

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2414/2018 & OC2442/2018

CATCHWORDS

Cross-application by the parties regarding the appointment of the administrator of the owners corporation – creditor seeks the removal and replacement of the administrator whereas the owners corporation seeks to extend the time of his appointment – sections 173 and 174 of the *Owners Corporations Act 2006* (Vic).

PARTIES TO PROCEEDING OC2414/2018:

APPLICANT Scotia Property Maintenance Pty Ltd (ACN: 092 988 700)

RESPONDENT Owners Corporation Plan No. PS316440K

FIRST INTERESTED PARTY Greater Geelong City Council

SECOND INTERESTED PARTY Danetha Pty Ltd (ACN: 006 360 578)

PARTIES TO PROCEEDING OC2442/2018:

FIRST APPLICANT Owners Corporation Plan No. PS316440K

SECOND APPLICANT Nathan Holmes

THIRD APPLICANT Leighanne Crocker

FOURTH APPLICANT Angelo Fusella

FIFTH APPLICANT Alana Maree Holmes Holmes

FIRST INTERESTED PARTY Greater Geelong City Council

SECOND INTERESTED PARTY Danetha Pty Ltd (ACN: 006 360 578)

DETAILS OF THE HEARING OF THE PROCEEDINGS:

WHERE HELD Melbourne

BEFORE Member D. Kim

HEARING TYPE Remote Hearing

DATE OF HEARING 16 and 17 November 2020

DATE OF ORDER 17 February 2021

CITATION Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations) [2021] VCAT 123

ORDERS FOR OC2414/2018:

ORDER

1. Pursuant to section 174 of the *Owners Corporations Act 2006* (Vic)(Act):
 - a. Mr Robert Evans' appointment as the administrator of Owners Corporation Plan No. PS316440K (OC) is to cease on 25 February 2021.
 - b. Mr Matthew Twiselton of Suite 12, 14 Albert Street, Blackburn, VIC 3130, is appointed as the administrator of the OC as of 26 February 2021 until 25 February 2022 or as otherwise ordered by the Tribunal.
2. Subject to this order, during his term as the administrator, Mr Twiselton may, pursuant to section 176(c) of the Act, do anything that the OC can do.
3. All proper costs and charges incurred by Mr Twiselton as the administrator, including the administrator's fees, and the employment of suitably qualified solicitors and experts, be costs in the administration and payable by all lot owners in proportion to their liability, unless otherwise ordered by the Tribunal.
4. The remuneration and expenses of Mr Twiselton as the administrator be calculated at the rate of \$198.00 per hour inclusive of GST.
5. The administration will continue until 25 February 2022, or as otherwise ordered by the Tribunal.
6. The appointment of an administrator is subject to the following further conditions:
 - a. The administrator is to take all steps necessary, as soon as possible, to respond to and address any outstanding Emergency Orders and Building Orders issued by the Municipal Building Surveyor of Greater Geelong City Council under the *Building Act 1993* (Vic) and/or *Building Regulations 2018* (Vic).
 - b. The administrator must take all steps necessary, as soon as possible, to pursue and obtain from lot owners all outstanding fees and levies.
 - c. The administrator must take all steps practical and appropriate to inform lot owners, including those whom English is not their first language, as to the issues – both financial and non-financial – facing the OC.
 - d. The administrator must ensure, if possible, that there is adequate insurance cover for the OC.
 - e. Upon being appointed, the administrator must determine what the administrator considers as the best course or courses of action for the OC to take in respect of the various issues the OC faces and then to take all steps necessary to implement that course or those courses of action.

7. Should a party wish to seek costs in the proceeding:
 - a. By **4.00pm on 8 March 2021**, the party seeking costs must file and serve written submissions as to costs which are to be no longer than six (6) A4 pages in length.
 - b. By **4.00pm on 22 March 2021**, any party seeking to oppose the application for costs must file and serve written submissions which are to be no longer than six (6) A4 pages in length.
8. Unless a party provides a written request to the Tribunal by **4.00pm, 29 March 2021**, for a hearing on the issue of costs, the issue of costs is to be determined on the papers.
9. If there is no party who complies with paragraph 7(a) above, there is to be no order as to costs.
10. Within 7 days of the date of this Order, the administrator must send a copy of this Order to all lot owners.
11. The parties have liberty to apply.

ORDERS FOR OC2442/2018:

ORDER

1. The applicant's application dated 30 October 2020 seeking an extension of Mr Evans' tenure as the administrator of Owners Corporation Plan No. PS316440K is dismissed.
2. Pursuant to section 174 of the *Owners Corporations Act 2006* (Vic)(Act):
 - a. Mr Robert Evans' appointment as the administrator of Owners Corporation Plan No. PS316440K (**OC**) is to cease on 25 February 2021.
 - b. Mr Matthew Twiselton of Suite 12, 14 Albert Street, Blackburn, VIC 3130, is appointed as the administrator of the OC as of 26 February 2021 until 25 February 2022 or as otherwise ordered by the Tribunal.
3. Subject to this order, during his term as the administrator, Mr Twiselton may, pursuant to section 176(c) of the Act, do anything that the OC can do.
4. All proper costs and charges incurred by Mr Twiselton as the administrator, including the administrator's fees, and the employment of suitably qualified solicitors and experts, be costs in the administration and payable by all lot owners in proportion to their liability, unless otherwise ordered by the Tribunal.
5. The remuneration and expenses of Mr Twiselton as the administrator be calculated at the rate of \$198.00 per hour inclusive of GST.
6. The administration will continue until 25 February 2022, or as otherwise ordered by the Tribunal.

7. The appointment of an administrator is subject to the following further conditions:
 - a. The administrator is to take all steps necessary, as soon as possible, to respond to and address any outstanding Emergency Orders and Building Orders issued by the Municipal Building Surveyor of Greater Geelong City Council under the *Building Act 1993* (Vic) and/or *Building Regulations 2018* (Vic).
 - b. The administrator must take all steps necessary, as soon as possible, to pursue and obtain from lot owners all outstanding fees and levies.
 - c. The administrator must take all steps practical and appropriate to inform lot owners, including those whom English is not their first language, as to the issues – both financial and non-financial – facing the OC.
 - d. The administrator must ensure, if possible, that there is adequate insurance cover for the OC.
 - e. Upon being appointed, the administrator must determine what the administrator considers as the best course or courses of action for the OC to take in respect of the various issues the OC faces and then to take all steps necessary to implement that course or those courses of action.
8. There is no order as to costs.
9. Within 7 days of the date of this Order, the administrator must send a copy of this Order to all lot owners.
10. The parties have liberty to apply.

D. Kim
Member

**APPEARANCES FOR
OC2414/2018:**

For Applicant	Mr D Free, solicitor
For First Respondent	Mr J Cohen, solicitor
For the First Interested Party	Mr P Somers, solicitor
For the Second Interested Party	Mr P Leaman & Ms R Rubinstein, solicitors

**APPEARANCES FOR
OC2442/2018:**

For the First Applicant	Mr J Cohen, solicitor
For First Interested Party	Mr P Somers, solicitor
For the Second Interested Party	Mr P Leaman & Ms R Rubinstein, solicitors

REASONS

BACKGROUND – THE PARTIES AND THE PROCEEDINGS

- 1 In essence, the two proceedings concern the appointment of Mr Robert Evans as the administrator of Owners Corporation Plan No. PS 316440K (**OC**). The OC is the respondent in proceeding OC2414/2018 (**Scotia Proceeding**) and the applicant in proceeding OC2442/2018 (**OC Proceeding**).
- 2 Scotia Property Maintenance Pty Ltd (**Scotia**) is a creditor of the OC and the applicant in the Scotia Proceeding. Scotia is not a party to the OC Proceeding. Scotia describes itself as a registered builder and in the business of making safe, unsafe buildings.¹ Mr William McLaughlin is the director of Scotia.
- 3 The OC is the owners corporation in respect of land situated at 135-149 Ryrie Street and 146-154 Moorabool Street, Geelong, Victoria. One of the lot owners is Danetha Pty Ltd (**Danetha**), who is an interested party in the two proceedings.
- 4 The land is a corner block which has a historic set of buildings. Originally there were three buildings comprised of Hopetoun Chambers (historic building on the register), Belcher's Corner (**Belcher's Corner Building**) (historic building on the register which had a basement), and the Belcher's building. All three buildings were physically joined to adjacent buildings such that no building was fully detached. The land is situated in the major commercial precinct of Geelong, with various businesses having operated in the buildings.
- 5 Unfortunately, the land has faced many issues. Most notably the Belcher's Corner Building suffered a significant degree of degradation, including concrete cancer, such that the Building had to be demolished due to safety concerns. The City of Greater Geelong (**Council**) has issued a number of emergency and building orders in respect of the Building. The Council is an interested party in both proceedings.
- 6 The first notice issued by the Council on the OC was a building notice dated 13 December 2017. That notice stipulated, among other things, that the Belcher's Corner Building was a danger to the life, safety or health of any person using the Building in that the structural concrete columns within the basement had suffered severe decay and had lost structural integrity. This was followed by an emergency order from the Council dated 13 December 2017 issued to the OC due to the danger of life or property arising out of the condition of the Building. The notice required works to be undertaken to reduce fire load and provide structural strength and rigidity to the Building. This was followed by another building order dated 19 January 2018.
- 7 On 24 July 2018, the Council issued an emergency order on the OC as the Council's opinion was that parts of the Belcher's Corner Building were at

¹ Points of Claim dated 8 November 2018 in proceeding OC2414/18 at paragraph 2.

risk of collapse and would take out part of Ryrie Street. Occupants of the land were told to evacuate and the order required works to be undertaken including the installation of temporary props.

- 8 On 24 July 2018, the OC Committee, Mr Greg Honeyman of MBCM Ballarat (the OC Manager), Mr Whitehead of Scotia and Council officers met at the Council's offices to discuss the emergency orders. Council sought a commitment from the OC Committee for immediate stabilising work on the land. If the OC failed to have the works done, Council advised that they would carry out the works at the OC's expense. It was noted in the OC minutes of the meeting that Scotia had advised that it would carry out the work, provided that the OC was in a position to finance the works, and that the Committee members had accepted Scotia's offer and authorised the OC Manager to issue Scotia an open work order.
- 9 Further emergency orders were issued by the Council in late July 2018 to November 2018, with an order in September 2018 that the Belcher's Corner Building be demolished. Building notices were also issued in August 2018 through to December 2018.
- 10 In around August 2018, the OC engaged Scotia to, among other things, supply and install over 100 temporary steel supports (**props**) which were placed at the basement of the Belcher's Corner Building so as to provide the requisite structural stability to the Building to prevent its collapse.
- 11 On or about 17 August 2018, Scotia sought payment for its services from the OC upon which the OC Manager informed Scotia that the OC did not have the funds to pay Scotia.
- 12 On 18 September 2018, Scotia issued proceedings in the County Court of Victoria against the OC seeking the sum of \$331,724.07 for providing its services to the OC (**County Court proceeding**). As at the time of the hearing of these proceedings, the props that Scotia provided were still on the land with the OC being unable to return them to Scotia. Scotia had obtained the props from its supplier, Shore Hire, who had leased the props to Scotia. Scotia asserts that it is continuing to suffer loss for providing the props.
- 13 In around October 2018, the OC made part payment of \$40,000.00 to Scotia in respect of Scotia's claim in the County Court proceeding.
- 14 On or about 19 October 2018, the OC held a special general meeting of the OC where various issues were discussed and options were put to the lot owners, including the option of selling the land. The OC failed to pass any resolutions at the meeting. In this regard, there has been, for some time, disagreement between lot owners as to what should be done with the buildings, in particular the Belcher's Corner Building (or site) and the land, including whether the owners should all sell their lots at the same time and thereby put the whole land on the market.
- 15 By application to the Tribunal dated 8 November 2018, Scotia issued the Scotia Proceeding seeking the OC to be placed into administration under

s.174 of the *Owners Corporations Act 2006* (Vic) (**Act**). Initially, Scotia sought the appointment of Mr Ian Ellis as the administrator.² In the Scotia Proceeding, Danetha sought to have Mr Brent Morgan of the firm, Rodgers Reidy, be appointed as the administrator.

