



Civil and Administrative Tribunal
New South Wales

Case Name: Lee v The Owners – Strata Plan No. 56120

Medium Neutral Citation: [2021] NSWCATCD 8

Hearing Date(s): 25 May 2021

Date of Orders: 25 May 2021

Decision Date: 25 May 2021

Jurisdiction: Consumer and Commercial Division

Before: Graham Ellis SC, Senior Member

Decision:

1. An order, under section 237(2)(b) of the Strata Schemes Management Act 2015, appointing Strata Real Estate Services Pty Ltd as strata managing agent, for a period of 1 year from the date of this order, to exercise all the functions of the chairperson, secretary, treasurer and strata committee of the Owners Corporation in relation to any matter relating to compliance with the orders made by the Tribunal on 04 October 2018 in the application with reference SC 17/53425, including but not limited to:
 - (a) the engagement of contractors and any ancillary persons required to carried out the work covered by those orders, and
 - (b) the raising of funds (by levies or strata loan) to enable payment of all contractors, costs and any other amount payable in order to achieve compliance with those orders.
2. An order, under section 229 of the Strata Schemes Management Act 2015, that the first respondent is provide a copy of these orders to:
 - (a) any current member of the strata committee, and
 - (b) any person who becomes a member of the strata committee during the period covered by order 1.
3. The second respondents are to pay the costs of the

applicants on the ordinary basis, as agreed or assessed.

4. The Tribunal notes that each of the applicants is a party who was successful in these proceedings.

5. As against the first respondent, the application is dismissed.

Catchwords: LAND LAW – Strata title – Appointment of compulsory strata managing agent – Limited to functions – Appointment of existing strata managing agent

Legislation Cited: Civil and Administrative Tribunal Act 2013
Civil and Administrative Tribunal Rules 2014
Property, Stock and Business Agents Act 2002
Strata Schemes Management Act 2015

Cases Cited: Bonita v Shen [2016] NSWCATAP 159
Cripps v G & M Mawson [2006] NSWCA 84
Latoudis v Casey [1990] 170 CLR 534
Megerditchian v Kumond Homes Pty Ltd [2014] NSWCATAP 120
Mortlock v Owners of Strata Plan No 55434 [2006] NSWSC 363
News v Cotes [2019] NSWCATAP 186
Oshlak v Richmond River Council [1998] HCA 11
Siewa Pty Ltd v The Owners Strata Plan 35042 [2006] NSWSC 1157
The Owners – Strata Plan No. 80412 v Vickery (No 2) [2019] NSWCATAP 97
The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256
Thompson v Chapman [2016] NSWCATAP 6
Unilodge Australia Pty Ltd v The Owners Strata Plan 54026 [2020] NSWCATCD, 29 April 2020

Category: Principal judgment

Parties: Applicants:
Stella Hoi Yi Lee, Tasman McManis,
D R Levy Pty Ltd, Caroline Renee Stuckey,
Roberta Carli, and Christopher McManamon.

First Respondent:
The Owners – Strata Plan No. 56230

Second Respondents:
Da Zhi Li and An Seng Chen, Fusan Atik,
Insoon Heo, Ming Dai and Zheng Quiang Chen,
Neil D'Alessandro, Gary Nairn, Irene Fong,
Check Seeto and Joyce Seeto, Mike Curman,
Kunaal Krishneil Chand, Houman Ebrahimi,
Lilian Krasnowski, Sayuri Hayashi, Gerald Renton,
and Kevin McConnochie

