



Civil and Administrative Tribunal

New South Wales

Case Name: Velastegui v Chan

Medium Neutral Citation: [2021] NSWCATCD 98

Hearing Date(s): 20 August 2021

Date of Orders: 06 September 2021 [amended 7 September 2021]

Decision Date: 6 September 2021

Jurisdiction: Consumer and Commercial Division

Before: Graham Ellis SC, Senior Member

Decision: The Notice of Order issued on 6 September 2021 is amended under Section 63 of the Civil and Administrative Tribunal Act 2013, and should read as follows:

1. An order, under ss 237(1)(a) and 237(2)(a) of the Strata Schemes Management Act 2015, appointing Strata Plus Pty Ltd as strata managing agent, from the date of this order up to the commencement of the next Annual General Meeting of the owners corporation, to exercise all the functions of the owners corporation and all the functions of the chairperson, secretary, treasurer and strata committee of the owners corporation in relation to strata scheme number 36811 upon the terms and conditions set out in the Strata Management Agency Agreement provided under cover of its letter dated 16 August 2021.
2. An order, under s 229 of the Strata Schemes Management Act 2015, that a copy of these orders and reasons be provided by the registry to Strata Plus Pty Ltd via email to XXX, marked for the attention of Mr David Ferguson.
3. An order, under s 232(1)(e) of the Strata Schemes Management Act 2015, granting a licence to the owner of Lot 1 to park the vehicle with registration XXX

outside the Lot 1 garages.

4. The application is otherwise dismissed.

Catchwords:	LAND LAW - Strata title - Challenges to decisions of strata committee - Appointment of compulsory strata managing agent
Legislation Cited:	Property, Stock and Business Agents Act 2002 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bischoff v Sahade [2015] NSWCATAP 135 Hoare v The Owners – Strata Plan No 73905 [2018] NSWCATCD 45 Mitchell v Cullingral Pty Ltd [2012] NSWCA 389 Mortlock v Owners of Strata Plan No 55434 [2006] NSWSC 363
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Alison Velastegui (Applicant) Linda Chan (First Respondent) The Owners – Strata Plan No SP36811 (Second Respondent) Victoria Bautista (Third Respondent) Jane Chujun Gu (Fourth Respondent)
Representation:	Applicant (Self represented) First Respondent (Self represented) Third Respondent (Self represented) Fourth Respondent (Self represented)
File Number(s):	SC 21/16147
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

- 1 On 13 April 2021 a lot owner (the applicant) lodged an application seeking:
 - (1) orders under s 232 of the *Strata Schemes Management Act 2015* (the SSMA) in relation to a number of matters,
 - (2) an order under s 237 of the SSMA for the appointment by the Tribunal of a strata managing agent, and

- (3) an order under s 238 of the SSMA for the removal of the first respondent from the strata committee (SC).
- 2 The strata plan the subject of these proceedings has four lot owners, each of whom is a party to the proceedings, along with the owners corporation:
 - (1) The applicant, Ms Velastegui, the owner of Lot 3.
 - (2) The first respondent, Ms Chan, a co-owner of Lot 2.
 - (3) The second respondent is the owners corporation.
 - (4) The third respondent, Ms Bautista, a co-owner of Lot 4.
 - (5) The fourth respondent, Ms Gu, a co-owner of Lot 1.
- 3 The subject building has four units: the downstairs units are the applicant's unit (unit 1) at the front and the second respondent's unit (unit 2) at the back. The upstairs units are the third respondent's unit (unit 3) at the front and the fourth respondent's unit (unit 4) at the back.

History of the proceedings

- 4 At a preliminary hearing on 14 May 2021, orders were made for the provision of documents to the Tribunal and the other parties: by applicant on or before 21 May 2021 and by the respondents on or before 04 June 2021. On 20 May 2021 those dates were amended to 28 May 2021 and 18 June 2021.
- 5 On 07 June 2021 the request of two lot owners to be added as respondents was granted. On 10 June 2021 a notice of hearing was issued to advise the parties that the application would be heard on 20 August 2021. On 05 August 2021 a fresh notice was issued to indicate that the hearing on that date would be conducted using audio-visual link (AVL) facilities.