- 16 On 9 November 2018, the OC issued the OC Proceeding, seeking the appointment of an administrator, on the grounds that the OC was unable to comply with its statutory duties pursuant to sections 46 and 47 of the Act. Accordingly, both the OC and Scotia agreed via their respective applications that an administrator ought to be appointed over the OC.
- 17 Subsequently, Scotia changed its position and supported the appointment of Mr Evans as the administrator instead of Mr Ellis.
- 18 On 26 November 2018, Scotia filed an affidavit from Mr Mclaughlin sworn 26 November 2018. Mr Mclaughlin deposed in his affidavit that the Council was considering filling up the basement of the Belcher's Corner Building with sand and cement to stabilise the Building such that the props would be lost. He deposed that this would cause further significant loss to Scotia given that it was responsible to Shore Hire. He deposed that should the props be lost the OC may owe Scotia in excess of \$800,000.00.
- 19 On 27 November 2018, the Tribunal made orders in the Scotia Proceeding and the OC Proceeding for the OC to be placed under administration pursuant to section 74 of the Act. On the same day, Scotia obtained judgment against the OC in the County Court proceeding for the principal sum of \$300,545.08. Since that day, penalty interest has been accruing on the principal amount. According to Scotia, as at 17 January 2020, the interest owed was \$34,332.42.
- 20 On 28 November 2018, the Council issued an emergency order on the OC. The OC did not comply with that order and subsequently the Council, at its expense, organised for the demolition of the Belcher's Corner Building. The Council has sought reimbursement of its costs from the OC.
- 21 On 30 November 2018, the Tribunal made orders in both proceedings (**30 November 2018 Orders**) appointing Mr Evans as the administrator of the OC until 30 November 2019 or as otherwise ordered by the Tribunal. In the Orders, the Tribunal noted (under "Findings") that "the task facing the administrator will be highly complex and challenging" and set out the tasks required to be undertaken, which included:
 - a. The need to respond to emergency building orders issued by the Council and for the demolition of part of the building (Belcher's Corner Building) so as to stem the "current flow of financial losses as quickly and effectively as possible".

² On 21 November 2018, Scotia filed in the Scotia Proceeding the Affidavit of Mr Mclaughlin sworn 21 November 2018. Mr Mclaughlin deposed that Scotia sought the appointment of Mr Ian Ellis, an Accredited Strata Manager, as the administrator. Mr Ellis' resume was exhibited as "WJM1".

- b. To negotiate an outcome that takes into account the differing interests of different lot owners, including those “whose buildings are not directly the subject of a demolition order”, so as to “enable all lot owners to realise the highest possible value for the assets they own”.
 - c. To deal with the County Court proceeding, noting that the debt was increasing daily and the amount Scotia claimed would shortly exceed \$500,000.00.
 - d. To recover unpaid levies from lot owners, which were in excess of \$700,000.00.
- 22 It was also noted in the 30 November 2018 Orders (under “Findings”) that:
- a. Mr Evans “stood ready to devote the substantial time which will be required, especially initially, to deal with the issues which have arisen.”
 - b. 34% of the members supported Mr Morgan’s appointment while 38% supported Mr Evans’ appointment.
 - c. Regardless of which of the two candidates was appointed, it was clear that the administrator would “need to obtain expert advice, including in relation to legal and property development/real estate matters”.
- 23 At paragraph 9 of the Order (under “Findings”), the Tribunal stated:
- In my view, a fundamental requirement for success in the role [of being the administrator] will be the ability to establish effective lines of communication, and gain the trust and confidence of all lot owners, including those for whom English is not their first language. From the information available to me, Mr Evans, having long experience in dealing with the disparate interests which arise in the specific environment of owners corporations, which has its own unique dynamic, is well placed to handle the negotiations which will be required.
- 24 In considering the circumstances where all lot owners except for owners of five lots, which were not directly affected by the Council’s demolition order, had agreed for their properties to be sold, the Tribunal stated at paragraph 12 of the 30 November 2018 Orders (under “Findings”):
- Now that an administrator has been appointed, that administrator will be able to harness the progress towards resolution which the preparation and negotiations concerning this Agreement [being the proposed agreement to sell the properties] represents.
- 25 It is thus clear that a proposal to sell the land was entertained by the members of the OC prior to the appointment of Mr Evans.
- 26 In terms of specific directions ordered by the Tribunal in the 30 November 2018 Orders, the paragraphs under “Orders” required Mr Evans to:
- a. Take “all steps necessary, as soon as possible”, responding to “all Emergency Orders and Building Orders” issued by the Council.

- b. Engage with lot owners in respect of taking steps under section 32 of the *Subdivision Act 1988* (Vic).
 - c. Take “all steps practical and appropriate to engage with lot owners for whom English is not their first language, including facilitating the engagement of appropriate interpreter(s), legal adviser(s), or others”.
 - d. Consider whether to lodge any claim on the insurance policies of the OC or whether to make claims of any other nature regarding matters arising out of the deterioration of the buildings on the land, including the cost of legal fees in defending the County Court proceeding issued by Scotia.
 - e. Take steps “to investigate and quantify (including obtaining any professional advice necessary) the extent to which potential financial disadvantage suffered by lot owners and [the OC] is due to the respective condition of the buildings on the various lots forming part of [the Plan of Subdivision], and to impose levies, distributions and make other financial arrangements equitably, in accordance with the outcome of the administrator’s investigations, and in accordance with the relevant provisions of the [Act], including s 24(2A), s 49 and s 53(1B).”
- 27 The 30 November 2018 Orders also required the OC to pay Scotia’s costs of the application, “given the overwhelming strength of the application for the appointment of an administrator, and that the OC’s separate application for the appointment of an administrator was not filed before this application.” Liberty to apply was also granted.
- 28 In July and August 2019, the Tribunal in proceedings OC263/2019 and OC264/2019 heard the OC’s claim for outstanding fees and levies against various lot owners (**Fee Recovery Proceedings**). I was the presiding Member for the hearing of the Fee Recovery Proceedings. The respondents in those proceedings argued that the fees and levies sought were invalid as the amounts were calculated based on lot liability rather than the benefit principle. Although the Fee Recovery Proceedings are not the subject of these proceedings, it is important that I make the following comments as the OC’s material filed in these proceedings refer to the Fee Recovery Proceedings, and so that lot owners are not mistaken as to what transpired in the Fee Recovery Proceedings.
- 29 Mr Cohen initially submitted at the hearing of these proceedings that I was the one who had stopped the hearing of the Fee Recovery Proceedings. Although Mr Cohen is technically correct that as the decision-maker in the Fee Recovery Proceedings, I made orders on 28 August 2019 which brought those proceedings to an end, such a statement has the danger of being misconstrued and may be overly simplistic.
- 30 Prior to making my orders in the Fee Recovery Proceedings, Mr Cohen disclosed to me on the second day of the hearing of those proceedings that the OC had changed its position in that the OC agreed with the respondents

that the benefit principle did apply. In response, I pointed out to Mr Cohen that the OC could not possibly succeed in its claim because it had conceded that the benefit principle applied – the OC had acknowledged that the amounts calculated in the fee notices were incorrect. In my orders of 28 August 2019 in the Fee Recovery Proceedings, I ordered that the OC's claim was struck out and ordered costs against the OC.

- 31 For the avoidance of doubt, following is an extract of my 28 August 2019 orders in proceeding OC264/2019:

NOTES

The Tribunal notes that:

1. After the first day of the hearing on 5 July 2019, by a letter dated 12 August 2019 from the administrator of the applicant to the lot owners, the administrator informed the lot owners, including the respondents, that:

1.1. The administrator received legal advice, among other things, that:

- (a) The previous levies based only on lot liability, the subject of the applicant's claim in the proceeding, were improper and should be reversed leaving some owners in credit.
- (b) The proceeding should be adjourned.
- (c) Fresh fee notices and final fee notices needed to be issued based upon the revised determination.
- (d) The applicant's claim should be amended to reflect the revised levies properly based and fresh fee notices issued to all members.

1.2. The administrator had made a determination to implement the advice the administrator received and was making calculations on the basis of the benefit principle and the administrator would present to the owners the calculations

...

FINDINGS

The Tribunal finds that:

- (a) The administrator's change in position as to the validity of the fee notices the subject of the applicant's claim was not disclosed to the Tribunal until towards the end of the second day's hearing when the respondents raised the existence of the letter dated 12 August 2019. Thereafter, the applicant provided a copy of the letter to the Tribunal.
- (b) Given the material change in the applicant's position, the applicant cannot continue with the applicant's claim in the proceeding.

- (c) No formal application by the applicant for an adjournment or to amend the applicant's claim was made prior to the second day of the hearing on 28 August 2019, but rather those applications were made orally at the second day of the hearing.
- (d) It is inappropriate to adjourn the proceeding given that the applicant has had a material change in position and the applicant no longer seeks to pursue the claim as stated in the applicant's application.
- (e) The applicant cannot be granted leave to amend as the applicant's amended claim has not arisen yet, as the applicant has not issued revised notices and has not given the respondents any opportunity to pay those revised fee notices, whatever amount they may be and based on whatever calculation.

...

Importantly, in making the above findings, the Tribunal has not determined whether or not the levies in the current dispute should be based on lot liability. Rather, the proceeding cannot continue as the applicant has fundamentally changed its position such that the applicant is unable to pursue the applicant's claim. The applicant no longer holds that the outstanding fee notices were based on the correct method of calculation.

- 32 Had the letter dated 12 August 2019 not been brought to my attention, I may have been left to decide on the OC's claim based on a claim that the OC did not consider was correct or tenable. Had that occurred, the Tribunal would have been intentionally misled.
- 33 I consider it important that I clarify what transpired in the Fee Recovery Proceedings as based on some of the documents that I have read in these proceedings, which include affidavit material from Mr Evans which I have discussed further below, it appears that some lot owners (and perhaps Mr Evans himself) may be of the belief that I did not want to determine the OC's claim in those proceedings or that I had prevented the OC from succeeding in its claim.
- 34 It also appears from some of the documents that one or more lot owners may believe that my orders in the Fee Recovery Proceedings should be interpreted in a way that I had ruled that the benefit principle should be applied in respect of the OC's fees and levies. As the above extract demonstrates, if there is any such belief then it is erroneous. Given that all parties in the Fee Recovery Proceedings admitted that the benefit principle applied to their circumstance, there was no dispute in this regard for me to determine.
- 35 By application to reopen an order dated 24 July 2019 filed by Scotia in the Scotia Proceeding, Scotia sought a review of the 30 November 2018 Orders made in the Scotia Proceeding (as mentioned, Scotia has never been a party to the OC Proceeding) and sought an order, among other things, for the removal of Mr Evans as the administrator and for Mr Matthew Twiselton to replace him (**Removal Application**). In support of the Removal Application, Scotia filed the Affidavit of Mr Mclaughlin sworn 24 July 2019. In his

affidavit, Mr McLaughlin sought for Mr Twiselton's appointment to be for 12 months. Exhibited to the affidavit as "WJM18" was a copy of a letter from Mr Twiselton in respect of the proposed appointment and his resume.