Representation: Applicants:
Ms S Saw, Speris Ryan

First respondent:
Not represented

Second Respondents:
Mr C Cunio, Strata Specialist Lawyers

File Number(s): SC 20/47897

Publication Restriction: Nil

REASONS FOR DECISION

History of the proceedings

- 1 The application which initiated these proceedings, dated 13 November 2020, sought an order under s 237 of the *Strata Schemes Management Act 2015* (the SSMA) for the appointment by the Tribunal of a strata managing agent. A schedule to that application listed (1) Stella Hoi Yi Lee, (2) Tasman McManis, (3) D R Levy Pty Ltd, (4) Caroline Renee Stuckey, and (5) Roberta Carli, the owners of lots 7, 8, 10, 11 and 25 in a strata title property at Crows Nest, as applicants. The Owners – Strata Plan No. 56120 (the OC) was the only respondent named in the application.
- 2 The reasons for the application were said to be the non-compliance with orders made by the Tribunal on 04 October 2018 in earlier proceedings by Ms Carli against the OC (SC 17/53425). Reliance was placed on paragraph (b) of s 237(3) of the SSMA.
- 3 The application was accompanied by a letter of consent from the applicants' proposed strata managing agent, a draft Managing Agent Agreement and a

copy of the relevant licences, thus facilitating compliance with s 237(4) and 237(5).

- 4 On 21 January 2021 Christopher McManamon was added as an applicant and the following respondents were added: (1) Da Zhi Li and An Seng Chen, (2) Fusan Atik, (3) Insoon Heo, (4) Ming Dai and Zheng Quiang Chen, (5) Neil D'Alessandro, (6) Gary Nairn, (7) Irene Fong, (8) Check Seeto and Joyce Seeto, (9) Mike Curman, (10) Kunaal Krishneil Chand, (11) Houman Ebrahimi, (12) Lilian Krasnowski, (13) Sayuri Hayashi, (14) Gerald Renton and (15) Kevin McConnochie.
- 5 On that occasion, leave for legal representation was granted to both the applicants and the respondents but it was noted that grant of leave did not necessarily mean that an order for the payment of legal costs would be made.
- 6 Provision was also made for a preliminary issue to be determined on the papers and that was finalised by a procedural ruling on 09 February 2021. Further, directions were made for documents to be filed and served: for the applicants by 04 February 2021, for the respondents by 04 March 2021 and any documents in reply for the applicants by 18 March 2021. Orders were also made for notification of any witness required for cross-examination and for the provision of outline submissions.
- 7 A notice of hearing, issued on 01 February 2021, advised the parties the application was listed for hearing on 25 May 2021.
- 8 On 20 April 2021, noting that the applicant wished to amend the application, the Tribunal made orders for the provision of written submissions if that amendment application was opposed in which case that aspect would be determined at the hearing. No document was lodged to suggest that amendment was opposed. However, it is not necessary to consider that amendment since it was indicated, at the outset of the hearing, that the applicant no longer pursues that amendment.

The hearing

- 9 It is convenient to refer to the numerous parties to these proceedings as the applicants, the OC (being the first respondent) and the remaining respondents

as the second respondents. Leave for legal representation having been granted, Ms Saw represented the applicants, the OC was not represented, and Mr Cunio represented the second respondents.

- 10 As to the order sought, Ms Saw indicated that the applicants no longer wish to pursue any amendment. Mr Cunio indicated that the second respondents agreed that a compulsory strata managing agent should be appointed but suggested that the person appointed should not be the current strata managing agent.
- 11 The next issue was what evidence should be admitted. The documents upon which the applicants wish to rely were the application and the accompanying documents which were received by the Tribunal on 16 November 2020. As a copy of those documents had been received by the second respondents and there was no objection to them, they were admitted as Exhibit A.
- 12 No documents referable to this hearing were lodged by or for the second respondents prior to a statement from Mrs Renton dated 21 May 2021 and the accompanying documents upon which Mr Cunio sought to rely.
- 13 On behalf of the applicants, Ms Saw objected on the basis that:
 - (1) The documents were not received until after the close of business last Friday (21 May 2021), only one clear business day prior to the hearing.
 - (2) As a result, there had not been adequate opportunity to consider those documents.
 - (3) Those documents were served well outside the 04 March 2021 deadline set by the Tribunal on 21 January 2021.
 - (4) An email sent on 14 May 2021, which asked whether the second respondents intended to rely on any documents at the hearing did not result in disclosure of the documents upon which the second respondents now sought to rely.
 - (5) The inclusion of documents which sought to revisit the issue of legal representation which had already been decided by the Tribunal on 09 February 2021.
 - (6) The documents included details of a new strata managing agent proposed by the second respondents.
- 14 Mr Cunio's response was that the second respondents cannot amend the application and that, while they agree with the order sought, they seek the appointment of a different strata managing agent and the documents required

for the appointment of that agent were included in the documents upon which he sought to rely. It is noted that Mr Cunio did not provide any explanation as to why the documents were served late, being more than two months after the deadline set by the directions made more than four months ago and only one clear business day prior the hearing.

