



Civil and Administrative Tribunal  
New South Wales

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Case Name: Maple v The Owners - Strata Plan No. 8950

Medium Neutral Citation: [2021] NSWCATCD 108

Hearing Date(s): 3 September 2021

Date of Orders: 19 November 2021

Decision Date: 19 November 2021

Jurisdiction: Consumer and Commercial Division

Before: G Sarginson, Senior Member

Decision: (1) The application is dismissed

Catchwords: LAND LAW — Strata schemes — Appointment of compulsory strata manager — Whether grounds for compulsory appointment established

Legislation Cited: Strata Scheme Regulation 2016 (NSW)  
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Bischoff v Sahade [2015] NSWCATAP 135  
Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45

Texts Cited: Nil

Category: Principal judgment

Parties: Allan Maple (Applicant)  
The Owners - Strata Plan No. 8950 (Respondent)

Representation: Applicant (Self-Represented)  
K Yanez-Forrest (Respondent)

File Number(s): SC 20/41336

Publication Restriction: Nil

## REASONS FOR DECISION

- 1 This is an application by a Lot owner in a strata scheme located in the inner-west of Sydney, NSW for appointment of a compulsory strata manager under s 237 of the *Strata Schemes Management Act 2015* (NSW) ('the SSMA').
- 2 The strata scheme building is located in close proximity to Sydney Harbour. Common property of the strata scheme includes a sandstone sea-walls and a wooden boatshed has been constructed on common property. The strata scheme comprises of 10 Lots and common property.
- 3 The land of the strata scheme slopes down to the harbour. There are a number of sandstone retaining walls upon the land, including a large retaining wall.
- 4 Between approximately June 2017 and 31 August 2020 the applicant was a member of the strata committee of the owners corporation. He was Chairperson of the strata committee from 24 October 2018 to 31 August 2020. The applicant did not nominate for election to the strata committee at the annual general meeting of the owners corporation on 31 August 2020.
- 5 At the annual general meeting of the owners corporation on 31 August 2020 a strata committee that included Ms Yanez-Forrest (Secretary) and Mr Orchard (Chairperson) was elected. They remained elected strata committee members after the Annual General Meeting on 24 August 2021, plus 4 other Lot owners.
- 6 On 23 September 2020, the applicant filed proceedings in the Tribunal.
- 7 The matter was listed for a directions hearing on 17 February 2021. At that directions hearing, the Tribunal made procedural directions regarding the filing and serving of evidence and submissions. The Tribunal set the matter down for hearing.
- 8 The matter was listed for hearing on 24 May 2021 before Senior Member Blake. The hearing was adjourned, for reasons that relevantly included the parties' failure to comply with procedural directions.
- 9 The matter was then listed for hearing at the Tribunal on 3 September 2021. The hearing was conducted by audio-visual link. The applicant appeared and gave evidence. He was not cross examined by the respondent. Ms Yanez-

Forrest gave evidence. She was briefly cross examined by the applicant. The respective parties then made oral submissions.

- 10 The vast majority of the evidence was the documents of each party. Both parties had filed and served extensive documentary evidence and written submissions.
- 11 The applicant had filed and served documentary evidence and submissions on 9 December 2020; 3 February 2021; 2 March 2021; 15 June 2021; 22 June 2021 (submissions) and 31 August 2021.
- 12 The documentary evidence and submissions of the applicant exceeded 540 pages.
- 13 The respondent had also filed and served extensive documentary evidence and submissions. The respondent's documents and submissions were filed on 27 January 2021; 24 February 2021; 14 May 2021 (submissions and a chronology); 4 June 2021; 15 June 2021 (submissions) and 31 August 2021.
- 14 The respondent's documents and submissions exceeded 600 pages.

## CONSIDERATION

- 15 As a Lot owner in the strata scheme, the applicant is an "interested person" under s 226 of the SSMA and has standing to bring the application seeking compulsory appointment of a strata manager.
- 16 Section 237 of the SSMA states:

### **237 Orders for appointment of strata managing agent**

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

- (a) to exercise all the functions of an owners corporation, or
- (b) to exercise specified functions of an owners corporation, or
- (c) to exercise all the functions other than specified functions of an owners corporation.