- 36 By letter dated 15 October 2019, the Council's lawyers served on Mr Evans a charge-sheet and summons filed in the Magistrates' Court alleging that the OC had failed to comply with building orders.
- 37 On 16 October 2019, the Tribunal made orders in the Scotia Proceeding setting out the interlocutory steps the parties in the proceeding were required to follow prior to the Removal Application being heard and determined, with the hearing listed for 12 November 2019.
- 38 On 31 October 2019, Scotia filed in the Scotia Proceeding the Affidavit of Mr David Free of LFS Legal (Scotia's lawyers) sworn 31 October 2019, in respect of the Removal Application.
- 39 On 8 November 2019, Mr Cohen of CLP Lawyers (OC's lawyers) emailed the Tribunal in the Scotia Proceeding the Affidavit of Mr Evans sworn 8 November 2019, which set out various steps that Mr Evans deposed that he had taken since becoming the administrator. The email also attached a copy of minutes of meeting of the OC held on 16 April 2019 and a letter from CLP Lawyers to Mr Evans dated 19 March 2019 which disclosed legal advice purportedly from counsel. At the hearing, Mr Cohen confirmed that the OC has waived privilege over the letter.
- 40 On 12 November 2019, I was to hear the Removal Application but at the commencement of the hearing Mr Free informed me that the parties had agreed to minutes of consent orders for the Tribunal to adjourn the hearing. No other party appeared before me.
- 41 On 12 November 2019, I made orders, among other things, extending Mr Evans' appointment until 12 November 2020 or as otherwise ordered by the Tribunal; listed the Scotia Proceeding for an administrative mention on 13 February 2020; and if the Removal Application was to proceed subsequent to the administrative mention, for the application to be heard before me.
- 42 By letter dated 20 January 2020, Scotia's lawyers wrote to the Tribunal seeking a directions hearing in the Scotia Proceeding for the purposes of obtaining a hearing date for the Removal Application. It was alleged that Mr Evans had failed to resolve a number of matters and Scotia wished to pursue its application.
- 43 On 18 June 2020, I presided over a directions hearing in the Scotia Proceeding and the OC Proceeding. The OC Proceeding was listed at the same time as the outcome of the Removal Application in the Scotia Proceeding may affect the validity and operation of the 30 November 2018 Orders made in the OC Proceeding.
- 44 On 18 June 2020 I made orders, among other things, requiring the Scotia Proceeding and the OC Proceeding to be listed before me at the same time and giving any parties who were not already parties to the Scotia Proceeding,

but who wished to be heard on the Removal Application, an opportunity to do so.

45 Subsequently, at her written request, Ms Leighanne Crocker, the third applicant in the OC Proceeding and the Chairperson of the OC, was joined as an interested party in the Scotia Proceeding for the purposes of the Removal Application. In support of her request, she provided written support from three lot owners. She also indicated that she supported Scotia in the Removal Application. However, before the hearing of the Removal Application, Ms Crocker requested that she be removed as a party, which the Tribunal ordered. She did not participate at the hearing.

46 In addition, on 7 July 2020, Mr Nathan Holmes, the second applicant in the OC Proceeding, emailed Mr Free copying in the Tribunal that whilst he was willing to provide written support for Scotia in the Removal Application, he was not interested in being joined as a party and did not intend to participate at the hearing.

47 On or about 19 August 2020, the OC filed the Affidavit of Mr Evans sworn 19 August 2020 in the Scotia Proceeding. The OC has indicated that the substance of the affidavit, insofar as it discloses the substance of the terms offered by a potential purchaser to purchase the entire land or the substance of the negotiations with the purchaser, is confidential and of commercial sensitivity such that it should not be made available to the public. In considering the request at the hearing, I made orders on 17 November 2020 pursuant to s.146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) in respect of the Tribunal's file.

48 Due to various subsequent events, by the time the Tribunal listed the hearing before me on 16 and 17 November 2020, it was apparent that the Removal Application would be heard after the expiration of Mr Evans' appointment on 12 November 2020. This was the end date stated in my order of 12 November 2019 in the Scotia Proceeding.

49 By an application dated 30 October 2020 in the OC Proceeding, the OC sought for Mr Evans' appointment as administrator to be extended until 31 October 2021 (**Extension Application**).

50 Given the unfortunate timing issue, on 12 November 2020, I made an order in chambers temporarily extending Mr Evans' tenure as administrator until further order of the Tribunal. I did so in order to avoid any confusion or further complication in respect of Mr Evans' position prior to me hearing and determining the Removal Application and the Extension Application.

51 On 16 and 17 November 2020, I heard the Removal Application and the Extension Application. Only Scotia, the OC, the Council and Danetha participated at the hearing.

ISSUES IN DISPUTE IN THE REMOVAL APPLICATION AND THE EXTENSION APPLICATION

52 Notwithstanding the considerable history in this dispute and the events that have transpired in the various proceedings, the core issues in dispute in the Removal Application and the Extension Application are addressed by the following questions:

- a. Should Mr Evans be removed as the administrator?
- b. If Mr Evans ought not to be removed, should Mr Evans' appointment be extended to 31 October 2021?
- c. If Mr Evans ought to be removed, should he be replaced by Mr Twiselton and if so, what should be the terms of Mr Twiselton's appointment?

53 Before I answer these questions, it is necessary that I consider the role of an administrator appointed under the Act.

THE ROLE OF AN ADMINISTRATOR UNDER THE ACT

54 Under section 173 of the Act:

An owners corporation, a lot owner, a creditor of an owners corporation or any person with an interest in land affected by an owners corporation may apply to VCAT for the appointment of an administrator for the owners corporation.

55 Under section 174 of the Act:

On an application under section 173, VCAT may—

- (a) Appoint an administrator and set down terms and conditions of the appointment; or
- (b) Make any other order it thinks fit.

56 Subject to any order of the Tribunal or court order, an administrator is given the power under section 176 of the Act to “do anything that the owners corporation or the committee can do”³ and “may proceed to alter a plan relating to land affected by the owners corporation in any of the ways set out in section 32 of the *Subdivision Act 1988* (Vic) only in accordance with an order of VCAT or a court order”.⁴ One of the ways in which under section 32 of the *Subdivision Act 1988* (Vic) a plan may be altered is, in limited circumstances, consolidating into a single lot all the land affected by an owners corporation.

57 In essence, as noted in ANSTAT commentary of the Act, an appointment of an administrator pursuant to section 174 of the Act:

displaces the decision-makers of the owners corporation and gives the administrator their decision-making power. The administrator may conduct

³ Section 176(c) of the Act.

⁴ Section 176(b) of the Act.

the affairs of the owners corporation as he or she sees fit, subject to the duty to act honestly and [in] good faith and with due care and diligence (s 177) and subject to any terms of the order making the appointment that might require the administrator to refer matters to or consult the members.⁵

- 58 Where an owners corporation is so dysfunctional such that it is unable to make decisions in the interest of its members, the owners corporation or an interested party may apply to the Tribunal to have an administrator appointed. In such a situation, the administrator may be appointed to bring the owners corporation to a functioning level such that it is able to deal with the matters facing the owners corporation. As Bongiorno J held in *McKinnon v Adams* [2003] VSC 116 when discussing administrators appointed under section 38(6) of the *Subdivision Act 1988* (Vic):⁶

To justify the appointment of an administrator the body corporate concerned must be affected by some incapacity, or must be acting so dysfunctionally as to render the provision of appropriate services to unit holders and/or care of the common property either non-existent, or so beset by difficulties as to render the body corporate unable to function at what the Court considers to be a satisfactory level. There may or may not be financial difficulties or even financial impropriety affecting the body corporate's capacity to function but there must be some deficiency in its operational capacity sufficient to justify the Court's intervention in the interest of some or all of the unit holders.

Thus, the power to appoint an administrator pursuant to s 38 (6) of the Subdivision Act 1988 may be ordered, in the Court's discretion, where the evidence discloses that the body corporate is failing to operate properly in the interests of its members, is being inefficiently or incompetently managed, or the appointment is necessary to protect the interests of the members.

- 59 Clearly, an administrator's role is to address the problems faced by the owners corporation – not to continue or exacerbate them. Nor can an administrator be excused from failing to act or act in a satisfactory manner because he or she faces a dysfunctional committee or antagonistic members who may seek to undermine or oppose the administrator's actions.
- 60 A deadlock between members is precisely a scenario where an administrator may be appointed to overcome the dysfunctional nature of the owners corporation.
- 61 In order to meet the challenges and his/her obligations under the Act, the administrator is given control over the owners corporation and is able to exercise the powers of the owners corporation.
- 62 Having been appointed, an administrator cannot be a passenger or a bystander of disagreements or arguments as between lot members *if* such

⁵ Alan Vassie, Ian Lulham and Bernadette Steele, *Owners Corporations Act 2006*, ANSTAT at [173.01].

⁶ *McKinnon v Adams* [2003] VSC 116 at [20] - [21].

disagreements hinder the operation of the owners corporation (as opposed to being personal tiffs or arguments).

- 63 Given that the administrator is the controller of the owners corporation, the administrator may be required to make tough decisions in respect of the owners corporation, including those that may displease some of the members.
- 64 The administrator's role is not to please members or to submit to their will. The administrator must exercise his/her own judgment as to what is in the best interests of the owners corporation after having sufficiently informed himself or herself of the relevant circumstances, and then to implement the necessary steps to achieve the outcome of his/her decision.

SUMMARY OF SCOTIA'S APPLICATION TO HAVE MR EVANS REMOVED

- 65 Scotia, through Mr Free, contends that whilst the OC is dysfunctional and it ought to remain in administration, Mr Evans "is not up to the job". In summary, Scotia submits that:
- a. Mr Evans has failed to properly discharge his duties as the administrator for two years.
 - b. Mr Evans has failed to ensure that the OC pays its debts, despite Mr Evans having an unfettered authority to raise special levies.
 - c. Mr Evans has allowed the OC's debt to double less than a year after his appointment and then to double again. The amount of debt that the OC now owes is so large that any equity that the lot owners had in the lots has disappeared.
 - d. The OC has no money to pay all of its debts. Scotia contends that the total debt of the OC is over \$5M, with the OC's legal costs to date being about \$180,000 and with the precise fees paid to Mr Evans unknown. Scotia submits that Mr Evans has managed the OC to financial ruin.
 - e. Mr Evans has failed to recover outstanding fees and levies from members.
 - f. Mr Evans has failed to comply with the 30 November 2018 Orders. At the hearing, Mr Free:
 - i. Referred to paragraph 6 of Mr Evans' affidavit sworn 30 October 2020 where Mr Evans deposed that he cannot comply with the order of 30 November 2018 unless the land is sold.
 - ii. Referred to the 30 November 2018 Orders requiring Mr Evans to take control of the administrator but instead the OC remained dysfunctional and the in-fighting has crippled the OC.
 - iii. Submitted that Mr Evans only collected the OC files from the OC Manager on 19 October 2019.