- 15 The Tribunal rejected the second respondent's application for leave to rely on those documents which have been marked for identification as MFI 3 (MFI 1 and MFI 2 being copies of the parties' submissions on the preliminary issue already decided by the Tribunal) and indicated that the reasons for that decision would be provided later. Those reasons appear below.
- 16 It is sufficient to note that the documents upon which the second respondents sought to rely comprise 247 new pages, being a five page statement of Mrs Renton plus annexures, together with not one but two copies of the earlier written submissions lodged in support of the second respondents' position on that preliminary issue. The inclusion of those submissions suggests the second respondents wanted the Tribunal to revisit its earlier decision and the covering letter dated 24 May 2021 referred to "*the application to revoke leave to the applicant's legal representatives*".
- 17 The reasons for the rejection of those documents are that (1) it would be procedurally unfair to require the applicants to be ready to deal with them at the hearing, (2) they were not provided either to the Tribunal of the applicants until a date that was more than two months late, only one working day clear of the hearing, (3) they were not foreshadowed by way of a response to the applicant's 14 May 2021 email, and (4) no explanation was provided as to why the documents were not filed and served earlier.
- 18 The alternatives to rejecting the tender of these documents are to allow the applicants to be ambushed by 247 pages of documents or to adjourn the hearing: the former would visit procedural unfairness on the applicants; the latter would be unfair to the many parties who seek to have their cases heard by the Tribunal and who comply with the Tribunal's directions.
- 19 Since the Tribunal's Consumer and Commercial Division receives more than 50,000 applications each year, even if they each only have one applicant and

one respondent, there are more than 100,000 parties wish to use the available hearing time and to grant an adjournment in this instance, where no explanation for the delay has been provided, would be to move towards a situation which would render the Tribunal like a tap that can be turned on and turned off at the will of any party.

- 20 A further consideration in this case is that each months' delay results in an additional cost to the OC, and thus to the lot owners, of \$3,910.71 under the orders made on 04 October 2018 (quoted below).
- 21 Mr Cunio also suggested the documents relating to the strata managing agent proposed by the respondent could be admitted and submissions made with the question of who should be the strata managing agent being decided on the papers. Apart from the lateness of that request, which would involve additional time and costs to both parties and the Tribunal, it is not considered appropriate to determine that issue on the papers as it would involve a consideration of criticism of the current strata managing agent and a contested question of fact, namely the reasons(s) for non-compliance with the orders made on 04 October 2018.
- 22 As there was no witness statement, statutory declaration or affidavit in the evidence, there was no cross-examination and it only remained to provide the legal representatives with an opportunity to make oral submissions, including as to costs, which submissions are summarised below.

Jurisdiction

- 23 It is clear that these proceedings relate to premises at Crows Nest which are the subject of a strata scheme. As a result, the SSMA applies and the Tribunal has jurisdiction to hear and determine the proceedings.

The relevant law

- 24 In the SSMA, s106, which is entitled "Duty of owners corporation to maintain and repair common property", reads:

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

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

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

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

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

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

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

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

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

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

25 *Siewa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 is a decision which held that the obligation to repair and maintain is a strict duty and not just a matter of reasonable care or best endeavours.

26 In relation to the appointment of a strata managing agent, s 237 of the SSMA provides as follows:

(1) Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation *The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent-*

to exercise all functions of an owners corporation, or

to exercise specified functions of an owners corporation, or

to exercise all functions other than specified functions of an owners corporation.

(2) Order may confer other functions on strata managing agent

The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise-

all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or

specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions, or

all the functions of chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.