The hearing

- 6 The hearing was conducted using those facilities since attendance in person was not possible due to movement restrictions imposed due to the Covid-19 pandemic. Present at the hearing were Ms Velastegui, Ms Chan, Ms Bautista and Ms Gu.
- 7 The documents which were admitted as evidence during the hearing, without any objection, were as follows:

Exhibit A, documents received from the applicant on 26 May.

Exhibit 1, documents received from the first respondent on 18 June.
Exhibit 2, documents received for the second respondent on 04 May.
Exhibit 3, documents received from the third respondent on 18 June.
Exhibit 4, documents received from the fourth respondent on 18 June.
Exhibit 5, 16 August 2021 letter from Strata Plus Pty Ltd with attachments.
Exhibit 6, minutes of the 07 August 2021 Annual General Meeting (AGM).

- 8 After identifying and admitting as evidence the documents upon which the parties wished to rely, the Tribunal ascertained the position of each party on each of the three aspects of these proceedings. As there was no cross-examination, it remained to provide an opportunity for oral submissions to be made. The usual sequence of applicant then respondent followed by applicant in reply enabled both parties to speak in support of their own case and in response to the case of the other party.

Jurisdiction

- 9 It is clear that these proceedings relate to premises at Parramatta 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

- 10 The Tribunal is given a broad power to make an order to settle a complaint or dispute about the operation, administration, or management of a strata scheme by s 232 of the SSMA which, so far as is presently relevant, provides:

(1) Orders relating to complaints and disputes

The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following-

(a) the operation, administration or management of a strata scheme under this Act,

...

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme.

...

1. The full wording of s 237 of the SSMA is set out below:

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

- (a) to exercise all functions of an owners corporation, or
- (a) to exercise specified functions of an owners corporation, or
- (a) 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-

- (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
- (a) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions, or
- (a) 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-

- (a) 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
- (a) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
- (a) an owners corporation has failed to perform one or more of its duties, or
- (a) an owners corporation owes a judgment debt.

(4) Qualifications of person appointed

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

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

- 11 The words appearing in that section have been previously considered by courts and tribunal and the decisions in those cases aid the application of s 237 to the circumstances of this case although such decisions obviously do not override the words of that section.
- 12 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 but goes on to suggest that there must be objective evidence that the management of the owners corporation is dysfunctional before an order is made for the appointment of a compulsory strata managing agent. Those

words serve as a reminder that s 237 of the SSMA contains a significant power that requires an evidentiary basis before an order is made under that section.

- 13 The decision in *Hoare v The Owners – Strata Plan No 73905* [2018] NSWCATCD 45 (*Hoare*) at [202] suggests the fact that some lot owners do not agree does not make an OC dysfunctional.
- 14 Despite dealing with a similar provision in the former legislation, *Bischoff v Sahade* [2015] NSWCATAP 135 (*Bischoff*) remains relevant since the grounds for an order to appoint a managing agent set out in s 162(3A) of the *Strata Schemes Management Act 1996* (the 1996 Act) contain exactly the same words as the grounds set out in s 237(2) of the SSMA. *Bischoff* at [32] is quoted below:

Circumstances in which the management structure may not be functioning or functioning satisfactorily include where the relevant level of management:

1. does not perform a required function, for example to properly maintain the common property;
2. exercises a power or makes a decision for an improper purpose, for example conferring a benefit upon a particular Lot owner or group of Lot owners in a manner not authorised by the SSMA;
3. fails to exercise a power or make a decision to prevent a contravention by Lot owners and occupiers of their obligations under the SSMA, including the Lot owners and occupiers obligation to comply with the by-laws; and
4. raises levies and takes or defends legal action on behalf of the owners corporation in circumstances where such action is unnecessary or not in the interests of the owners Corporation or the Lot owners as a whole.