**(2) Order may confer other functions on strata managing agent** The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—

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

**(3) Circumstances in which order may be made** The Tribunal may make an order only if satisfied that—

- (a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or
- (b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
- (c) an owners corporation has failed to perform one or more of its duties, or
- (d) an owners corporation owes a judgment debt.

**(4) Qualifications of person appointed** A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must—

- (a) hold a strata managing agent's licence issued under the *Property and Stock Agents Act 2002*, and
- (b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

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

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

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

**(8) Persons who may make an application** The following persons may make an application under this section—

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

- (b) a person having an estate or interest in a lot in the strata scheme concerned or, in the case of a leasehold strata scheme, in a lease of a lot in the scheme,
- (c) the authority having the benefit of a positive covenant that imposes a duty on the owners corporation,
- (d) a judgment creditor to whom the owners corporation owes a judgment debt.

- 17 The applicant's documents contained the details of the licensed agent and terms and conditions whom the applicant sought appointment as a compulsory strata manager in accordance with s 237 (4) and (5) of the SSMA.
- 18 The principles regarding whether or not a compulsory strata manager should be appointed are well established. In *Hoare and Ors v The Owners-Strata Plan No 73905* [2018] NSWCATCD 45 the Tribunal stated at [199]-[200]:

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

In respect of s 237 (3) (a) of the SSMA 2015, the Appeal Panel of the Tribunal stated in *Bischoff v Sahade* [2015] NSWCATAP 135 (*'Bischoff'*) at [22]:

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

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

- 19 The Tribunal must be satisfied, based on sufficient evidence, that one or more of the matters set out in s 237 (3) (a)-(d) has occurred, and, if so, there are appropriate discretionary reasons for the appointment of a compulsory strata manager. The exercise of that discretion must take into account the fact that appointment of a compulsory strata manager is a serious matter.

- 20 An applicant may, for example, provide sufficient objective evidence to satisfy the Tribunal that one of the matters set out in s 237 (3) (a)-(d) has occurred, but fail to satisfy the Tribunal that the nature or duration of the actions or inactions of the owners corporation (or the level of dysfunctionality) does not justify the appointment of a compulsory strata manager.
- 21 Further, a relevant matter is whether, despite past inadequacies of the management of the owners corporation that involve failure to comply with obligations under the SSMA and/or the *Strata Schemes Regulation 2015* (NSW) there has been a recent change in behaviour involving compliance, such as the recent election of a new strata committee that has adopted an approach that accords with ensuring the owners corporation complies with its obligations; and whether any previous “dysfunctionality” has improved.
- 22 The applicant bears the onus of establishing that a compulsory strata manager should be appointed. The Tribunal focusses upon the objective evidence. It is axiomatic that a Lot owner who is making an application for compulsory appointment of a strata manager is subjectively dissatisfied with the current management of the owners corporation. However the matters set out in s 237 (3) of the SSMA and the discretionary considerations as to whether a compulsory strata manager should be appointed are not established merely because of the subjective belief of a Lot owner that management of the owners corporation is, or has been, inadequate.
- 23 The matters raised by the applicant as to why a compulsory strata manager should be appointed are summarised in the applicant’s outline of submissions dated 13 June 2021 (pp 324-331 of the applicant’s documents) and 21 June 2021 (pp 485-489 of the applicant’s documents). They are:

*Unauthorised Changes to Common Property and Inadequate Strata Records*

- 24 The applicant asserts there has been a long history of works being performed by Lot owners to alter common property without any applicable common property rights by-laws being passed; and without local Council approval.
- 25 The applicant, in particular, points to a verandah, timber deck and stair structure that was installed by the owner of Lot 1. The applicant asserts that

the “timber deck and stair structure inhibits repair of a supporting retaining walls”.

26 The documentary evidence provided by the parties does not clearly indicate when such works were performed. However, it appears that alteration of common property by Lot 1 is of longstanding duration, as there is reference in the applicant’s documents to a “stop-work” notice issued by the local Council on the owner of Lot 1 on 31 October 1990.

27 The documents of both parties contain a copy of the minutes of an Extraordinary General Meeting of the owners corporation dated 29 November 2019. At that meeting a resolution was passed that the owner of Lot 1:

...remove the unauthorised timber structure attached to Lot 1 and proceed with required repairs to remediate the retaining walls and access to the waterfront garden area to repair and reinstate the common property...