(3) Circumstances in which order may be made

The Tribunal may make an order only if satisfied that-

the management of the strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

*an owners corporation has failed to perform one or more of its duties, or
an owners corporation owes a judgment debt.*

(4) *Qualifications of person appointed*

A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must-

hold a strata managing agent's licence issued under the Property, Stock and Business Agents Act 2002, and

have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) *Terms and conditions of appointment*

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

(6) *Return of documents and other records*

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

(7) *Revocation of certain appointments*

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

(8) *Persons who may make the application*

The following persons may make an application under this section-

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

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

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

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

27 The words appearing in that section have been previously considered on a number of occasions and the decisions in those cases aid the application of section 237 to the circumstances of this case although such decisions obviously do not override the words of that section.

28 In *Mortlock v Owners of Strata Plan No 55434* [2006] NSWSC 363 (*Mortlock*) at [18] there is quoted the words of the decision-maker being challenged in that appeal which describes the earlier equivalent of s 237 of the SSMA as draconian on the basis that it removes the democratic process established by statute. Subsequent paragraphs in that judgement serve to remind that s 237 of the SSMA contains a significant power that requires an evidentiary basis before an order is made under that section.

29 It is noted that, in *Unilodge Australia Pty Ltd v The Owners Strata Plan 54026* [2020] NSWCATCD, 29 April 2020, one of the grounds for the appointment of a compulsory strata manager was a failure to repair common property despite expert advice, detailed work and funding proposals and a notice from the City of Sydney Council.

The evidence

30 The applicants, who are members of the strata committee (SC) expressly base their case on the OC's failure to comply with the orders made by the Tribunal on 04 October 2018 and, impliedly, on the duty to maintain and repair common property imposed by s 106 of the SSMA.

31 Quoted below are those orders made by the Tribunal on 04 October 2018:

a. An order is made pursuant to the provisions of the Strata Schemes Management Act 2015 s 232(1)(a) that the respondent shall fulfill its duty pursuant to s 106(1) of the Act and specifically the respondent, on appointment of an independent expert to report on the adequacy of remedial work pursuant to consent orders made in application SC 17/37483, shall direct such independent expert to report on the adequacy of remedial works carried out on the common property windows, doors and balcony of lot 601 and to include any additional work associated with lot 601 in any scope of additional works found to be necessary.

b. An order is made pursuant to the provisions of the Strata Schemes Management Act 2015 s 232(1)(a) that the respondent shall contract with suitably qualified contractors for the carrying out of all work necessary to rectify damage to lot 601 arising from ingress of water and work performed within the lot by the respondent's contractors. All necessary work to be completed within 30 days of the date of these orders.

c. An order is made pursuant to the provisions of the Strata Schemes Management Act s 232(1)(a) to give effect to the applicant's rights pursuant to s 106(5) that the respondent shall pay the applicant the sum of \$50,839.23 forthwith.

d. A further order is made that the respondent shall pay the applicant the sum of \$3,910.71 per month from 27 August 2018 until all works referred to in order (2) are complete. Payment to be made immediately on completion of those works.

e. The application is otherwise dismissed.

32 The chronology of relevant events for which the applicant contends is as follows:

04 Oct 18 After the orders were made, Mr Pickering of Building and Waterproofing Report Australia (BWRA) engaged to prepare a report and scope of remedial works for Unit 601

31 Oct 18 Date for completion of the work covered by the orders

18 Dec 18 BWRAs' first report provided

07 May 19 Special levy (the first levy) made to pay for the rectification works

28 May 19 That first levy was revised

Jul 19 OC sought a further report from BWRA in relation to Unit 601

04 Sep 19 BWRA's second report was provided

01 Apr 20 OC sought tenders for work suggested by BWRA's second report

07 May 20 Impact Group provided a project management proposal

02 Sep 20 OC held Extraordinary General Meeting (EGM) to raise special levies of \$315,182 for rectification work and \$46,928.52 to pay compensation

