a contractor.

52 This leads to a consideration of the terms of the Order made by the Member which has been attacked by Ms Crittenden on behalf of the appellant.

53 Insofar as the appellant submitted that the Member failed to appropriately articulate the basis upon which he had found that Stephen Hempton had not discharge his obligations under the contract, we have found that there is such a basis.

54 The appellant attacked the form of the Order because it allegedly imposed obligations on the strata manager which was not a party to the proceedings. As is obvious, an order can only be made in proceedings of this kind against a person or entity who is a party to the proceedings. The submission of the appellant misreads the order made which is clearly directed to the appellant. The use of the words "via its strata manager" is designed to formulate a process by which the contractor is to be identified and retained. Seen in this way, the order made is directed to the appellant as a party to the proceedings and contains consequential matters of the kind envisaged by section 229 (a) of the Act.

55 However, we have concerns that the manner in which the order is framed which specifies a particular budget might unduly fetter the process by which an appropriate contractor might be located and retained. To this extent, we intend to grant leave to appeal and allow the appeal on this issue in order to vary the decision under appeal pursuant to the provisions of section 81 (1) (b) of the *Civil and Administrative Tribunal Act* to substitute the following order for order number 2 made by the Member namely;

The Respondent, The Owners – Strata Plan No 14593 is ordered within 14 days hereof to seek at least two tenders from persons or entities for the work of cleaning, gardening, mowing and general maintenance of the common property of the Owners Corporation and for the work of managing the rubbish and recycling bins used for the collection, disposal and storage of garbage materials, recycling materials and garden waste in and about the common property of the Owners Corporation and to award a contract for such work to commence within a further 14 days. In so doing the Owners Corporation may, at its discretion, utilise the services of the strata manager for this purpose.

No such tenders shall be sought from, and no such contract shall be awarded to any person or entity in which or in relation to which Stephen Hempton has any interest of any kind or any entitlement to receive any share of the income derived from the contract, whether directly or indirectly

The Owners Corporation shall terminate the existing contract with Stephen Hempton in terms such that the termination of services will coincide with the commencement of the new contract

Costs

56 In substance the appellant has not been successful in the appeal. The respondents did not seek any costs order in their favour. However, as we indicated to Ms Crittenden during the course of the proceedings it is appropriate that we ensure that section 104 of the Act which is in the following terms, applies;

104 Restrictions on payment of expenses incurred in Tribunal proceedings

- (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.
- (2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.
- (3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal

57 It would be unfair in all the circumstances if the respondents were required to contribute to any levy raised by the Owners Corporation with respect to any costs and disbursements incurred in connection with these appeal proceedings. Accordingly, the respondents having been successful overall in the proceedings, we observe that no such contribution should be required of them.

Orders

58 We make the following orders;

- (1) Order No 1 made in proceedings SC 18/26649 is varied by deleting it and substituting therefor;

1 Consequent upon the finding made by the Appeal Panel that the Owners Corporation is in breach of section 106 of the Strata Schemes Management Act 2015 it shall undertake forthwith the following works in the rear yard of the property at 617 New South Head Road Rose Bay namely the laying of concrete pavers measuring 450 x 600 mm over a compacted sand and cement base from the rear doors of lots 1

and 2 over all that part of the common property shown in a plan in the form produced by the parties to these proceedings at the appeal hearing on 23 January, 2018 and marked with cross-hatching, up to the laundry door.

- (2) Order No 2 made in proceedings SC 18/26649 is varied by deleting it and substituting therefor;

2 (a) The Respondent, The Owners – Strata Plan No 14593 is ordered within 14 days hereof to seek at least two tenders from persons or entities for the work of cleaning, gardening, mowing and general maintenance of the common property of the Owners Corporation and for the work of managing the rubbish and recycling bins used for the collection, disposal and storage of garbage materials, recycling materials and garden waste in and about the common property of the Owners Corporation and to award a contract for such work to commence within a further 14 days. In so doing the Owners Corporation may, at its discretion, utilise the services of the strata manager for this purpose.

(b) No such tenders shall be sought from, and no such contract shall be awarded to any person or entity in which or in relation to which Stephen Hempton has any interest of any kind or any entitlement to receive any share of the income derived from the contract, whether directly or indirectly

(c) The Owners Corporation shall terminate the existing contract with Stephen Hempton in terms such that the termination of services will coincide with the commencement of the new contract

- (3) The Tribunal notes, and to the extent necessary orders and directs that no part of the legal costs incurred by the appellant in these appeal proceedings should be levied against the respondent owners of lots 1 and 2.

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

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