- 15 In the SSMA, s 238 is in the following terms:

(1) The Tribunal may, on its own motion or on application by an interested person, make any of the following orders-

- (a) an order removing a person from a strata committee,
- (b) an order prohibiting a strata committee from determining a specified matter and requiring the matter to be determined by resolution of the owners corporation,
- (c) an order removing one or more of the officers of an owners corporation from office and from the strata committee.

(2) Without limiting the grounds on which the Tribunal may order the removal from office of a person, the Tribunal may remove a person if it is satisfied that the person has-

(a) failed to comply with this Act or the regulations or the by-laws of the strata scheme, or

(b) failed to exercise due care and diligence, or engaged in serious misconduct, while holding the office.

Evidence of the applicant

16 Exhibit A contained submissions in relation to each aspect of these proceedings, including a chronology for each of those aspects plus 37 attachments.

Evidence of the first respondent

17 Exhibit 1 comprised her statutory declaration, submissions and 23 attachments.

Evidence of the second respondent

18 Documents numbered 1 to 7 were included in Exhibit 2 under cover of a letter dated 03 May 2021 signed by the first respondent in her capacity as secretary of the second respondent.

Evidence of the third respondent

19 Helpfully, the third respondent's documents were also paginated and began with a statutory declaration, followed by a submission on each of the five s 232 topics, the s 237 and s 238 issues and then 9 attachments.

Evidence of the fourth respondent

20 The fourth respondent also provided a statutory declaration, subdivided by reference to each of three sections of the SSMA, plus 12 pages of attachments.

Other evidence

21 Exhibit 5 served to provide the Tribunal with a copy of the licence and proposed managing agency agreement for Strata Plus Pty Ltd, being the strata managing agent proposed by the first respondent.

22 The minutes of the AGM, held on Saturday 07 August 2021 between 3.04pm and 5.57 pm, which became Exhibit 6, reveal that, of the 34 occasions when a

vote was taken at that meeting: (1) 23 decisions were unanimous, (2) 3 times the votes were split 3-1, and (3) 8 instances where the votes were divided equally (ie 2-2).

- 23 Noting that the accuracy of the section of the minutes relating to the election of the SC is disputed, that section reads:

That the members of the Strata Committee be elected

1 nomination declared and accepted for a 1 member committee.

Confirmed member of the committee is Lot 2 (co-owner) Jeremy Chan

Noted:

Lot 1 (Jane) elected Lot 4 (Vikki) as Chairperson, Lot 2 (Linda) as Secretary, Lot 1 (Jane) as Treasurer – all declined as no nomination made for the committee

Lot 3 (Alison) rejects Lot 2 co-owner (Linda) as member

Lot 4 (Vikki) abstained

- 24 Those minutes do not record any voting and that it appears the word “*elected*” in that section of those minutes should read “*nominated*”. Further, those minutes have not been adopted at a subsequent meeting and have thus not yet been confirmed as an accurate record.

Oral submissions

- 25 It is not feasible to summarise the oral submissions of four speakers in relation to the various issues in these proceedings other than to indicate the position of the lot owners in summary form.
- 26 In relation to what has been referred to as the s 232 topics, the applicant sought an order in relation to each of the five topics each of which the first respondent opposed. The position of the third and fourth respondents is set out below, when dealing with each of those topics.
- 27 The application for the appointment of a compulsory strata managing agent under section 237 was opposed by the fourth respondent but was otherwise supported.
- 28 As to section 238, being the application to remove the first respondent from the strata committee, this request of the applicant was supported by the third respondent but was opposed by the first and fourth respondents.

Consideration

29 In reaching a decision in relation to this application, the Tribunal has considered the entirety of the documents admitted as evidence and the submissions. These reasons focus on the material central to the issues but, to the extent that any evidence or a submission is not referred to, it should not be assumed that evidence or submissions has been ignored.