28 The applicant’s submissions also refer in a general way to other alterations of common property that have occurred over the years without consent of the owner corporation and the passing of common property rights by-laws; but it is the alterations to Lot 1 that are referred to in detail.

29 It is unnecessary for the Tribunal to make detailed factual findings about what common property has been altered with consent and when such alterations occurred because of the concession of the owners corporation in its submissions filed on 27 January 2021 (pp 1-8).

30 The owners corporation relevantly states as follows:

Many...lots have additions or renovations which do not have formal owners corporation and/or Council approval. Most of these works pre-date current owners, and many have implications for common property. Removing these structures would incur significant cost and unnecessarily interfere with owners use and enjoyment of the property. At least one owner has threatened legal action if removal is initiated.

Rather than removing these structures, the current strata committee has sought legal advice and plans to prepare a retrospective works by-law which makes each Lot owner responsible for works which have already been conducted in their Lot (including the relevant Council approval).

...

31 The submission of the owners corporation states that at an Extraordinary General Meeting on 12 January 2021, a common property rights by-law under

s 142 of the SSMA was passed to retrospectively approve the alterations to common property by Lot 1. A copy of the minutes of that meeting was contained in the documentary evidence of the owners corporation.

- 32 The applicant, in his submissions of 1 March 2021, accepts that a common property rights by-law in respect of the alteration of common property was passed at the general meeting of the owners corporation on 12 January 2021; but asserts “the by-law is invalid as does not address the requirements of the SSMA Section 108. There is no mention in the by-law of the works improving or enhancing common property”.
- 33 The applicant is not seeking an order that the common property rights by-law be declared invalid under s 150 of the SSMA; or that the Motion passing the common property rights by-law at general meeting of the owners corporation on 12 January 2021 be declared invalid under s 24 (1) of the SSMA. The applicant identifies no irregularity in the holding of the meeting or the passing of the Motion on 12 January 2021.
- 34 The applicant’s submission that the common property rights by-law regarding Lot 1 “does not meet the requirements” of the SSMA is incorrect. Section 108 of the SSMA does not require a common property rights by-law use the specific words “improving or enhancing the common property”.
- 35 Rather, if a Lot owner is adding to, enhancing, or erecting a new structure on common property for the purpose of improving or enhancing the common property (under s 108 of the SSMA); or carrying out work on the common property (under s 111 of the SSMA) in respect of works that are more than cosmetic or minor (under ss 109 and 110 of the SSMA), the owners corporation must consent to the works by way of passing by special resolution a common property rights by-law under s 142 of the SSMA (that meets the requirements under ss 143 and 144 of the SSMA). That is what occurred at the general meeting of the owners corporation on 12 January 2021.
- 36 Prior to the general meeting on 12 January 2021, there were Motions pertaining to the common property alterations by Lot 1. At a general meeting on 25 November 2019, a Motion was passed to take action in NCAT against the owner of Lot 1. A subsequent Motion was passed deferring action being



taken. The owner of Lot 1 had previously unsuccessfully proposed a common property rights by-law at a general meeting on 13 July 2020. A previous Motion to pass a common property rights by-law by the owner of Lot 1 had been withdrawn at a general meeting on 24 February 2020.

- 37 However, those events have been superseded by the passing of the common property rights by-law at the general meeting on 12 January 2021. The history of Motions being passed, or not passed, at general meetings of the owners corporation is part of the democratic process of Lot owners proposing Motions and debating them at general meetings. It is not, in the circumstances, of this matter, reflective of dysfunction in the management of the strata scheme.
- 38 The owners corporation submits that, in respect of other historical alterations to common property, the current strata committee “has sought legal advice and plans to prepare a retrospective works by-law which makes each Lot owner responsible for already been conducted to their Lot (including obtaining relevant Council approval).
- 39 The Tribunal is satisfied that in the past there have been alterations to common property by Lot owners without the consent of the owners corporation and the passing of appropriate common property rights by-laws.
- 40 However, alterations to common property by Lot owners to common property can be (and often are) retrospectively authorised by the passing of an applicable common property rights by-law under s 142 of the SSMA, and its subsequent registration. The Tribunal accepts that a common property rights by-law has been passed in respect of the alteration to common property by Lot 1.
- 41 It is not clear from the documentary evidence and the oral and written submissions of the parties whether the common property rights by-law in respect of Lot 1 passed at the general meeting on 12 January 2021 has been registered, but there is nothing to infer that it has not been registered.
- 42 There is nothing inconsistent with the obligations of the owners corporation under the SSMA or its Regulations for the owners corporation to adopt a collaborative approach so that common property right by-laws are drafted and