- g. Mr Evans has not acted in the best interest of the lot owners. The lot owners face serious charges against them in the Magistrates' Court.
- h. Mr Evans has made preferential payments to creditors.
- i. It was not until 2020 that Mr Evans took some meaningful action, and further extension of Mr Evans' appointment "will not achieve anything".
- j. If Mr Evans had addressed the various issues faced by the OC in 2018, then the purpose of his appointment would have long been achieved.
- k. The issue of a potential sale of the land remains unresolved. There is no unanimous agreement of the members on the terms of the contract of sale and there is no certainty that there will be agreement. The members disagree on the terms of the contract and some of the terms (without going into detail) may expose the OC to liability if the members fail to comply with certain conditions.
- l. No one who supports Mr Evans' continued appointment gave evidence but rather Mr Cohen submitted that there were such members.

SUMMARY OF THE OC'S APPLICATION FOR MR EVANS' APPOINTMENT TO BE EXTENDED

- 66 The OC, through Mr Cohen, submits that Mr Evans has addressed the matters facing the OC "cautiously" and has done a commendable job considering the difficult circumstances that he faces. The OC submits that, among other things:
- a. All throughout his appointment, Mr Evans has made the necessary inquiries, taken the necessary actions and engaged with the various stakeholders. In support, the OC primarily refers to the matters contained in the affidavits sworn by Mr Evans.
 - b. Mr Evans has considered the operation of sections 32, 34D and 34G of the *Subdivision Act 1988*. Mr Evans has not taken action under 34G of the *Subdivision Act 1988* as it is premature for him to do so and acting under legal advice, Mr Evans has taken steps to conclude negotiations between him and the potential purchaser.
 - c. One of the difficulties in negotiating the sale has been that some lot owners have mortgages tied to the lots.

SUBMISSIONS BY DANETHA AND THE COUNCIL

- 67 Neither Danetha nor the Council gave any evidence except for the short affidavit from Mr Smith of the Council that I have briefly referred to below. Danetha and the Council did however make the following submissions.
- 68 Lawyers for Danetha submitted that:

- a. The OC's original debt was approximately \$750,000.00. The debt is now in excess of \$5M with an additional sum of approximately \$200,000.00 in legal costs.
- b. Danetha neither consents to nor opposes the Removal Application. Although Danetha did not expressly address the Extension Application, it follows that it holds the same position in respect of the Extension Application.

69 Lawyers for the Council submitted that the Council neither consents to nor opposes the Removal Application. As with Danetha's position, I take it that the Council neither consents nor opposes the Extension Application.

70 I now turn to the evidence of the parties.

THE EVIDENCE OF THE PARTIES

Scotia's evidence

71 Scotia relies on the oral evidence of Mr Mclaughlin and the affidavit material sworn by him and Mr Free.

72 In summary, Mr Mclaughlin gave the following oral evidence at the hearing:

- a. At the request of the OC, on 23 July 2018, Scotia's personnel attended the Belcher's Corner Building in order to make the site safe.
- b. On the following day, he attended a meeting where Ms Crocker, the OC Manager, the Mayor and Councillors of the Council were present. They were told about how severe the problem with the Belcher's Corner Building was and Scotia gave an oral quote of the cost of propping to be \$700,000.00 to \$750,000.00. In response, the OC Manager told Mr Mclaughlin that the OC had the funds to pay Scotia.
- c. Subsequently, there were some 30 tradespeople who worked at the site to ensure that the Belcher's Corner Building did not pose a danger. This included Scotia spending approximately \$150,000.00 on a steel fixer and paying Shore Hire approximately \$600,000.00 for the hiring of the props.
- d. Once Mr Evans was appointed as administrator, the lack of communication from Mr Evans was "significant". Other than monthly meetings he had with Mr Evans, Mr Mclaughlin received no communications from Mr Evans.
- e. The first meeting he had with Mr Evans was in January 2019, and thereafter they had monthly meetings in February, March and April 2019.
- f. At some point, he said to Mr Evans during one of the meetings that Mr Evans had the power to consolidate all the lots into one lot. Mr Evans replied to him that he did not believe that he had to power to do so.

- g. He questioned why Mr Evans had not put the sale of the land up for tender.
- h. He also questioned whether there was now any day-to-day need for the OC Manager when the Belcher's Corner Building had been demolished.
- i. He said that Scotia did not receive the OC's books until he had a few meetings with Mr Evans.

73 In addition to his oral evidence, the OC relies on the contents of the affidavits sworn by Mr Mclaughlin in support of the Removal Application.

74 Based on his affidavits, Mr Mclaughlin deposed that:

- a. Upon his appointment, Mr Evans appointed Mr Honeyman to administer and manage the OC.
- b. On 26 February 2019, Scotia's lawyers sent a letter to Mr Evans demanding that he take immediate steps to recover all money owed to the OC.⁷ The letter stated that:
 - i. Mr Evans had informed Scotia that Mr Evans was "seeking an all-encompassing solution to the financial dysfunctionality" of the OC and that Mr Evans was "seeking legal advice in relation to [Mr Evans'] ability to sell the real estate without reference to Lot Owners".
 - ii. Even if the entire property was "sold tomorrow for \$3m there would not be enough funds to discharge the debt [to Scotia] and mortgages owing on this property".
 - iii. Mr Evans had an unfettered authority to raise special levies and to recover fees and levies by legal action.
- c. On 23 April 2019, Scotia's lawyers sent a letter to Mr Evans raising Scotia's concerns over what it considered was Mr Evans' inaction to bring the OC into solvency and stated that it would return to the Tribunal to seek his removal if he continued to fail to take action to recover money owed to the OC. It was also stated that:
 - i. Mr Evans' appointment had been a concession from Scotia.
 - ii. Mr Evans had failed to discharge his obligations as an administrator "to the creditors" of the OC or to the lot owners.
 - iii. Mr Evans' inaction was exposing the owners to further and ongoing losses.
 - iv. There should be commencement of expedited fee recovery actions.
 - v. There may have been preferential payments made by the OC and Scotia had sought the OC's financial report.

⁷ Exhibit "WJM 12".

- d. On 2 May 2019, Scotia's lawyers sent a letter to Mr Evans again seeking him to take immediate action to recover all money owed to the OC.
- e. On 20 June 2019, Scotia's lawyers sent a letter to Mr Evans referring to Mr Evans' failure to recover fees and levies and asserted that preferential payments had been made by the OC. Mr Evans was requested to provide access to the accounts of the OC.
- f. On 10 July 2019, Mr Evans sent an email to Mr McLaughlin stating that he did not have the financial records of the OC. The actual email from Mr Evans (exhibit "WJM 16") reads: "I'm glad that you didn't ask [for the financials] as I had requested them from [the OC Manager] with a deadline which they did not meet[.] As soon as I have them you will be the first recipient thereof."
- g. On or about 10 July 2019, Scotia received "a statement pertaining to the balance sheet" prepared by Mr Honeyman.
- h. By letter dated 1 May 2020 to Mr Evans, Scotia's lawyers stated that Scotia was owed \$260,000 and that:
 - i. Mr Evans had failed to recover its debts as required under the Tribunal's orders.
 - ii. In the circumstances where Mr Evans had failed to comply with the Tribunal's orders and to manage the OC's financial affairs that he should resign and transfer the management to Mr Ellis.
- i. By letter dated 13 May 2020 to Scotia's lawyers, the OC's lawyers provided a table reflecting the status of then current fee recovery proceedings. Among the lot owners who were recorded in the table was Danetha, who was alleged to have owed a total of \$959,077.24. The earliest date of an application issued for fee recovery as recorded in the table was 13 February 2020. The total amount owed by the owners in the table was over \$1.379M. The letter also stated:

Each of the applications is being pursued assiduously on behalf of the Owners Corporation with a view to payment of all creditors.

Further ... as an overriding matter, there are advanced negotiations on foot with a potential purchaser ... of all of the Lots ... and that negotiations are being conducted in concert with The City of Greater Geelong.

The terms being negotiated include ...

In the circumstances we see no reason the administrator ought to resign and indeed we consider that the work done to date by or on behalf of the administrator has been conducted in accordance with the VCAT orders appointing him and should be allowed to be followed through to completion.

- j. At all material times, Mr Evans:
- i. did not take possession or has not had the financial records of the OC in his keeping or control;
 - ii. failed or omitted to pay down any of the County Court judgment debt owed to Scotia;
 - iii. failed or omitted to recover fees and levies historically owed by lot owners;
 - iv. failed or omitted to place the OC on the real estate market;
 - v. has supervised and permitted the OC to accumulate further debt;
 - vi. permitted the preferential payments made by the OC at or around the time of administration without attempting to account for, or to claw back, those payments;
 - vii. failed or omitted to properly, or at all, to administer the financial affairs of the OC; and
 - viii. failed or omitted to regularise the dysfunctional OC.

75 Further, correspondence between Mr Honeyman and Mr Evans exhibited to Mr McLaughlin's affidavit reveal that in late 2019, Mr Honeyman and Mr Evans had a disagreement as to Mr Honeyman's fees charged to the OC.

76 On 21 December 2018, approximately a month after Mr Evans' appointment, Mr Honeyman emailed Mr Evans relevantly stating:

Please find management contract attached, together with Activity Report for the period 17 September – 23 November 2018.

Please note that due to the precarious nature of the owners corporation when I took over management, the Management Contract was signed with a special condition (Clause 11.5) that management fees would be paid monthly. Our management software has been amended to ensure no further fees are payable.

Any work I now carry out on behalf of the Administrator will be billed through Activities ... Please advise if you require any further information.

77 On 2 September 2019, Mr Honeyman sent an email to Mr Evans⁸ which stated:

Hi Robert,

Just heard from Jonathan [Mr Cohen]. I am forwarding an email which originally was sent to you on 21 December last year. The intent of this email was to advise that our Management Contract was on a month by month basis at a rate of \$500 per month. This contract was driven by my head office on

⁸ Exhibit WJM-19.

the understanding that it would only be for a few months until the OC went into administration.

I make it quite clear in this communication that no further fees were payable by the Owners Corporation from the end of November 2018.

Also attached is a letter dated 12 November 2018 which was copied through to you in May of this year re-confirming the fact that the contract had ended upon your appointment as Administrator. I recall we had a rather long discussion at that time because you were concerned that I was resigning and walking away from the task.

We have had at least two additional telephone conversations about this issue over the past several months where I have specifically reminded you that there is no Management Contract and all my work is being done on the basis of 2.2. fees. In addition you have received regular Financial Reports which clearly show that no management fees have been paid.

I regard the time invested in this project has been of value to you as Administrator, and the charges for this work have been consistently demonstrated to be fair and equitable. I believe it is reasonable to request that we be paid for our work.

- 78 On 7 October 2019, Mr Evans sent Mr Honeyman an email relevantly stating:

Firstly in reference to your email to me dated 1 August you advised that the month to month contract of appointment which you had with OC 316440K terminated on my appointment as Administrator on 30 November, 2018.

Subsequent to 30 November obviously there has been no formal agreement as to the services which you were to provide the OC. My understanding was that you would continue in the role as manager and that instructions would be given to you by me in my capacity as administrator in accordance with the VCAT orders. Obviously that is not the case as you have advised me that MBCM Ballarat has been performing only secretarial duties on my behalf.

...[R]eviewing your time sheets I have no doubt that the times reflected are an accurate representation of the direct involvement of MBCM Ballarat with OC 316440K and your support of myself as the Administrator.

What I have difficulty in addressing is your charge of \$160 per hour to provide effectively the usual owners Corporation Management secretarial duties and apart from attending the April meeting in Geelong and our recent one day attendance at VCAT, which I am willing to compensate you at \$160 per hour, the balance of the hours charged would in my opinion be at a more realistic hourly rate of \$80 per hour (plus GST) ...