02 Oct 20 Some lot owners sought to have a meeting to rescind those resolutions

30 Oct 20 The motions to rescind were defeated

05 Nov 20 Another request was made for a meeting to rescind those resolutions

- 33 It is to be noted that the 02 October 2020 request which led to the meeting held on 30 October 2020 sought to not only to rescind each of the resolutions passed on 02 September 2020 but also sought to (1) remove Ms Carli as an SC member, (2) have two quotes obtained to carry out the work recommended in BWRA's first report, and (3) prohibit Ms Carli from any involvement in compliance with the orders made on 04 October 2018. Each of the seven proposed resolutions was defeated at the 30 October 2020 meeting.
- 34 The 05 November 2020 request proposed ten resolutions: the same seven plus three more. Those three were (1) for one of fourteen nominees to replace Ms Carli on the SC, (2) for the strata managing agent to provide each lot owner with a copy of every electronic vote, and (3) to limit to \$10,000 the amount which the SC is authorise to spend.
- 35 While some lot owners have paid their contributions to the special levies, a significant number of lot owners have not paid their share of those special levies. It is in these circumstances that the applicants, as SC members, seek to have the current strata manager appointed to exercise the OC functions in order to raise the required funds and have the works the subject of the orders completed. The applicants' case is that (1) the compensation payable is

increasing with time, (2) it is likely that the cost of rectification is likewise increasing, and (3) the damage needing to be rectified is likely to be increasing.

The submissions

36 The orders now sought by the applicants was set out in the written submissions dated 21 May 2021 (MFI 4):

An order under section 237(1)(b) of the Strata Schemes Management Act 2015 (“the Act”) for the appointment of a compulsory strata managing agent to exercise all the functions of the Owners Corporation in relation to compliance with the NCAT orders SC 17/53425 made by Member Smith on 4 October 2018 for a period of twelve (12) months, such functions to include but not [be] limited to the engagement of contractors and all ancillary persons to carry out all works and raising of funds (by levies or strata loan) to enable payment of all contractors, costs and all other amounts payable to ensure compliance with the NCAT orders; and any other order the Tribunal sees fit.

37 For the applicant, it was submitted that an order should be made for the appointment of a strata managing agent because of non-compliance the order made by the Tribunal on 04 October 2018. It was not being said that the OC or SC was dysfunctional and the order sought was confined to what was required in order to achieve compliance with that order. Reference was made to the conduct of the second respondents, indicated in the attachments numbered 9 to 11 within Exhibit A, as summarised on A4 (ie page 4 of Exhibit A) at [22-27] (ie paragraphs 22 to 27). The applicants’ case is that their efforts are being thwarted by the second respondents and that there is a continuing cost of almost \$4,000 per month resulting from the non-compliance which the order sought seeks to address.

38 On behalf of the second respondents, it was noted that an order for the appointment of a compulsory strata managing agent was not opposed. Further, there was agreement that an order should be made on the limited basis suggested by the applicants. However, it was contended the current strata managing agent should not be appointed. Reasons advanced in support of that were that the current strata managing agent had been in place for two years and should not be appointed due to a lack of action and not enough had been

done to achieve compliance with the Tribunal's orders which, it was submitted, should be addressed by "fresh eyes".

- 39 In submissions in reply, it was contended that the difficulties arose not from the conduct of the strata managing agent but from the conduct of the second respondents.

Consideration

- 40 The fact that the parties consent to an order being made does not remove the need for the Tribunal to be satisfied that an order under s 237 should be made. From the evidence before the Tribunal, the Tribunal finds (1) that orders were made by the Tribunal on 04 October 2018 and (2) that there has not yet been compliance with those orders. As a result, paragraph (b) of s 237(3) has been satisfied.
- 41 Further, the conduct of the second respondents, notably in repeated requests to rescind resolutions, suggests a continuing impediment to efforts to achieve compliance. As a result, the Tribunal is satisfied that it is necessary and reasonable for an order to be made under s 237 of the SSMA.
- 42 While it is far more common for an order to be made on a unlimited basis, the Tribunal is satisfied that an order should be made on a limited basis in this instance by reason of (1) the need to address non-compliance with an earlier order of the Tribunal being the only basis established for an order, (2) the fact that an order removes the democratic process established by the SSMA, and (3) the consent of the parties to an order being made on a limited basis.
- 43 Likewise, although it is far more common for a new strata managing agent to be appointed, the evidence before the Tribunal does not establish any deficiency in the conduct of the existing strata managing agent. Appointing the existing strata managing agent may be expected to save time and money by reason of familiarity with both the strata scheme and the subject matter of the s 237 order. There is the added consideration that appointing a fresh strata managing agent on a limited basis would leave the existing strata managing agent in place for the remaining aspects of the administration of the strata scheme and practical considerations favour having only one strata managing agent for a strata scheme, not two at the same time.