30 That approach is consistent with what was said by Allsop P in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2]:

[A] judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving the overall controversy. The need for coherent and tolerably workable reasons sometimes requires a truncation of reference and expression. Judgement writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved ...

31 It is convenient to first deal with what might be called the five s 232 topics before considering the s 237 and s 238 issues.

First topic – Whether to invalidate a resolution requiring payment of \$2,400

32 The third respondent indicated that she abstained from voting on this resolution as she was concerned it may set a precedent which may “*serve to aggravate the stress levels and inharmonious relationship within this very small group of Owners*”. The fourth respondent said she supported the recovery of the \$2,000 but not the \$400 interest.

33 Having considered not only the evidence but also the submissions made by the parties, the Tribunal makes the following findings:

- (1) In mid-2018 work was done on the shower recess in the *en suite* bathroom in unit 1.
- (2) At that time, the applicant was the occupant of that unit, and her father was the owner of that unit.
- (3) At that time the applicant held the position of treasurer, and her father held the position of secretary.

- (4) By cheques dated 28 May and 12 June in 2018, each for \$1,000, an amount of \$2,000 was paid for that work from the second respondent's funds.
- (5) Those cheques were signed by the applicant and her father.
- (6) Those payments were related to an 11 June 2018 invoice for \$2,000.
- (7) No other supporting documents have been provided.
- (8) Thus, there is no documentary support for the proposition that the work was a matter for which the second respondent was responsible.
- (9) At the general meeting held on 30 January 2021 a resolution was passed for the applicant to pay the second respondent \$2,400.
- (10) That amount comprised the \$2,000 paid from the second respondent's funds plus two years of interest at 10% pa.
- (11) As a 30 January 2021, it was more than two years since the money had been paid from the second respondent's funds.

34 Section 87 of the SSMA, which is titled "*Orders varying contributions or payment methods*" reads:

(1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable-

- (a) an order for payment of contributions of a different amount,
- (b) an order for payment of contributions in a different manner.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.

35 The decision to pass the resolution at the AGM could have been based on (1) the applicant, who now owns **unit 3**, obtaining the benefit of that work, or (2) that the applicant, as treasurer, should not have signed the cheques whereby payment was made for that work without proper supporting documents and/or approval due to she and her father both having a personal interest in the work the subject of the payment of that amount of \$2,000. The amount cannot be said to be either inadequate or excessive, and the manner of payment is not unreasonable.

36 Noting that s 85 of the SSMA provides for simple interest on unpaid contributions to be payable at the rate of 10% per annum, the addition of \$400

for interest cannot be considered unreasonable when seeking reimbursement of an amount that should not have been paid from the second respondent's funds more than two years prior to that decision.

- 37 The applicant has not made out a case under s 87 which is the specific provision enabling a variation of this resolution and the Tribunal is not satisfied it should exercise its discretion in favour of making an order under the broad power conferred by s 232. In those circumstances, the applicant, who bears the onus of proof, has not satisfied the Tribunal that the resolution passed on 30 January 2021 should be set aside. As a result, the request for an order to overturn that resolution is rejected.

Second topic – Approval for owner of unit/lot 1 to park in front of that lot's garage

- 38 Item 3 was recorded in the minutes of the AGM held on 30 January 2021 as follows:

3. REVIEW OF BY-LAWS

That the Owners Corporation RESOLVE to review the Strata By-Laws, with particular attention to

By-Law 2 – Vehicles

“An owner or occupier of a lot must not park or stand any motor or other vehicle on common property except with the written approval of the Owners Corporation.”

Motion CARRIED

RESOLVED to issue “Notice to Comply” to Owners/tenants who are consistently in Breach of the registered By-Laws.

Refer Attachment B – Factsheet Regarding By-Law Enforcement.

- 39 Subsequently, a notice which set out the wording of By-Law 2 was placed on the notice board. That notice contained the words “*STRICTLY NO PARKING IN FRONT OF GARAGES*”.
- 40 On 07 February 2021 the fourth respondent, being the owner of lot 1, applied for permission to park a specified vehicle “*permanently in front of Lot 1's garage*.”