- 79 On 7 October 2019, Mr Honeyman emailed Mr Evans relevantly stating:

...I am greatly aggrieved that after my providing support to you in your as Administrator over the past 10 months, and particularly having on several

occasions outlined to you in writing as well as verbally the terms under which I agreed to carry out this work, you have now decided to move the goalposts.

[You] use the term 'secretarial' very lightly which I find insulting. In fact the work I have done has actually been far more than simply 'the usual owners Corporation Management secretarial duties'. ... [M]anaging the Belchers Corner owners corporation whilst it is in extremis has been virtually a full time occupation for me. In order for me to carry out this work it has been necessary to employ another person in my business to cover the workload that I would normally have been doing.

...[T]here has not been a management contract since November 2018, and as I have already indicated, I wish now to conclude my involvement with this owners corporation.

80 In addition, Scotia relies on the contents of affidavit material sworn by Mr Free. Mr Free was not called to give evidence at the hearing and neither the OC nor the interested parties sought to cross-examine him.

81 In his affidavit sworn on 31 October 2019, Mr Free deposed that:

- a. It was not until after 21 October 2019 that Mr Evans obtained the record and register of the OC from Mr Honeyman.
- b. On or about 23 October 2019, he attended Mr Evans' office and inspected the record and register and was unable to find any evidence that the OC was insured.
- c. Despite not recovering outstanding fees and levies, Mr Evans had approved payments to the OC's lawyers, being over \$38,000.00, for the period 15 January 2019 to 2 August 2019.
- d. It was "common ground" that up and until 16 October 2019, Mr Evans had failed to recover fees and levies from any lot owner.

The OC's evidence

82 The only person who gave evidence at the hearing on behalf of the OC was Mr Evans. The OC also relies on the affidavit material from Mr Evans.

83 As best as I can summarise, Mr Evans gave the following evidence in chief:

- a. Works by the Council on the land had commenced prior to his appointment.
- b. The fee notices which were the subject of the Fee Recovery Proceedings had already been approved and issued prior to his appointment.
- c. He kept Mr Honeyman to deal with the day-to-day matters of the OC.
- d. In December 2018, he consulted with Mr Cohen about the way forward for the OC, which included the issue of the outstanding fees.
- e. In February 2019, he sought from the OC's lawyers an update on the status of things and instructed the lawyers to issue proceedings against

lot owners to recover fees. This culminated in the issuance of the Fee Recovery Proceedings.

- f. In March 2019, he had the OC's lawyers brief counsel (**first counsel**) for advice on whether the lots could be consolidated into one lot.
- g. In April 2019, he met with the Council and discussed the valuation of the land he had received from Colliers Commercial Real Estate (**Colliers**).
- h. In May 2019, he discussed the "benefit rule", which I take him to mean the benefit principle.
- i. Subsequent to the first day of hearing of the Fee Recovery Proceedings on 5 July 2019, he sought advice from another barrister as to the benefit principle. The barrister's advice was that the benefit principle should be applied.
- j. On 21 November 2019, all previous outstanding levies were retracted and all owners were issued with new fee notices that considered the benefit principle.
- k. Around this time, he also received an offer from a potential purchaser to purchase the land. The purchaser's lawyers had prepared a deed. He attended a meeting with the Council's staff, the potential purchaser regarding the proposed sale where it was agreed that the purchaser's lawyers would prepare a contract of sale which would be put to the owners.
- l. He had not experienced any difficulties with the Council but there were delays between lawyers.
- m. The OC could not satisfy the Council's order to demolish the Belcher's Corner Building as it had "no money".
- n. Other than having the lot owners sell their lots, he saw no other way of resolving the OC's issues. The legal advice he received was that the OC ought to have all the lots consolidated as one lot and then for the lot to be put up for sale.
- o. In early 2020, the OC issued legal proceedings seeking to recover outstanding fees and levies.
- p. At present, the OC has the following liabilities:
 - i. Approximately \$2.195M for work done to stabilise the site. Danetha has argued that the liability to members should be based on lot liability as opposed to the benefit principle.
 - ii. Approximately \$2.9M for demolition work organised by the Council. He said that he had previously been advised that it was around \$1.5M and then \$2M, but then he found out from a media release on 2 November 2020 that it was in the vicinity of \$2.9M. The Council disputes that they did not properly inform

Mr Evans. The OC has not received any invoices from the Council.

- iii. Approximately \$213,000.00 is owed to Scotia from an initial debt of about \$746,000.00. During his appointment, the debt owed to Scotia has been significantly reduced.
- q. There needed to be a determination on the division of costs of the OC, including approximately \$2.195M for work undertaken on the site and demolition costs – whether they should be apportioned by lot liability or the benefit principle or a combination of both.
- r. He did not “need this job”.
- s. He had 25 years of experience as an owners corporation manager, and had been the managing director of his own owners corporation management company.
- t. He anticipated there would be a meeting on 4 December 2020 of the OC where he expected to put various proposals to the members for vote. It was unclear to me as to the precise resolutions that he wanted the members to pass. When asked what he would do if at the proposed December 2020 meeting the members could not agree on the proposed sale, initially Mr Evans said that he did not know what he would do if the sale did not go through. Subsequently he gave evidence that he anticipated that he would make an application to the Tribunal for an order that the OC be wound up. When asked what proposed resolutions would be put at the meeting, he said that he would:
 - i. move a motion that the outstanding levies be based on the benefit principle across the board but in respect of the demolition costs they would be based on lot liability;
 - ii. seek authority to market the property in public as individual lots;
 - iii. failing the proposal in the preceding subparagraph, seek approval to consolidate the land into one lot. He referred to the need to get at least 50% of members to vote in favour of consolidation;
 - iv. seek approval as to how the proceeds of sale of the entire land would be apportioned, for example whether based on the value of the lots individually or on lot entitlement;
 - v. if resolution for consolidation was passed, then he would go to the Tribunal to seek consolidation; and
 - vi. if there was no resolution of a way forward then it appeared the only other option was to seek to have the OC wound up but he had not explored the option. He later said that upon the failure of resolution in the December 2020 meeting, he proposed to have the OC put into liquidation.

- u. Although he was not able to answer my question of why the OC had sought until 31 October 2021 to extend his appointment, he did say that if all members agree on the proposed sale, then the contract will need to be signed, due diligence performed by the purchaser and then for settlement to take place, which would take some time. I took him to mean that was the reason why appointment should extend to 31 October 2021.
- v. He said that the current situation was one of the most difficult circumstances he had faced with an owners corporation in that in addition to the issues with the Belcher's Corner Building, he had to deal with three different buildings with heritage issues.

84 Under cross-examination, Mr Evans gave evidence that:

- a. He had not sent the Tribunal's orders to lot owners but that he had no obligation to inform all lot owners of the orders.
- b. He had not provided any clear table of assets and liabilities of the OC.

85 Mr Evans did not refer to his affidavits much at all during his oral evidence. It was Mr Cohen who took me to the substance of Mr Evans' affidavits and provided some elaboration and explanation on the substance of the affidavits, which went further than the contents of the affidavits and Mr Evans' oral evidence.

86 Mr Cohen was not, at any time, giving evidence as a witness. When I asked Mr Cohen if he was going to give evidence, he made it clear to me that he was not going to give evidence. It follows that anything that Mr Cohen said to me about Mr Evans' affidavits were by way of submissions only. I cannot, and I do not, consider anything that Mr Cohen said to me as evidence.

87 In respect of Mr Evans' affidavits, the first affidavit that was filed by the OC was his affidavit dated 8 November 2019.

88 In his 8 November 2019 affidavit, Mr Evans deposed that:

- a. So as to understand the task ahead of him, he met the following "Stakeholders":
 - i. On 11 December 2018, Mr Cohen, the current lawyer for the OC.
 - ii. On 12 December 2018, the "Owner" of Scotia and Mr Free.
- b. Some, but not all steps required to be taken under the various building orders from the Council had been addressed at significant costs to the OC. This was a statement and there was no breakdown or detail as to what those costs were, and whether he was referring to the OC's liability to other parties or that the OC actually had paid for costs.
- c. By examining the OC's records - the time undisclosed - his initial assessment was that fees had been levied based on lot liability and that members were in arrears of approximately \$1.5M.

- d. He decided to retain Mr Honeyman to obtain information from him and for him to carry out secretarial and administrative tasks for the OC, leaving him “free to concentrate on the major issues facing the [OC]” being:
- i. Collection of outstanding fees, levies charges.
 - ii. Dealing with the Council in respect of extensions of time for demolition of the Belcher’s Corner Building.
 - iii. Redevelopment proposals and how they might be addressed by the owners.
 - iv. Potential reorganisation of the Plan of Subdivision to facilitate a sale and the legal steps necessary to achieve it.
 - v. Engaging with and ascertaining the attitude of the owners to such a sale.
 - vi. Obtaining valuations of each lot.
 - vii. Initiating steps to elicit offers from parties to purchase part or all of the land in the subdivision.
- e. Subsequent to his meeting with Mr Cohen on 11 December 2018, he instructed Mr Cohen to engage a barrister to advise on the way forward and steps necessary to reorganise the Plan of Subdivision to facilitate a potential sale. I note that the letter of advice that the OC disclosed in the proceedings was a letter from CLP Lawyers dated 19 March 2019.
- f. In December 2018, Mr Honeyman sent final fee notices and Mr Evans dealt with administrative matters especially with Mr Honeyman. Mr Evans also instructed Mr Honeyman to send debt recovery letters to lot owners. He also communicated to the OC Committee and members regarding the status of the administration.
- g. In January 2019, he attended to “various minor correspondence” including from Danetha’s lawyers and reviewed a deed proposed by Danetha’s lawyers on the sale of the entire site. All but 6 members were willing to sell their lots. He also organised for the payment of \$99,163.89 to Scotia.
- h. In February 2019, he met with the Council together with Mr Cohen. He had a separate meeting with Scotia and its lawyer. He attended the Belcher’s Corner Building and met with the Council’s surveyor, a person from Colliers, and other persons, the relevance of whom is not disclosed in the affidavit. He also met with CLP Lawyers “to discuss status of debt collection et al”. He was informed by Mr Cohen that the services of a particular barrister could not be obtained. He responded to some correspondence from Danetha’s lawyers. Finally, he instructed CLP Lawyers to issue proceedings against lots 11 and 12 for recovery of outstanding fees and levies, based on fee notices that had approved prior to his appointment.