Costs

- 44 When leave was granted for the parties to be legally represented, it was noted that such an order did not necessarily mean that a costs order would be made. Since the applicants have succeeded in obtaining the order sought in the application, there is no basis for the applicants being order to pay the costs of the respondent: the only question is whether the second respondents should be ordered to pay the costs of the applicants since there do not seem to be any costs of the OC, the first respondent in these proceedings.
- 45 The first question is whether costs in this case are governed by s 60 of the *Civil and Administrative Tribunal Act 2013* (the Act) or rule 38(2)(b) of the *Civil and Administrative Tribunal Rules 2014* (the Rules).
- 46 The effect of s 60 of the Act is that s 60(1) provides that “Each party to proceedings in the Tribunal is to pay the party’s own costs” but s 60(2) relaxes that default position by providing that “The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs”. A non-exhaustive list of considerations is set out in s 60(3):
- (a) *whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,*
 - (b) *whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,*
 - (c) *the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,*
 - (d) *the nature and complexity of the proceedings,*
 - (e) *whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,*
 - (f) *whether a party has refused or failed to comply with the duty imposed by section 36(3),*
 - (g) *any other matter the Tribunal considers relevant.*

47 It is well-established that the adjective “*special*” requires circumstances that are out of the ordinary but do not need to be extraordinary or exceptional: *Megerditchian v Kumond Homes Pty Ltd* [2014] NSWCATAP 120, adopting what was said in *Cripps v G & M Mawson* [2006] NSWCA 84 at [60].

48 However, s 35 of the Act operates to make s 60 subject to Rule 38 of the *Civil and Administrative Tribunal Rules 2014* which provides as follows:

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:

...

(b) the amount claimed or in dispute in the proceedings is more than \$30,000.

49 When rule 38 applies there is a general discretion to award costs and it is well established, by decisions such as *News v Cotes* [2019] NSWCATAP 186, *Bonita v Shen* [2016] NSWCATAP 159 and *Thompson v Chapman* [2016] NSWCATAP 6, that: (1) the starting point is that the usual order for costs should be in favour of the successful party, (2) the award is to compensate the successful party for the costs incurred in the proceedings, and (3) departure from the usual order is permissible if the circumstances favour that course of action.

50 Simply stated, when rule 38 applies, the usual order is that costs follow the event unless there is disentitling behaviour by the successful party: *Latoudis v Casey* [1990] 170 CLR 534, *Oshlak v Richmond River Council* [1998] HCA 11.

51 As to whether rule 38 applies in this instance, the decision in *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 is of assistance as it summarises the position as follows:

2. Rule 38(2)(b) of the Civil and Administrative Tribunal Rules, 2014 (NSW) (Rules) does not apply to proceedings under s 236(1) of the Strata Schemes Management Act, 2015 (NSW) (Management Act) for an order that the unit entitlements in a strata scheme be reallocated because the initial unit entitlement allocation was unreasonable.

3. Rule 38(2)(b) applies to the following proceedings:

1. Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than \$30,000;

2. Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that:

1. there is credible evidence relating to the amount the Tribunal could award; and

2. that evidence, if accepted, would establish an entitlement to an order for an amount more than \$30,000.

4. Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than \$30,000.

5. Rule 28(2)(b) does not apply to proceedings:

1. Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than

\$30,000; or

2. Where there is a matter at issue amounting to or of a value of more than \$30,000 but:

1. no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than \$30,000; or

2. the relief sought does not depend on there being a finding that a specific amount of money is owed.

52 As this application only seeks an order that could result in the payment of more than \$30,000 and does not depend upon a finding that such an amount is owed, this case falls within [5] above with the result that costs fall to be determined by s 60 rather than rule 38(2)(b).