41 On 08 March 2021 the first respondent, who held the position of secretary, sent an email to the third respondent who replied that she did not object to the request.

42 On 13 March 2021 an email was sent by the then secretary to the fourth respondent, the body of which read as follows:

Your application for permanent parking of your vehicle in front of your garage has been approved by the Owners Corporation committee.

Please print the attached document and place it on the Strata Noticeboard for notification to all building residents confirming your approval.

43 A revised notice was then placed on the notice board which added the words: "Approval granted to Rego ***** (outside Lot 1 garages)".

43 The applicant contended that, by reason of section 112 of the SSMA, a licence granting use of common property required a special resolution of the owners corporation, ie the second respondent.

44 The first respondent contended that the written application from the fourth respondent was approved by the SC members, at that time being the second and third respondents.

45 The third respondent said that (1) the need for an application was discussed at the AGM, (2) the fourth respondent advised the meeting that an application would be made, and (3) that she was under the impression that approval by the SC was sufficient.

46 The position of the fourth respondent was that the procedure was discussed at the AGM, her application was approved by emails and no meeting was required.

47 Set out below is the wording of s 112 of the SSMA relevant to this topic:

(1) An owners corporation may grant a licence to an owner or occupier of a lot in a strata scheme or another person to use common property in a particular manner or for particular purposes if the owners corporation has approved the granting of the licence by a special resolution.

(2) A licence may be granted subject to terms and conditions.

- 48 It is also noted that s 147 of the SSMA enables a common property rights by-law to confer either a right of exclusive use or special privileges but requires a special resolution of the owners corporation.
- 49 The Tribunal is satisfied that the applicant has demonstrated technical merit in relation to this topic in that the decision (1) was made by the SC and not by the owners corporation, and (2) there was no special resolution. However, in circumstances where the application of the fourth respondent appears to have the support of three of the four lot owners, it would appear holding a meeting and passing an appropriately worded resolution would only be a formality.
- 50 Clearly, s 232(1)(e) provides the Tribunal with the power to make a decision which the owners corporation could have made by special resolution in order to comply with by-law 2 and s 112 of the SSMA. Since s 232 commences with the words "*The Tribunal may ...*", even where the Tribunal has the power to make an order, it still has a discretion as to whether such an order should be made.
- 51 There does not appear to be any utility in setting aside the SC decision in relation to this topic and/or requiring a meeting of the owners corporation to be convened to consider this topic when there are only four lots and three lot owners clearly support the request of the fourth respondent. In such circumstances, the Tribunal is satisfied that an order should be made to regularise the approval given by the SC by granting a licence that will serve to confirm that decision, noting that such a licence may be revoked by a special resolution of the owners corporation.

Third topic – Provision of ‘financial assistance’ of \$340 to the owners of lot 1

- 52 The minutes of the AGM held on 12 September 2020 record that a resolution was passed which granted financial assistance of \$340 to Lot 1 for bathroom waterproofing rectification works. After referring to various communications on this topic, the applicant suggested it was not clear either what type of financial assistance was provided or how that amount was determined. Further, it was contended that the explanations she received from the first and fourth respondents were contradictory.
- 53 It was the first respondent’s case that this is a matter which was discussed and agreed at a meeting which the applicant did not attend, despite being provided

with the opportunity to attend either in person or via a video link facility. The fourth respondent indicated that the three people who attended that 12 September 2020 meeting waited 20 minutes for the applicant to attend but she failed to do so.

54 From the evidence provided, the Tribunal makes the following findings:

- (1) The owner of Lot 1 incurred a cost of more than \$2,000 for repairs to damage to common property.
- (2) At a meeting held on 12 September 2020 it was resolved, after discussion, that the owners corporation would contribute \$340 towards that cost.
- (3) That meeting also resolved to increase the quarterly Sinking Fund levy by \$170.
- (4) The applicant did not attend that 12 September 2020 meeting, despite being provided with an opportunity to do so.