- i. In March 2019, he engaged in further correspondence with Danetha's lawyers, he spoke to Mr Cohen regarding issues related to Danetha and Scotia, and he met with Scotia and its lawyer. He paid a total of \$58,000 to Scotia and its lawyers. On 15 March 2019, he and Mr Cohen met with the first barrister and obtained advice.
- j. In April 2019, decision was made to issue proceedings against lots 11 and 12 at the Tribunal for special levies totalling \$1.167M.
- k. In April 2019, he had a conversation with Danetha's lawyer. He also had a discussion with a valuer regarding obtaining a quote for a valuation of the land. He attended to some "documentation in regard to meeting of members" on 16 April 2019; chaired the meeting; met with the Council (making references to various persons' names without setting each of their position and their relevance); met with other people (on an undisclosed date); spoke to a valuer who provided a quote to do a valuation; met with Scotia and its lawyer regarding outstanding fees and levies; had "[v]arious discussions" with Mr Cohen and Mr Honeyman; sent emails to valuers and received a call from an agent introducing a potential buyer.
- l. In May 2019, he spent "[s]ignificant time and extended discussions with Stakeholders in regard to the application of the 'Benefit Principle'" and the possible resultant effect on members. No further elaboration was provided regarding this. He had discussions with Mr Honeyman and the insurer about renewal of insurance. He deposed to some of the issues he saw with insurance. He received an expression of interest proposal from the estate agents, Colliers. From 14 May to 10 June 2019, he was on annual leave.
- m. Upon his return from leave, in June 2019 he attended to "matters of insurance", updated individual members of the status of legal actions, spoke to valuers and the Council, attended to invoices including those from CLP Lawyers, "[a]ddressing ongoing debt collection application", addressing letter from Scotia's lawyers and "[a]ttending to various emails and telephone calls".
- n. In July 2019, he had telephone discussions with Colliers regarding the EOI, met with Scotia and its lawyer, met with Mr Cohen regarding the fee recovery proceeding, "[a]ttending to preparation of a notice to members and review letter from Scotia's lawyer", met with a valuer and forwarded financial status of the OC to Scotia.
- o. In August 2019, he met with Mr Cohen, he had a telephone discussion with a real estate agent, he had meetings with the Council as to the OC's liability to the Council, he had meetings with an agent as to a potential purchaser, and he made several calls to Hawthorn Engineering regarding reassessing "the building stability status". After some weeks he received a quote from Hawthorn Engineering but due to apparent

lack of interest he sought a quote from another engineer, who provided a quote and was given the job. He also “[i]ssued advice to members”.

- p. In September 2019, he received submission from a lot owner concerning how to apportion costs to members, met with Mr Cohen on a number of occasions regarding the benefit principle, instructed Mr Cohen to seek advice from the first barrister as to the method of apportionment based on the benefit principle and other matters, communicating with the Council, discussion with Perry Demolition for an estimate of cost for demolition of the entire site, received and read valuation, spoke with a potential purchaser, and met with the Council and its lawyer about the status of the administration.
 - q. In October 2019, he had a meeting with another barrister as the first barrister was unavailable for advice in respect of apportioning costs based on the benefit principle. He attended a hearing at the Tribunal in respect of the Removal Application, had a subsequent meeting with counsel regarding his proposed advice, received summons from the Council’s lawyers issued in the Magistrates’ Court charging the OC under the *Building Act 1993* (Vic), had a meeting with Mr Cohen, prepared the agenda for a special general meeting, distributed the agenda, sought clarification from a surveyor about works done on lot 3 and received a Prosecution Notice from the Council’s lawyers.
 - r. In November 2019, he read an affidavit from Mr Free in the Removal Application, he sent a letter which was prepared by CLP Lawyers regarding members’ financial responsibilities, and he chaired a special general meeting of the OC where, among other things, Mr Cohen discussed issues with sections 32 and 34D of the *Subdivision Act 1988* (Vic) and rights of certain persons to apply to the Tribunal for winding up of the OC under section 34G of that Act, and the application of the benefit principle. It was also discussed at the meeting the offer to purchase the entire site by a potential purchaser. Other than Danetha, all other members voted to accept the proposed purchase price. Danetha indicated that upon receiving a formal contract of sale, it would give proper consideration and respond to the offer. In relation to insurance, a number of underwriters had declined to provide insurance for the replacement value of Hopetoun Chambers and Belcher’s Corner Building but had agreed to provide such coverage for the Belchers Building. There was also public liability cover of \$20,000,000 for all the buildings and common property.
- 89 In his 19 August 2020 affidavit, Mr Evans deposed that:
- a. He attended the special general meeting of the OC on 7 November 2019 where “it was agreed” (with one member holding 27.55% of the total units of entitlement opposing) that there would negotiations with a particular potential purchaser for the land, and that he instructed Mr Cohen to represent the OC in the negotiation process.

- b. Based upon the outcome of the special general meeting of the OC on 7 November 2019, he reissued levy charges to the lot owners of the OC “based upon my determination of the application of the ‘benefit rule’ in respect of shoring up and stabilising Belcher’s Corner Building”.
- c. Although he did not depose when he provided Mr Cohen instructions to issue proceedings, upon his instructions, on 13 February 2020 (approximately 3 months after the special general meeting), CLP Lawyers instituted fee recovery proceedings at the Tribunal against owners who had failed to pay, including Danetha.
- d. Upon his instructions (again he did not state when), on 5 May 2020 (approximately 6 months after the special general meeting), CLP Lawyers issued fee recovery proceedings against other owners. Further, attached to the affidavit was a table which recorded that fee recovery proceedings were issued against members on various dates in February and May 2020.
- e. On or about 10 February 2020, he and Mr Cohen considered a draft agreement from a potential purchaser for the purchase of 135-149 Ryrrie Street, Geelong. Around the same time, the Council had issued proceedings in the Magistrates’ Court for the OC’s failure to comply with four emergency orders issued by the Council over the course of 2019. The proceedings have been stayed pending the negotiations of the sale of the land. I note that Mr Gareth Smith of the Council has sworn an affidavit filed in the Scotia Proceeding disputing that the Magistrates’ Court proceeding has been stayed or that the Council has agreed to a stay.⁹
- f. His ongoing involvement as the administrator “was to be kept on the one hand apprised of the progress of the finalisation of a draft contract of sale to be negotiated with each and every Lot owner and the [OC] and on the other the progress of recovery of [the OC] fees from approximate 50% of Lot owners who were outstanding notwithstanding that I had individual conversations with a number of the members of the [OC]”.¹⁰
- g. The lawyers of the potential purchaser were “the dominant party in the drawing up of relevant agreements required to meet in part the demands of [the Council] given that the [Council] had assumed responsibility for the Belchers Corner site and the demands of Scotia ... given that there were no funds to pay the balance of the debt owing to Scotia by [the OC].¹¹
- h. The OC’s lawyers kept him informed of the progress of the fee recovery proceedings.

⁹ Affidavit of Gareth Smith sworn 16 October 2020.

¹⁰ Affidavit of Robert Evans sworn 19 August 2020 at paragraph 13.

¹¹ Ibid at paragraph 15.

- i. The significant delay in obtaining an agreement with the Council for the sale of the land was due to the lack of response from the Council. This assertion is disputed by Mr Gareth in his affidavit where Mr Gareth deposes that discussions between the Council and other parties have been ongoing and Mr Evans has not been involved in the majority of those discussions.¹²
- j. On 20 April 2020, he requested a status report of the demolition works for Belcher's Corner building from the Council. The Council responded on 23 April 2020 that additional works were required which would result in delays and increased costs so that the Council anticipated that the original demolition cost of \$756,690 would rise to approximately \$1.5M.
- k. On 5 May 2020, he requested from the Council a copy of the contract for demolition works that the Council had entered into. The Council declined the request on grounds of confidentiality and on 27 May 2020, a freedom of information request for access to the contract was made on behalf of the OC.
- l. On 19 June 2020 a notice of special general meeting for 6 July 2020 was sent to all members in respect of the proposed sale of the land to the potential purchaser.
- m. He requested Mr Cohen to "vigorously pursue" the lawyers for the potential purchaser to provide final copies of the relevant agreements. The documents were received on the day of the special general meeting (6 July 2020) and were distributed to members immediately upon receipt.
- n. Two working days prior to the meeting on 6 July 2020, Danetha's lawyers expressed concerns over the terms of the proposed agreements. It appears that Mr Evans is referring to the letter from Danetha's lawyers dated 2 July 2020 that is exhibited to his affidavit. In that letter, Danetha raised concerns over particular terms of the contract. Among the concerns, Danetha alleged that the proposed terms would give preferential payment to unsecured creditors. In concluding, Danetha stated that it was premature to hold the meeting.
- o. The terms of the proposed sale required a number of events to take place. Without going into the details of the terms, some of which the OC submits is confidentially sensitive, what can be disclosed (and this aspect was repeatedly raised by Mr Cohen at the hearing without any claim of confidentiality) is that the contract of sale could only be completed if all of the lot owners agreed to sell their respective lots to the purchaser and there was settlement of all the lots. Failure to have all lot owners agree or to settle gave the potential purchaser various remedies and actions against the owners under the contract.

¹² Affidavit of Gareth Smith sworn 16 October 2020 at paragraphs 10 to 12.

- p. The proposed agreements, together with Danetha's concerns were discussed at the 6 July 2020 meeting. There were two members (Danetha being one) who opposed the terms of the agreements. The minutes of the meeting exhibited to the affidavit also record that Mr Cohen mentioned that in the event that the members did not unanimously agree to the sale of the land, Mr Evans would be applying to the Tribunal under section 34 of the *Subdivision Act 1988* (Vic) to have the OC consolidated into one lot and to give authority to Mr Evans to sell the site as a whole.
 - q. The outcome of the 6 July 2020 meeting was "to encourage dialogue between Danetha P/L and [purchaser's lawyers] in an attempt to resolve concerns raised by Danetha ... and to present an amended [agreement] to all members for approval of all members, to pursue Freedom of Information application in order to obtain copy of demolition contract ... to present to the members the financial status of [the OC] including estimate of amounts owing to creditors and to identified [sic] a structural engineer capable of reviewing costs incurred in respect to the current demolition works given that the [Council] has advised that there will potentially be \$1,244,000 of variations".¹³ All of these actions were pursued.
 - r. On 16 July 2020, the Council refused the Freedom of Information request. An application for review of that decision that been lodged with the Office of the Victorian Information Commissioner.
 - s. By letter dated 19 August 2020, the lawyers for the potential purchaser have provided an amended set of proposals taking into account Danetha's position.
- 90 In his 30 October 2020 affidavit, Mr Evans deposed that:
- a. His task was to:
 - i. respondent to the emergency building orders issued by the Council;
 - ii. negotiate an outcome for lot owners to realise the highest possible value for their assets;
 - iii. deal with the OC's liability to Scotia; and
 - iv. recover the very substantial amounts of unpaid levies.
 - b. In October 2019, the Council brought charges against the OC to enforce the emergency building orders.
 - c. "The Owners Corporation is not able to meet its obligations and I will not be able to satisfy the objectives of the administration unless the site is sold".¹⁴

¹³ Affidavit of Robert Evans sworn 19 August 2020 at paragraph 28.

¹⁴ Affidavit of Robert Evans sworn 30 October 2020 at paragraph 6.

- d. In terms of negotiating an outcome for lot owners to realise the highest possible value for their assets, it was contemplated in the 30 November 2018 Orders that members of the OC might affect sale of their private lots by dissolving the common property and forming one title of land under section 32 of the *Subdivision Act 1988* (Vic).
- e. A potential purchaser had offered to purchase all the lots and the common property provided that all owners entered into the contract of sale.
- f. Differences had arisen between lot owners as to the sale including the basis of distribution of the proceeds of sale, the basis of lot owners' liability for costs, whether Scotia and Council would attain settlement funds prior to lot owners, and in respect of the unknown amount for costs incurred by the Council in the exercise of its statutory powers that the OC may be liable for.
- g. "Accordingly, a sale of the site is not yet agreed and the Owners Corporation remains dysfunctional in discharging its obligations."¹⁵
- h. Since 19 August 2020, he had "continued to take active steps to satisfy the objectives of the administration"¹⁶
- i. Further efforts had been made (it is not clear whether he had made the efforts or others had on his behalf) to achieve unanimous agreement of the lot owners to the proposed sale by:
 - i. Holding a videoconference meeting on 29 September 2020 with all lot owners to discuss the approach adopted by Danetha and to give members an opportunity to put forward their position.
 - ii. The revision of the sale documents in light of discussions between Danetha and the OC (he does not depose that he was the person discussing with Danetha).
 - iii. On 14 October 2020, him (making a clear distinction that it was him) issuing a notice of a special general meeting of the OC to be held on 2 November 2020.
- j. If unanimous agreement of lot owners to enter into the revised contract of sale could not be reached at the proposed special general meeting, he would seek "to achieve the best possible outcome for Lot owners and deal with their liabilities to Scotia and Council through consolidation of all the land affected by the Owners Corporation and marketing the property as one consolidated lot."¹⁷
- k. Proceedings in the Tribunal were on foot to recover unpaid levies.