53 It is noted that, on 13 November 2018, an order for costs was made in the proceedings which gave rise to the order with which the applicants now seek to achieve compliance. That costs order, made in proceedings based on s 106 between Ms Carli (on the of the present applicants) and the OC, which was based on the required work costing more than \$30,000, was for the OC to pay 70% of her costs. However, that was a different application between different parties in relation to a different provision of the SSMA.

54 Accordingly, it is necessary to consider whether there are special circumstances in this case. The Tribunal considers that there are special circumstances in that paragraphs (a), (b), (c), (f) and (g) are applicable for the following reasons:

- (1) The applicants have been disadvantaged by the way on which the second respondents have conducted the proceedings, notably in failing to comply with the directions of the Tribunal, not consenting to the order sought until the day of the hearing and seeking to revisit the decision of the Tribunal made on 09 February 2021.
- (2) As a result of that conduct, the proceedings have been unreasonably delayed.
- (3) The second respondents could and should have consented to the appointment of a strata managing agent but contested who should be appointed until late on the Friday prior to the Tuesday hearing.

- (4) The opposition to the order sought lacked strength as did the request for a different strata manager which was raised for the first time one working day clear of the hearing.
- (5) The failure to comply with the directions of the Tribunal was a failure to comply with the duty of cooperation imposed by s 36(3) of the Act.
- (6) The effect of the opposition to the order sought was to oppose compliance with the orders of the Tribunal made on 04 October 2018.
- (7) Multiple requests (on 02 October 2020 and 05 November 2020) to rescind decisions made on 02 September 2020 caused these proceedings which were commenced on 13 November 2020.
- (8) Each month's delay caused the OC to incur additional expense of \$3,190.71.
- (9) These proceedings were based on non-compliance with an earlier order of the Tribunal.

55 As a result, an order will be made for the fifteen second respondents to pay the costs of the six applicants.

Successful party

56 In the SSMA, s 104 provides as follows:

(1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.

(2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.

(3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal.

57 That section was considered in *The Owners – Strata Plan No. 80412 v Vickery (No 2)* [2019] NSWCATAP 97 at [25-27] where it was noted that:

... s 104 expressly regulates the position of proceedings in the Tribunal. Further, s 104 operates according to its own terms and does not provide power to the Tribunal to make an order.

Accordingly, there is no power for the Tribunal to make the order sought and we decline to do so.

- 58 On the basis of that decision, the Tribunal notes that the applicants have the benefit of being 'quarantined' from any levy made for the purpose of paying the costs of the owners corporation in relation to these proceedings. As a result, the Tribunal need do no more than note that each of the applicants was a successful party in these proceedings in order for them to avail of the benefit afforded to them by s 104 of the SSMA.

Orders

- 59 For the reasons indicated above, the orders that will be made are as follows:

- (1) *An order, under section 237(2)(b) of the Strata Schemes Management Act 2015, appointing Strata Real Estate Services Pty Ltd as strata managing agent, for a period of 1 year from the date of this order, to exercise all the functions of the chairperson, secretary, treasurer and strata committee of the Owners Corporation in relation to any matter relating to compliance with the orders made by the Tribunal on 04 October 2018 in the application with reference SC 17/53425, including but not limited to:
 - (a) *the engagement of contractors and any ancillary persons required to carry out the work covered by those orders, and*
 - (b) *the raising of funds (by levies or strata loan) to enable payment of all contractors, costs and any other amount payable in order to achieve compliance with those orders.**
- (2) *An order, under section 229 of the Strata Schemes Management Act 2015, that the first respondent is provide a copy of these orders to:
 - (a) *any current member of the strata committee, and*
 - (b) *any person who becomes a member of the strata committee during the period covered by order 1.**
- (3) *3. The second respondents are to pay the costs of the applicants on the ordinary basis, as agreed or assessed.*
- (4) *4. The Tribunal notes that each of the applicants is a party who was successful in these proceedings.*
- (5) *5. As against the first respondent, the application is dismissed.*

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

Registrar

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

Registrar

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