put before General Meetings of the owners corporation voted upon. This has occurred in respect of Lot 1. To the extent that there are other unauthorised alterations of common property by Lot owners, the owners corporation intends to take a similar approach.

- 43 If such Motions are passed by special resolution, the alterations to common property will be regularised in accordance with ss 108, 111, and 142 of the SSMA. If such Motions are not passed, the relevantly affected Lot owners may have rights to make an application to the Tribunal for an order under s 149 of the SSMA.
- 44 If no such Motions are put, nor is an Motion put forward at a general meeting for the owners corporation to take action in the Tribunal to seek the restoration of common property, then an issue may arise in the future as to whether the management of the owners corporation is dysfunctional under s 237 (3) of the SSMA.
- 45 However, the owners corporation is now clearly aware of its obligations under the SSMA (having obtained legal advice). There is also nothing preventing a Lot owner who seeks the owners corporation take action against a Lot owner in NCAT for failure to comply with ss 108, 111, and 142 of the SSMA from putting forward a Motion at a general meeting of the owners corporation that the owners corporation take action in NCAT to seek the restoration of common property.
- 46 The Tribunal is not satisfied that the failure of the owners corporation to take action against Lot owners for unauthorised alterations to common property in the circumstances of this matter warrants compulsory appointment of a strata manager. The current strata committee is clearly being active in resolving the issues regarding unauthorised works, and there is nothing unreasonably or inconsistent with the owners corporation's under the SSMA in the approach they have taken.
- 47 The applicant also asserts that alterations to common property have been performed without Development Consent approval by the local Council. However, the applicant (as are any other Lot owners) free to complain to the

local Council and for the local Council to determine whether or not to take action in this regard.

- 48 In respect of “inadequate strata records” the only “inadequacy” which the applicant clearly points to in his submissions is in respect of documenting unauthorised works to common property, which the applicant submits has affected the ability of the owners corporation to obtain insurance of common property. It is clear from the submissions of the owners corporation that alterations to common property have occurred in respect of a number of Lots (but the documents and submissions of both parties focus upon the works pertaining to Lot 1).
- 49 The duty on the owners corporation to keep records is set out in Part 10 of the SSMA (in particular ss 176-180) and in the *Strata Scheme Regulation 2016* (NSW) (‘the SSM Regulations’-for example, Reg 41). The Tribunal does not accept that the owners corporation has a duty to record every alteration or addition to common property, nor that any inadequacies in making records of such alterations falls within s 237 (3) of the SSMA in the circumstances of this matter.
- 50 The copious documents of each party do not indicate any deficiencies of the owners corporation to keep appropriate records in accordance with its obligations under the SSMA and SSM Regulations.

#### *Repair of Common Property-Seawalls and Retaining Walls*

- 51 In April 2016, part of the large retaining wall leading to the waterfront and seawalls on common property collapsed. The retaining wall is located on a slope. A pathway area has been fenced off due to safety reasons, subject to completion of the repairs.
- 52 Since that occurred, there has been a lengthy process involving repair to the retaining walls. That process has been complicated by the fact that the site is located within a Heritage Conservation Area under an Inner West Council Local Environment Plan, and works to the area require a Development Approval from Inner West Council. In August 2016, the loss adjuster for the owner’s corporation’s insurer recommended that the insurer not indemnify the owners corporation for damage and cost of repairs.