¹⁵ Ibid at paragraph 10.

¹⁶ Ibid at paragraph 13.

¹⁷ Ibid at paragraph 15.

- l. He had continued to seek proper information from the Council about the cost of demolition works to the Belcher's Corner Building, referring to his previous request for information.
 - m. "Considering the significant progress which I have made to develop a relationship with an interested buyer and to negotiate an outcome which takes into account the differing interests of Lot owners, an extension in term is required to consolidate the current progress and finalise the sale of the Owners Corporation and discharging of the Owners Corporation's debts."
 - n. He sought an extension of his appointment to 30 October 2021 or otherwise ordered by the Tribunal essentially on the same terms and conditions as per the 30 November 2018 Orders.
- 91 In his 12 November 2020 affidavit, Mr Evans deposed that:
- a. The special general meeting referred to his affidavit sworn 30 October 2020 was held on 2 November 2020.
 - b. At the meeting, the members discussed the apportionment of all costs incurred by the OC and the apportionment of the pending proceeds of sale of the land. Two members voted against the apportionment based on the benefit principle while one owner abstained.
 - c. In terms of the fee recovery proceedings, Member Kim "denied the Owners Corporation the right to recover levies based at the time upon the application of Schedule of Entitlements & Liabilities and invited the Owners Corporation to apply a more reasonable measure in apportioning costs."

For the reasons I have previously stated above I reject this summary by Mr Evans. It is factually inaccurate and in my view misleading. I did not deny the OC any right because the OC, through Mr Cohen, conceded to me at the hearing of the Fee Recovery Proceedings that the OC had no right to seek fees and levies based on lot liability.

Mr Evans did not appear at the hearing of the Fee Recovery Proceedings. Nor has he deposed that he obtained an audio recording or transcript of the hearing. At the hearing of these proceedings, I made clearly known to Mr Cohen that I was less than impressed by this content of Mr Evans' affidavit. Upon recalling to Mr Cohen what had transpired at the hearing of the fee recovery, he agreed that the substance of the quoted passage was inaccurate.

- d. At the meeting, the issue of the apportionment of fees and levies was unresolved. A draft deed of agreement prepared by the Council's lawyers in respect of, among other things, payments of the Council's debt from the proceeds of sale should a sale eventuate was opposed. The proposal of consolidating the Plan of Subdivision into one lot with the approval of the Tribunal only gained 31.63% approval, well short of the minimum of 50% which would have provided the OC with the

opportunity of applying to the Tribunal. A sticking point was how mortgages would be treated upon consolidation. It was agreed that a further special general meeting would be held as soon as possible. At the hearing, Mr Evans indicated that he anticipated the meeting to be held in early December 2020.

- e. Subsequent to the meeting, the Tribunal held a compulsory conference in respect of an application by the OC to recover fees against members, including Danetha. The parties were not able to settle and the hearing is expected to be set down in early 2021.
- f. He disagreed with Scotia that an alternative administrator would be more effective in recovering the outstanding levies in order for Scotia's debt to be paid out in full. Nothing more could have been done to recover monies.
- g. The OC was continuing to pursue resolution of all issues confronting it but it can only deal with the common property, whereas the sale of the entire site rests with the lot owners who each hold title to their lots, some of which are mortgaged.
- h. If he was replaced, and also possibly Mr Cohen as the OC's lawyer, this would "seriously disrupt the current progress and significantly delay finalisation".

THE TRIBUNAL'S FINDINGS AS TO THE PARTIES' EVIDENCE

Scotia's evidence

- 92 Mr McLaughlin came across to me as a credible witness. I accept his recollection of events as being what had actually transpired. However, other than the various letters and written correspondence between the parties and their lawyers that are exhibited to his affidavits and that he has deposed to, and his personal dealings with Mr Evans, which were limited, there is marginal relevance of Mr McLaughlin's evidence to the underlying issues in dispute that I have identified previously in these reasons.
- 93 Scotia's evidence demonstrates a clear sign of desperation and urgency from Scotia to get paid and its belief that it had been misled by the OC as to the OC's financial position prior to Mr Evans' appointment. These matters are not relevant to whether or not Mr Evans ought to be removed as the administrator.
- 94 Whilst Mr Evans was required to have the OC address its debts, as that would be in the interest of the OC members, the underlying obligation that Mr Evans has is to the OC and the members, not to a creditor. Although there may be issues that both may face, an administrator of an owners corporation is not akin to being a liquidator of an indebted company. In this regard, despite Scotia's allegations, Scotia did not present any evidence of instances where Mr Evans has allowed preferential payments to be made by the OC.

- 95 Further, I do not accept Scotia's submission that it is a helpless party. The fact that it has obtained a judgment debt in the County Court proceedings highlights that it has a number of enforcement options available to it in respect of the judgment debt. Which option it seeks to adopt depends on the choice Scotia wishes to make.
- 96 In addition, I do not consider Scotia's submission that Mr Evans' failure to provide the OC's books or financial information to Scotia until some months after he was appointed is a persuasive argument for Mr Evans' removal. In the absence of a court or Tribunal order, there was no obligation on Mr Evans to provide access to the OC's accounts to Scotia, who is not a member of the OC. I do, however, accept Scotia's submission that the evidence draws me to find that Mr Evans did not obtain the financial information of the OC from the OC Manager until some months after being appointed.

The OC's evidence

- 97 Mr Evans' oral evidence was brief compared to the contents of his affidavit material. As I have stated previously, he did not refer to the contents of his affidavits in any great degree but rather gave me a summary of what he had done and the issues that he had been considering.
- 98 When considering his oral evidence, Mr Evans failed to demonstrate that he had carried out all of his obligations under the 30 November 2018 Orders or that he had adequately addressed the multiple issues faced by the OC.
- 99 Mr Evans' affidavits, which were prepared by the OC's lawyers, provided further detail and to an extent addressed matters that Mr Evans failed to address in his oral evidence.
- 100 Upon a careful consideration of the substance of Mr Evans' affidavits, I make the following findings about their contents:
- a. Although when one reads the lists of tasks that Mr Evans has deposed to one might get an impression that he may have undertaken numerous tasks throughout his appointment, one needs to consider what he actually did, the duration of his appointment and the issues that he was required to address.
 - b. The contents of his affidavits are lacking in detail and in substance in respect of what Mr Evans actually did to address the various issues that he was required to address, such as those stipulated in the 30 November 2018 Orders.
 - c. By example, I am less than impressed with the adequacy of the contents of Mr Evan's 8 November 2019 affidavit. For a large part, his affidavit is comprised of either single sentences to describe each task he undertook or a generic or overall description of events. The matters that I have extrapolated previously in these reasons are a summary of the matters contained in parts of the affidavit. But the actual contents of affidavit do not provide much more detail than what I have set out. And

the exhibits to the affidavit seem to show that persons other than himself were performing the bulk of the tasks.

- d. Put simply, I am unable to ascertain from his affidavit the level of engagement and work that Mr Evans did. In much of the items of work he has described, he has, in essence, simply provided a list of tasks.
- e. Presenting evidence by way of a brief description of the tasks that were performed (e.g., email sent on ..., discussion with ..., attended meeting, such as in a bill of costs) does little to assist me to understand the level, quality and even at times the relevance of the particular work (e.g., "Spoke with Nicole Wilde"). Further, just because he may have sent many emails in a given day, week or month, that does not prove, in and of itself, that he was complying with his obligations as the administrator or that he was addressing the matters raised in the Tribunal's 30 November 2018 Orders.
- f. Indeed, I am none the wiser as to the time that Mr Evans gave to the various tasks. For all I know, all the items he has described in a given month may have taken him a day in total to perform or many days or weeks. In any event, keeping oneself busy may not mean that one has been productive or fulfilling one's obligations.
- g. At best, the content of the affidavit has been poorly prepared, is sloppy, contains sentences which are not proper sentences but rather more akin to bullet points, and fails to do what it says it does in many respects, including that it does not clearly set out the basis of Mr Evans' knowledge when it comes to some of the facts alleged.
- h. The rest of Mr Evans' affidavit materials fair little better. Whilst they provide further detail than his affidavit dated 8 November 2019, they fail to adequately inform me as to whether Mr Evans has addressed the multiple pressing issues facing the OC and if so, how.
- i. As I have mentioned, at the hearing Mr Evans was not able to elaborate on the matters that he deposed to in his affidavits. He did not have much recollection of the various issues nor did he elaborate on the complexities of the situation and the difficulties he had faced, whether it was by way of his interactions with lot owners or legal and non-legal considerations.

SHOULD MR EVANS BE REMOVED AS THE ADMINISTRATOR?

- 101 Considering the parties' evidence and my findings, I am satisfied that Mr Evans ought to be removed as the administrator of the OC. My decision is based on a number of reasons.
- 102 First, I am not satisfied that Mr Evans has complied with the 30 November 2018 Orders, in that he has:

- a. not been providing regular updates to stakeholders nor has addressed the Tribunal's concerns that he clearly communicates to owners whom English is not their native language;
 - b. failed to take all steps necessary to respond to the emergency and building orders of the Council. Indeed, Mr Evans' evidence was that the OC has insufficient funds to comply with the orders;
 - c. failed to resolve the issue concerning allocation of liability to lot owners in relation to the imposition of levies and fees;
 - d. failed to stem the flow of financial losses as quickly and as effectively as possible;
 - e. failed to negotiate an outcome that takes into account the differing interests of the lot owners;
 - f. failed to have the OC satisfy the judgment debt in the County Court proceedings;
 - g. failed to recover all outstanding levies and fees from lot owners;
 - h. failed to act promptly to address the various issues faced by the OC;
 - i. failed to take the initiative by following up with the Council, Scotia, and the OC Manager concerning the pressing matters of the OC. The OC failed to present evidence of Mr Evans promptly following up on any alleged delays caused by the Council or that he had corresponded with the Council or Scotia throughout his appointment;
 - j. by in large, has been providing responses which are reactionary rather than proactive to issues faced by the OC; and
 - k. admitted by oral evidence and by his affidavit of 30 October 2020 that he is unable to comply with the 30 November 2018 Orders unless the land is sold, which has not come to fruition.
- 103 Despite having liberty to apply, other than seeking to extend Mr Evans' appointment, at no time did the OC apply to amend the 30 November 2018 Orders if Mr Evans considered that what the Tribunal had asked of him was unachievable or too burdensome.
- 104 Secondly, I accept Scotia's submission that Mr Evans only obtained the financial records of the OC until some months after his appointment on 30 November 2018. This is evidenced by the email from Mr Evans to Mr Mclaughlin on 10 July 2019 that Mr Evans had requested the financials from Mr Honeyman and he was still waiting for them. Such evidence demonstrates the lack of supervision or oversight exercised by Mr Evans.
- 105 In this regard, the following matters are further illustrative of Mr Evans' failure to provide proper supervision or to keep up to date with matters:
- a. Mr Evans gave evidence that the reason why he retained Mr Honeyman was so that he could focus his attention on the difficult issues with the Council and what to do with the property.