55 Had the applicant attended that general meeting she would have not only heard the discussion which led to that decision but also would have been able to speak and vote either for or against the resolution she now challenges in these proceedings.

56 The decision to grant what was termed 'financial assistance' of \$340 was plainly partial compensation and the fact that the amount equalled two quarters of the increased Sinking Fund levy is of no moment. This is another matter where the applicant, who bears the onus of proof, has failed to establish that the decision made at a general meeting was unreasonable. As a result, she is not entitled to any order in relation to this topic.

Fourth topic – Failure to attend to common property repairs

57 It is not necessary for the Tribunal to delve into questions of who said what to whom and when, which would only serve to reinforce the damaged relationships which have led to these proceedings. The following findings are sufficient to indicate why no order is warranted in relation to this topic:

- (1) Lot 3, being the applicant's unit, located upstairs at the front of the building, sustained bathroom ceiling damage.
- (2) That damage was caused by a roof leak.
- (3) An insurance claim was made.

- (4) A report obtained by the insurer identified the cause.
 - (5) Three quotes for the requisite repair work were then obtained.
 - (6) Arrangements have been made for that work to be carried out.
- 58 While the time taken to achieve repair of a matter that was first reported just over a year prior to the hearing is longer than would normally be expected, the factors which gave rise to that delay included difficulties in contacting the occupant of the applicant's unit. Proper and prompt functioning of a strata scheme requires not only compliance with obligation to repair and maintain (set out in s 106 of the SSMA) but also maintenance of the strata roll. If telephone contact details are not provided then it must be recognised that, in case of an emergency, personal contact or an email are the only options.
- 59 It appears that the repair of the ceiling has not yet been finalised. However, that will depend on the willingness of the occupant of Lot 3 to provide access, movement restrictions imposed due to the COVID-19 pandemic and whether this strata scheme is to be administered by a strata managing agent appointed by the Tribunal or by a new SC, being an issue considered below.
- 60 The applicant has not established any basis for an order in relation to this topic.

Fifth topic – Whether the first respondent should be required to reimburse \$495

- 61 The first respondent submitted an invoice, the effect of which was to seek \$450 plus GST for preparing the preparation of financial statements, budgets and forecasts for the AGM that was held on 12 September 2020. At that meeting, a resolution was passed to approve the payment of that invoice.
- 62 Payments to officers of an owners corporation are permitted by s 46 of the SSMA which provides:
- An owners corporation may pay a person who is an officer of the owners corporation or another member of the strata committee of the owners corporation an amount determined by the owners corporation at an annual general meeting in recognition of services performed by the person for the owners corporation during the period since the last annual general meeting.
- 63 It is noted (1) that the payment was permitted by the SSMA, even if the person paid does not hold a licence to act as a strata managing agent, (2) that there

was compliance with the requirements of s 46 in that the amount was determined at an AGM and related to services provided during the period, and (3) that this appears to have been a one-off payment to a person who carried out a lot of other work at no charge.

- 64 The applicant, who appears to have chosen not to attend the AGM at which that decision was made by 3-0 vote, has not satisfied the Tribunal that the decision to pay was anything either irregular or unreasonable. Accordingly, the Tribunal determines that no order should be made in relation to this topic.

Whether to appoint a strata managing agent – s 237

- 65 The applicant's written submissions referred to the voting situation which, for this strata scheme, involves four lots with each lot owner having the same number of unit entitlements. Her case was based on allegations that the first respondent did not, when she held the position of secretary, exercise the functions of that position with due care and diligence and for the benefit of the owners corporation.
- 66 In other words, it was alleged by the applicant that the first respondent's conduct as secretary breached s 37 of the SSMA. Reliance was placed on the matters raised by the applicant in support of an order against the first respondent under s 238 of the SSMA. Oral submissions of the applicant did not provide any additional reasons for a s 237 appointment.
- 67 Matters alleged by the applicant as against the first respondent may be summarised as follows:
- (1) The five topics considered above.
 - (2) The first respondent claiming to be the strata managing agent.
 - (3) The first respondent obtaining finance to pay for the annual insurance premium.
 - (4) The first respondent invalidating the applicant's proxy for the AGM held on 22 August 2020.
 - (5) Improper use of the common seal by the first respondent.
 - (6) Threats of legal action against her by the first respondent.
 - (7) "*A long history of acrimony, deep seated discord*" between the first respondent and the applicant.