- 53 A Development Application for works to occur was lodged with Inner West Council on 16 February 2021. As discussed previously, Development Consent was issued by Inner West Council on 6 August 2021.
- 54 The applicant submits that the owners corporation “has mismanaged this initial phase of the works, taking 221 days from appointment of a project manager to lodgement of a Development Application” and that there will be further significant delays before repairs are complete because tenders will have to be obtained; a scope of works approved by the owners corporation; and a builder and engineer appointed to conduct the works.
- 55 The applicant submits that the owners corporation has failed to “ensure” the current project manager SafeOz (Aust) Pty Ltd (who were appointed at an Extraordinary General Meeting of the owners corporation on 13 July 2020) has “undertaken in a timely manner” work in the “project management brief” including installing safety barriers preventing access to the waterfront.
- 56 The applicant submits that a compulsory strata manager would “manage the project” of repairing the retaining walls more efficiently than the owners corporation and current strata committee.
- 57 The owners corporation submits (in its written submission of 21 January 2021) that there have been inadequacies in the past regarding the owners corporation complying with its duty to keep and maintain in a state of good repair the common property, but that the owners corporation is now taking action. A project manager has been appointed. There were some delays due to Inner West Council not being prepared to allow emergency works to be performed, but requiring a Development Approval to be lodged and approved before works can commence.
- 58 The owners corporation submits that the lodgement of the Development Application was not a straightforward process, requiring various expert reports including a geotechnical engineer (JK Geotechnics) and a heritage architect (Oikos Architects). The owners corporation asserts that since mid-2020 it has been proactive in obtaining expert reports and preparing a Development Application.

- 59 As discussed previously, a Development Application was lodged in February 2021. The applicant filed an objection to the Development Application, as is his right. On 6 August 2021, Development Consent was issued by Inner West Council. That Development Consent identifies the cost of works as \$190,000 to “repair and reconstruction of various retaining walls, restoration of parts of seawall and repair work to pathways and tree removal”.
- 60 In respect of the management of the rectification works, the owners corporation pointed out that a Motion had been passed at the Extraordinary General Meeting of the owners corporation on 12 January 2021 that the owners corporation “accept and endorse the Waterfront and Garage Retaining Walls Projects Brief” prepared by SafeOz (Aust) Pty Ltd, and had raised two special levies to fund the works (in addition to an existing amount of \$160,000 in the capital works fund) on 31 August 2020 and 8 February 2021 (both being special levies of \$50,000).
- 61 The owners corporation also referred to miscellaneous items where the applicant had submitted the owners corporation had failed to conduct repairs to common property, and set out the measures it was taking to conduct repairs (page 4 of respondent’s submissions filed on 14 May 2021).
- 62 Having considered the evidence and submissions of the parties regarding whether or not the owners corporation had failed to comply with its duties under s 106 of the SSMA in a timely manner, the Tribunal is not satisfied that any failure to comply is of such duration and magnitude that a compulsory strata manager should be appointed.
- 63 The Tribunal accepts that the repairs to the retaining walls are a complex issue, and there is no evidence to indicate that the failure to repair is creating a risk of damage to any Lot property. The owners corporation has taken significant measures since mid-2020 to advance the preparation and lodging of a Development Application; to appoint a project manager; and to raise special levies to fund the (at present) likely future cost of works. Such measures are consistent with an owners corporation that is managing its affairs in a manner sufficiently compliant with its obligations under the SSMA that appointment of a compulsory strata manager is not warranted.

- 64 Inner West Council has now issued a Development Consent. At the Annual General Meeting of 24 August 2021 the owners corporation passed a Motion to issue levy contributions of \$56,000 in respect of the Administrative Fund; and \$80,000 in respect of the Capital Works Fund. The next step is for tenders to be obtained and appropriate experts engaged to do the rectification works. There is nothing to indicate that the owners corporation will not follow the procedure of calling an Extraordinary General Meeting to consider this issue and enter into appropriate contracts.