- b. What I have concluded from the correspondence between Mr Evans and Mr Honeyman that I have previously disclosed is that:
- i. it was not until many months after Mr Evans' appointment that he began questioning Mr Honeyman's fees;
 - ii. Mr Evans appears not to have been fully aware of the precise nature of work that Mr Honeyman had been carrying out. Indeed, Mr Evans' response to Mr Honeyman suggests that Mr Evans was not even aware of the precise tasks that Mr Honeyman had been performing and had only become aware of the "secretarial duties" from what Mr Honeyman had advised;
 - iii. Mr Evans had not been meeting with Mr Honeyman or communicating with him on a regular basis as to what Mr Honeyman was doing and the tasks to be performed by him; and
 - iv. Mr Evans had not even resolved or discussed the issue of the charge out rate of Mr Honeyman before Mr Honeyman performed work after Mr Evans' appointment.

106 It concerns me that knowing the financial burden of the OC, Mr Evans did not address the issue of Mr Honeyman's charge out rate or fees and scope of work prior to asking Mr Honeyman to continue providing his services to the OC. The correspondence demonstrates that there was no supervision or oversight carried out by Mr Evans of Mr Honeyman.

107 Thirdly, and what strikes me from Mr Evans' evidence is that he appears to have been delegating many of the tasks that the Tribunal had stipulated in the 30 November 2018 Orders. Simply delegating matters to lawyers and then accepting their advice is not what I consider as fulfilling one's role as an administrator.

108 I am not satisfied that Mr Evans has imparted his own opinions or expertise on matters but rather has been instructing the OC's lawyers to carry out various tasks (such as to negotiate with the purchaser's lawyers and prepare documents for members) and to obtain various expert opinions. I am not critical of Mr Evans for seeking expert opinion – it is a difficult situation he faces and the 30 November 2018 Orders contemplate Mr Evans engaging experts. However, an administrator who has professed to have the requisite experience and expertise, and who is paid for his or her services, ought to provide some insight, direction or guidance to the OC. Mr Evans' past experiences and qualifications do not assist him in this regard. What is important is whether he has utilised his expertise as the situation requires.

109 Fourthly, the OC has failed to establish that Mr Evans is integral or crucial to the negotiations to sell the land to a potential purchaser – an option that the members have rejected on more than one occasion. The option of selling the entire land was one that had been discussed by the members prior to Mr Evans' appointment. The option is also recorded under the "Findings" of the

30 November 2018 Orders where it is stated that the expectation was that Mr Evans would “harness the progress towards resolution” concerning the proposal to sell the land.

- 110 None of the OC’s evidence demonstrate to me that Mr Evans has been integral to the negotiations. He gave no evidence as to whether he turned his mind to the proposed terms of the contract of sale, which had been prepared by the potential purchaser’s lawyers, or he had suggested changes to the document or proposed arrangement. The evidence also shows that it was the OC’s lawyers who communicated with the potential purchaser.
- 111 From reading the 30 November 2018 Orders, it is clear that Mr Evans is required to take an active role and actually engage in the negotiations with the potential purchaser himself, with the assistance of advisors and experts, rather than having Mr Cohen or anyone else do the task and for them to then debriefed Mr Evans about those matters.
- 112 There is no basis to the OC’s claim that the negotiations would fall through because Mr Evans is replaced by another administrator. The fact is, the negotiations have not been fruitful even with his assistance. It is clear to me that the proposed deal does not depend on Mr Evans remaining as the administrator.
- 113 There is no certainty that the lot owners will agree to the proposed sale. I agree with Mr Cohen’s submission during the hearing that there are real problems to overcome in order for there to be an agreement by all lot owners to sell the entire site to the potential purchaser.
- 114 There must a cut-off point to negotiations. They cannot continue in perpetuity, especially in light of the urgent problems facing the OC. Despite the assertions made in the OC lawyers’ letter dated 13 May 2020 that there were “advanced negotiations on foot”, this has not eventuated in a signed contract of sale of land. I note that during his evidence in chief, Mr Evans said that it was around late November 2019 when he received an offer from a potential purchaser to purchaser the land.
- 115 I do not see the utility in giving Mr Evans more time to pursue the same course of action. He conceded as much when he said to me that if the members were not going to pass a resolution to agree sell their lots to the potential purchaser that he may seek to have the OC wound up.
- 116 Fifthly, Mr Evans has had over two years as the administrator to progress the matter. Instead, he seeks until 31 October 2021 to implement his strategy. If I grant the OC the Extension Application, this would mean that Mr Evans would have had almost 3 years to complete the tasks envisaged by the 30 November 2018 Orders. I am not satisfied that he has demonstrated to me that, given time, he will be able to bring the issues faced by the OC to a satisfactory conclusion.
- 117 Sixthly, although having another administrator may result in the OC incurring further costs, at least in respect of the new administrator getting up

to speed on the various issues, that possibility is not the paramount concern and is far outweighed by the lack of progress made by Mr Evans. I also note that Mr Twiselton's hourly rate is lower than Mr Evans' rate.

- 118 Seventhly, whilst it may be preferable to try and obtain consensus among lot owners, what is more important for an administrator is to fulfil his or her obligations as the administrator despite tensions and disagreements between lot owners. This is a situation where hard decisions need to be made fairly promptly. Other than instructing the OC's lawyers to issue fee recovery proceedings and obtain expert opinions on matters, and to call meetings, the OC has failed to demonstrate what Mr Evans has actually done to have matters resolved or have progressed to a concluding state.
- 119 Eighthly, despite receiving legal advice in a letter from the OC's lawyers in March 2019 that the OC ought to have all the lots consolidated as one lot and to have it put up for sale, the OC failed to present evidence that Mr Evans had promptly pursued this option with the members. Indeed, in his affidavit of 8 November 2019, Mr Evans deposed that one of his roles was the potential reorganisation of the Plan of Subdivision to facilitate a sale and the legal steps necessary to achieve it. In the same affidavit, he deposed that it was not until November 2019 when he chaired a special general meeting of the OC where Mr Cohen discussed issues with sections 32 and 34D of the *Subdivision Act 1988* (Vic) and the offer to purchase the entire land was discussed.
- 120 Ninthly, the reality remains that after two years as the administrator, Mr Evans has overseen the OC which:
- a. is being pursued by the Council in respect of the various failures to comply with the Council's orders and Council's expense in addressing the issues facing the land;
 - b. has members who owe significant amounts of levies and fees to the OC; and
 - c. has a level of debt which has increased and may be greater than the equity available in the lots even if the entire land is sold to a purchaser. Based on the figures disclosed by the parties, the total debt owed by the OC at the time of the hearing was over \$5.3M. This amount is not fixed and the debt is continuing to accrue.
- 121 Finally, the OC failed to provide any evidence of any member supporting Mr Evans' continued appointment. Mr Cohen's assertion that there were, in the absence of any evidence in support, bears no weight.
- 122 Given that I have determined that Mr Evans ought to be removed as the OC's administrator, it follows that I must dismiss the Extension Application. I need not consider the Extension Application any further.

SHOULD MR TWISELTON BE APPOINTED AS THE ADMINISTRATOR WHO REPLACES MR EVANS?

123 Unlike Scotia, the OC did not make any oral submissions nor provided any material in respect of the appropriateness of Mr Twiselton. That is, there was no criticism or concern over Mr Twiselton's experience or ability to act as the administrator should Mr Evans be removed.

124 Scotia's material in terms of the appropriateness of Mr Twiselton are those that it had filed in the Scotia Proceeding for the Removal Application.

125 Based on Mr Twiselton's letter dated 26 June 2019 and his resume,¹⁸ Mr Twiselton:

- a. Consents to be appointed as the administrator of the OC.
- b. Has indicated an hourly rate of \$198.00 inclusive of GST.
- c. Will carry out the functions and powers of the administrator honestly and in good faith and exercise due care and diligence at all times.
- d. Has been a Certified Practising Strata Manager since 2012, with approximately 9 years' experience as a Strata Manager with exceptional knowledge of administering owners corporations.
- e. Has been the General Manager of Excel Strata Managers since 2015. Excel Strata Managers have been managing for 17 years with a varied portfolio of 114 buildings ranging from residential, commercial, retail and industrial.
- f. Manages 6 full time staff and large owners corporations including financial reporting, settling budgets, providing financial analysis and ongoing project management.
- g. Is a winner of the Macquarie Bank Client Service Award in 2015. He was nominated by clients of Excel Strata Managers.
- h. Has had one experience as an administrator from the period of "August 2018 – Present" in respect of an owners corporation situated in Dandenong which "was beset with defects relating to non-compliant cladding and other fire service issues impacting the safety of all occupants." He has brought about key achievements such as:
 - i. Satisfying two Building Orders issued by the VBA relating to Essential Safety Measures, including the installation of a new Fire Indicator Panel, new Occupant Warning System and new fire detectors inside all 31 apartments.
 - ii. Engaging preeminent fire engineers to ensure detailed investigation of all defects, leading to scope of works for maximum compliance and safety.

¹⁸ Both exhibited to the Affidavit of Mr McLaughlin sworn 24 July 2019 as exhibit "WJM18".

- iii. Regular communications with lot owners and occupants regarding works and financials.
- iv. Engaging legal professionals, skilled in OC law and building disputes to bring action against the original builders.
- v. Proactively administering the owners corporation to take all steps required to return it to a state of functionality as quickly as possible.

126 I am satisfied that Mr Twiselton has the appropriate level of experience to be the administrator of the OC.

127 Given the circumstances and the difficult task before Mr Twiselton, I consider that Mr Twiselton should be given 12 months as the administrator of the OC in order that he address the various issues facing the OC. Of course, that does not mean that, upon properly informing himself, that should Mr Twiselton consider that his appointment should cease prior to 12 months he cannot seek to have his tenure expire at an earlier date. He must do what he considers is in the best interests of the OC.

ISSUE OF COSTS

128 Given my decision to have Mr Evans removed as the administrator, I will allow for the parties in the Scotia Proceeding to provide submissions as to costs in respect of the Removal Application. In doing so, I am not stating that I would necessarily exercise my discretion and award costs.

129 Unless expressly requested by a party in the Scotia Proceeding for a hearing on the issue of costs, the issue is to be determined by me based on any written submissions parties may wish to provide. Should the parties in the Scotia Proceeding fail to provide any written submissions in the timeframe that I will order, there is to be no order as to costs.

130 In respect of the Extension Application filed by the OC in the OC Proceeding, I make no order as to costs. This is because:

- a. In respect of the OC, I have dismissed the Extension Application. Accordingly, I see no basis for the OC to seek costs in that application.
- b. In respect of Scotia, it was not a party to the OC Proceeding and it did not seek to be joined as a party to that proceeding. All material filed and submissions made by Scotia in relation to the appropriateness of Mr Evans as the administrator were raised in the Scotia Proceeding. In essence, Scotia's defence of the Extension Application comprised of the matters it raised in support of the Removal Application. Accordingly, if Scotia seeks costs, it can only do so in respect of the Scotia Proceeding. In any event, Scotia would not be entitled to "double-dip" by seeking costs in both proceedings for the same work or item of costs it incurred in seeking Mr Evans' removal.

- c. In respect of Danetha and the Council, neither of them opposed the Extension Application.

CONCLUSION

131 In conclusion, I have found that Mr Evans should be removed as the administrator and Mr Twiselton be appointed in his place. I will make orders reflecting my decision.

D. Kim
Member