- 68 The first respondent's written submissions suggested that the current position was due to the applicant's conduct, referred to the democratic vote of lot owners and opposed the appointment of the strata managing agent suggested by the applicant. It is noted that the first respondent's reply to the matters listed in the previous paragraph took the form of raising matters said to have occurred during the period when the applicant's father owned Lot 3. Oral submissions of the first respondent went to the question of who should be appointed rather than whether an appointment should be made.
- 69 The third respondent's written and oral submissions referred to the animosity and distrust that currently exists between the applicant and first respondent and the stress caused to all lot owners by ongoing disputes. She said that she did not wish to hold any position on the SC which meant that the applicant and first respondent would become members of the SC if a strata managing agent was not appointed. These written submissions requested that any appointment not be for all functions as she was of the view that lot owners should still be able to determine any increase in levy contributions and the allocation of funds for work to be carried out, seemingly a reference to expenditure from the Sinking Fund.
- 70 The fourth respondent expressed concern at the resulting cost of an appointment by the Tribunal and favoured self-management.
- 71 In relation to this issue, the only reasons advanced as a basis for the appointment of a strata managing agent are the matters raised by the applicant against the first respondent. A close consideration of those matters does not reveal what can be said to be major issues. However, they do reflect clear animosity between the applicant and the first respondent.
- 72 By reference to the circumstances in which an order under s 237 may be made, it appears that the only basis which could apply is s 237(3)(a), namely that the management of the strata scheme is either not functioning or is not functioning satisfactorily.
- 73 It is clear the strata scheme is functioning. Indeed, a consideration of the minutes of the AGM held on 07 August 2021 suggests a standard of administration well above that seen by strata scheme which has not appointed

a strata manager. While it could be said that the strata scheme is not functioning in that there was no appointment of SC members at the AGM held on 07 August 2021, that situation appears to have arisen because it was, at that time, known there would be a hearing in the Tribunal less than two weeks after that meeting at which hearing a s 237 application would be considered.

- 74 Accordingly, the question becomes whether it is functioning satisfactorily. In circumstances where (1) the person who chaired the SC during the year prior to the recent AGM says she is no longer willing to be on the SC because that involves stress levels that affect her health, (2) there is a deadlocked vote on eight out of 34 resolutions, (3) only one person is appointed to the SC, and (4) the validity of what is set out in the minutes in relation to that appointment is questioned, the Tribunal is satisfied that the strata scheme is not functioning satisfactorily.
- 75 In relation to those deadlocked votes, as indicated in *Hoare*, the mere fact that lot owners disagree on matters is not sufficient to warrant an order being made under s 237. However, here there were eight occasions out of 34 resolutions when there was a 2-2 vote although in one of such occasion an amendment resulted in a unanimous decision. While two of the remaining seven occasions related to the question of whether a managing agent should be appointed, the remaining occasions related to significant matters, namely whether there should be restrictions placed on the SC, aspects of levy collection, whether to compensate SC members for their service and a matter relating to the repair of common property. Those are significant matters.
- 76 In reaching that decision, the Tribunal has borne in mind that the appointment of a compulsory strata manager is a serious measure that should not be taken lightly as it removes the democratic process established by the SSMA for an owners corporation to govern itself, a point that was noted in *Mortlock*. In addition, the Tribunal has taken into consideration there will be a significant financial imposition on each lot owner of more than \$1,000 per annum for each lot owner as a result of an order being made under s 237 since there are only four lots in the strata scheme the subject of these proceedings.