### *Insurance*

- 65 The applicant submits that the owners corporation “has not since 30 May 2020 insured the strata plan as required by ss 160 and 164 of the SSMA due to the exclusion of high-risk items from all sections of the policy”.
- 66 The applicant states that on 4 May 2020 the owners corporation’s insurance broker advised that “due to the retaining walls issue” all insurers (including the current insurer) had declined to provide a quotation for insurance. The broker was only able to obtain insurance for 6 months with exclusions in respect of the retaining walls requiring repair and the “illegal” (sic) structures (i.e. the alterations to common property, in particular the alterations involving Lot 1).
- 67 The applicant states that in November 2020 four insurers declined to provide a quotation, and the broker could only obtain insurance for 6 months with an increased premium and exclusions regarding the retaining walls requiring repair and the “illegal” (sic) structures. In May 2021, the owners corporation obtained an insurance extension for a further 6 months on the same conditions, but the insurer indicated that it would not be prepared to offer a further renewal.
- 68 The applicant submits that appointment of a compulsory strata manager is required to “rectify the items excluded from the insurance policy”; to “produce a comprehensive report of changes to common property” and to “develop a contingency plan to negotiate with insurers.
- 69 The owners corporation submits that the insurance it has taken out is compliant with ss 160 and 164 of the SSMA. The owners corporation submits that the current insurance difficulties in respect of exclusions arise from past failures of management of the owners corporation (including the period the applicant was

a strata committee member) and that the owners corporation is working closely with the insurance broker to inform them of the measures being taken to repair common property (including the progression of the Development Application) and the regularisation of alterations to common property by Lot owners.

- 70 The owners corporation submits that it has been proactive in attempting to ensure difficulties in obtaining insurance are resolved. It further submits that the applicant has provided no evidence to establish that a compulsory strata manager would be able to obtain more extensive and cheaper insurance coverage than the owners corporation has been able to obtain through its broker.
- 71 The owners corporation also acknowledges that, if the strata scheme does become uninsured under ss 160 and 164 of the SSMA, then there would be very strong reasons to appoint a compulsory strata manager.
- 72 Under s 160 (1) of the SSMA, the owners corporation “must” obtain insurance in respect of a “damage policy” for the “whole of the building”. A “damage policy” is insurance covering the strata building if it is destroyed by fire, lightning, explosion or any other occurrence identified in the policy.
- 73 Under s 164 of the SSMA, the owners corporation “must” take out insurance in respect of workers compensation and public liability. However, s 164 does not state that such insurance cannot have exclusions, nor stipulate the duration of insurance or the appropriate premium.
- 74 The Tribunal is satisfied that the insurance that has been taken out by the owners corporation and remains current is insurance that complies with the requirements under ss 160 and 164 of the SSMA.
- 75 Further, the Tribunal also accepts the submission that the owners corporation is working proactively so that it continues to obtain insurance coverage in accordance with its obligations under ss 160 and 164 of the SSMA, with a view to being able to obtain insurance that does have the exclusion clauses that are currently in place. When repairs of the retaining walls occur and alterations to common property by Lot owners are regularised, insurance difficulties are likely to resolve.

- 76 The actions of the owners corporation in respect of insurance are consistent with an owners corporation whose management is operating in accordance with its obligations under the SSMA. Further, the Tribunal accepts the submission of the owners corporation that the applicant has not provided evidence that appointment of a compulsory strata manager would make any difference to the ability of the owners corporation to obtain insurance coverage.
- 77 At the Annual General Meeting on 24 August 2021, the issue of insurance was “reviewed” but the Minutes do not state what, if any, further action is to occur. As discussed previously, if insurance of a type required under ss 160 and 164 of the SSMA lapses and the owners corporation does not have the insurance required, that would be grounds for a future application for compulsory appointment of a strata manager.

*Financial Management-Inadequate Funds For Capital Works*

- 78 The applicant submits that the owners corporation has “not complied with the requirements of SSMA Section 79 (sic) to estimate with reasonable accuracy at each AGM how much money it will require to credit to its Capital Works Fund and to its Administrative Fund”.
- 79 The basis of this submission is, in essence, that the owners corporation has failed to impose adequate special levies for the likely cost of rectification of the retaining walls and associated works and expenses. The applicant describes the current Capital Works Fund approved at the Annual General Meeting on 31 August 2020 as “fiction”
- 80 The applicant asserts that the Special Levy of \$50,000 for works to the retaining walls (which was reduced from a proposal of \$100,000) passed at the Annual General Meeting on 31 August 2020; and further Special Levy of \$50,000 passed at the Extraordinary General Meeting on 8 February 2021 were grossly inadequate, in circumstances where the likely cost of rectification of the retaining walls and associated works was likely to range from a minimum of \$120,000 (estimated cost of the project manager SafeOz dated 28 August 2020) to \$650,000 (high range of potential cost identified by McDonnell Somers & Partners Consulting Engineers in February 2019). The applicant states that



the estimated cost of works by Oikos Architects in the Development Application submitted in February 2021 was \$190,000.

- 81 According to the applicant, a Quantity Surveyor should be engaged to provide an accurate costing of the scope of works (but noting that tenders have not yet been called for) and a compulsory strata manager should be appointed to ensure that there is appropriate financial management of the strata scheme.
- 82 The owners corporation submits that prior to the Annual General Meeting on 31 August 2020 the owners corporation estimated the monies it needed to credit to its Administrative Fund and Capital Works Fund. Contributions were levied for \$45,000 to the Administrative Fund; \$30,000 to the Capital Works Fund; and an additional Special Levy of \$50,000 in respect of future repairs to the retaining walls.
- 83 The owners corporation set out (at page 4 of its submissions filed on 27 January 2021) how such amounts were calculated. The owners corporation acknowledged that the levies were lower than initially proposed in the Annual General Meeting Agenda (which had allowed for an additional \$6,100 in administrative expenses and \$280,000 for the “waterfront remediation”) but the levies were amended down “to reflect SafeOz’s assessment of the waterfront works required and an initial builder’s estimate of \$120,000”. The owners corporation submits that the reduction was supported by the strata manager.
- 84 The owners corporation submitted that the Capital Works Fund Plan was passed at an Annual General Meeting in 2016. At the Annual General Meeting on 31 August 2020, a Motion was passed to review the Capital Works Fund Plan when there is a more accurate estimate of the likely cost of the remediation works to the retaining walls, and that an updated Capital Works Fund would be presented to the 2021 Annual General Meeting of the owners corporation.
- 85 The owners corporation acknowledged that a Motion for a further Special Levy of \$50,000 was passed at the Extraordinary General Meeting on 8 February 2021 (as well as Motions regarding the lodging of the Development Application and adopting an “indicative budget and timeframe” contained in the Development Application) but this was an appropriate amount based on expert

advice, and that the issue of whether further Special Levies needed to be imposed would be reviewed after Development Consent was obtained from Inner West Council, and tenders obtained from builders and other experts.

- 86 Having considered the documents and submissions of the parties, the Tribunal is not satisfied that the owners corporation is administering the financial affairs of the strata scheme in a manner inconsistent with its obligations under Part 5 of the SSMA. The Tribunal does not accept that the Special Levies that have been imposed in 2020 and 2021 are grossly inadequate or manifestly inconsistent with expert opinions regarding the likely future cost of the remediation works to the retaining walls (and the obtaining of Development Consent for such works).
- 87 It may be the case in the future that further Special Levies will need to be imposed in the future. However, such future contingencies do not mean the finances of the strata scheme have been mismanaged in the 2020-2021 period.
- 88 The owners corporation has appointed a project manager to administer the works. Whether or not a Quantity Surveyor should be appointed in the future is a matter that should appropriately be dealt with at future meetings of the owners corporation; and the applicant can put forward a Motion regarding that issue. The failure to appoint a Quantity Surveyor does not indicate any financial mismanagement of the strata scheme by the owners corporation.
- 89 In respect of review of the Capital Works Fund, the Minutes of the Annual General Meeting of the owners corporation dated 24 August 2021 state that the current 10 year Capital Works Fund was reviewed, and it was resolved that *“the plan be updated upon completion of the remedial works project relating to the retaining wall”*. There is nothing inappropriate about the owners corporation adopting this approach.
- 90 The Tribunal is not satisfied that there are inadequate funds in the Administrative Fund or Capital Works Fund for the owners corporation to meet its obligations.

### *Miscellaneous Issues*

- 91 In his submissions, the applicant raised various other issues. The focus of his application for compulsory appointment of a strata manager was, however, based on the issues that have previously been dealt with.
- 92 For example, the applicant was critical of the contents of the Development Application lodged by the owners corporation. However, Development Consent has now been issued by Inner West Council. It is unnecessary to further address the applicant's criticisms of the Development Application.

### **Conclusion**

- 93 The Tribunal is not satisfied any of the grounds put forward by the applicant warrant the appointment of a compulsory strata manager under s 237 of the SSMA.

### **ORDERS**

- (1) The application is dismissed.

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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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