- 77 The next question is whether the strata manager should have all the functions of the owners corporation and whether that manager should also have all the function of the SC. As the problems upon which the order is based appear to relate to the conduct of the SC as well as the voting of the owners corporation, and as there does not appear to be any practical basis for restricting the exercise of those functions, the Tribunal is satisfied that the appointment should be on an unrestricted basis.
- 78 Finally, it is necessary to consider what should be the term of the appointment. While an appointment can be made for a period not exceeding two years, the Tribunal considers that one year will be a sufficient period and that the period should end at the commencement of the next AGM so that a new SC can be elected at that meeting.
- 79 Within the applicant's documents (Exhibit A) was a copy of a 24 October 2020 email which was sent by the third respondent in which she expressed her desire for the relationship amongst the lot owners to be rebuilt and asked: *"Can we draw the line of what was the past and start on a clean slate moving forward? Whatever we need to get done, we can get those done without referring to history anymore. What do you think?"*
- 80 When one lot owner refers to the stress levels affecting her health which she experienced while chairing the SC due to the acrimony between two other lot owners having reached the point where she does not wish to be a member of the SC, there is a need for change in that level of acrimony and the appointment of a strata manager by the Tribunal will not, of itself, result in such a change.
- 81 It is not the Tribunal's role to try to fix problems but to assess evidence and apply the relevant statutory provisions. As a result, the order that will be made under s 237 of the SSMA will only address the effect of the problem that has arisen and not its cause. Hopefully, the individual lot owners will address the cause prior to the expiry of the term of the appointed strata manager. If not, then the position will not be different when the term of the appointed strata manager comes to an end.

- 82 The remaining matter that requires consideration is who should be appointed? As to the applicant's suggestion of Starr Partners, the 10 February 2021 letter consenting to appointment: (1) is only a quotation, (2) does not indicate awareness that the role would be that of a compulsory strata manager, (3) does not attach a copy of a licence, and (4) does not provide a copy of the proposed managing agency agreement.
- 83 In contrast, Exhibit 5 contains a letter dated 16 August 2021 which consents to a compulsory appointment, a copy of the licence for Strata Plus Pty Ltd and a copy of the proposed managing agency agreement. Thus, the Tribunal considers Strata Plus Pty Ltd should be the appointed strata manager.
- 84 By way of summary, the Tribunal determines that Strata Plus Pty Ltd should be appointed as strata managing agent for the period from the date of this order until the commencement of the next AGM and that it should exercise all the powers of the owners corporation and strata committee.
- 85 Whether to remove the first respondent from the strata committee – s 238
- 86 This aspect of the proceedings no longer requires consideration since the first respondent is no longer a member of the SC.

Orders

- 87 For the reasons indicated above, the orders that will be made to finalise this application are as follows:
- (1) An order, under ss 237(1)(a) and 237(2)(a) of the Strata Schemes Management Act 2015, appointing Strata Plus Pty Ltd as strata managing agent, from the date of this order up to the commencement of the next Annual General Meeting of the owners corporation, to exercise all the functions of the owners corporation and all the functions of the chairperson, secretary, treasurer and strata committee of the owners corporation in relation to strata scheme number 36811 upon the terms and conditions set out in the Strata Management Agency Agreement provided under cover of its letter dated 16 August 2021.
 - (2) An order, under s 229 of the Strata Schemes Management Act 2015, that a copy of these orders and reasons be provided by the registry to Strata Plus Pty Ltd via email to XXX, marked for the attention of Mr David Ferguson.
 - (3) An order, under s 232(1)(e) of the Strata Schemes Management Act 2015, granting a licence to the owner of Lot 1 to park the vehicle with registration XXX outside the Lot 1 garages.

(4) The application is otherwise dismissed.

A handwritten signature in black ink is positioned to the left of the official seal of the NSW Civil & Administrative Tribunal. The seal is circular, featuring the text 'NSW CIVIL & ADMINISTRATIVE' around the top and 'TRIBUNAL' at the bottom, with a central emblem.

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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