Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No. 64807 v Sunaust Properties Pty Ltd
Medium Neutral Citation:	[2022] NSWCATCD 20
Hearing Date(s):	15-17, 19 November 2021 (last submissions 14 January 2022)
Date of Orders:	17 January 2022
Decision Date:	17 January 2022
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	1. Pursuant to s 72(1)(a) of the Strata Schemes Management Act 2015, the caretaker agreement between the applicant and the respondent is terminated. 2. Pursuant to s 72(1)(d) of the Strata Schemes Management Act 2015, the respondent is to sell Lots 107 and 109 in accordance with Schedule 1. 3. If either party seeks to vary order 2 and/or Schedule 1: (a) any submissions seeking a variation are to be filed and served by 31 January 2022, (b) any submissions in reply are to be filed and served by 14 February 2022, and (c) any such submissions are to indicate whether it is agreed that the Tribunal should dispense with a hearing for that issue, pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013. 4. Pursuant to s 72(1)(d) of the Strata Schemes Management Act 2015, on or before 5pm on Friday 21 January 2022 the respondent is to provide the secretary of the applicant with the password for the digital video recording system.

5. Should either party seek an order for costs:
(a) any submissions seeking an order for costs are to be filed and served by 28 January 2022,
(b) any submissions in reply are to be filed and served by 14 February 2022, and
(c) any such submissions are to indicate whether it is agreed that the Tribunal should dispense with a hearing for that issue, pursuant to s 50(2) of the Civil and Administrative Tribunal act 2013.

Catchwords: LAND LAW – Strata title – Building manager – Whether caretaker agreement should be terminated -Whether saving provision applies – Whether ancillary orders should be made

Legislation Cited:
Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Regulation 2013 (NSW)
Evidence Act 1995 (NSW)
Interpretation Act 1987 (NSW)
Local Government Act 1993 (NSW)
Strata Schemes Amendment Act 2002 (NSW)
Strata Schemes Development Act 2015 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited:
Attorney-General for the State of Queensland v Australian Industrial Relations Commission [2002] HCA 42
Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 [2021] NSWCA 162
Body Corporate 396711 v Sentinel Management Ltd [2012] NZHC 1957
Briginshaw v Briginshaw [1938] HCA 34
Community Association DP No 270180 v Arrow Asset Management Pty Ltd [2007] NSWSC 527
Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250
Corporate Property Maintenance NSW Pty Limited v The Owners - Strata Plan No 81647 [2014] NSWDC 22
Jones v Dunkel [1959] HCA 8
Mahon v Air Zealand [1984] 1 AC 808
Mitchell v Cullingral Pty Ltd [2012] NSWCA 389
OC SP 81647 v Corporate Property Management NSW Pty Ltd [2013] NSWCTTT 351

	Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Ltd [2015] NSWSC 289 SZTAL v Minister for Immigration and Border Protection [2017] HCA 34 The Owners Corporation – Strata Plan 64807 v BCS Strata Management Pty Ltd [2020] NSWSC 1040
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 64807 (Applicant) Sunaust Properties Pty Ltd (Respondent)
Representation:	Counsel: R Gration (Applicant) E Young (Respondent) Solicitors: DEA Lawyers (Applicant) MC Lawyers & Advisers (Respondent)
File Number(s):	SC 21/02639
Publication Restriction:	Nil

Abbreviations used

AGM	Annual General Meeting
Applicant	The Owners – Strata Plan No 64807
CA	Caretaker Agreement
CATA	Civil and Administrative Tribunal Act 2013
CSR	Central Sydney Realty
DVR	Digital Video Recorder
EGM	Extraordinary General Meeting

George Xue	Xiang Long Xue
Ken Xue	Yuan Kai Xue
Meriton	Meriton Apartments Pty Ltd
Ms Liang	Zhuohui Liang aka Cherry Liang
Ms Sun	Yan Xin Sun aka Susan Sun
Respondent	Sunaust Properties Pty Ltd
SC	Strata Committee or Executive Committee
SSDA	Strata Schemes Development Act 2015
SSMA	Strata Schemes Management Act 2015
the 1996 Act	Strata Schemes Management Act 1996

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REASONS FOR DECISION

Outline

1 In these proceedings, the applicant sought an order under s 72(1)(a) of the SSMA that its CA with the respondent be terminated.

2 The parties submitted more than 5,000 pages of documents which included 20 affidavits from 15 witnesses. Cross-examination occupied three hearing days and a fourth hearing day was needed to cater for oral closing submissions

which supplemented more than 60 pages of what were said to be Outline Submissions.

3 After considering the evidence and having had regard to the submissions made by counsel for the parties, the Tribunal determined that the applicant is entitled to a termination order and to a consequential order for the sale of the respondent's caretaker lots. The applicant was also considered to be entitled to an order requiring the respondent to provide, to the secretary of the applicant, the password for the DVR system which has been withheld.

Background

4 The strata scheme the subject of these proceedings, numbered 64807, was registered on 18 January 2001. It covers two buildings in Ultimo, developed by Meriton, which contain both commercial and residential lots. There are 334 lots: 109 in what was called Stage 1 and 225 in Stage 2. When the construction of Stage 1 was completed in 2000, what became Stage 2 was only one lot (Lot 110) but held 6,804 of the total number of unit entitlements which is 10,000. When the development of Stage 2 was completed in 2009, a strata plan for the subdivision of Lot 110 was registered on 28 May 2009. That strata plan, numbered 80571, comprises lots 111 to 335.

5 The respondent, incorporated on 20 October 2000, has only one shareholder and director, Ms Sun. Her husband, George Xue has been employed by the respondent as a caretaker since 2009. Ken Xue, their son, is also employed by the respondent, as a manager.

6 Cherry Liang, who is the wife of Ken Xue, was the sole owner of Lot 71 until 30 April 2019 when she transferred a 1% interest in that lot to him. Ms Sun and George Xue are the owners of Lot 107 which is a commercial lot, used by the respondent to run a real estate agency. The respondent owns Lot 109 which is the on-site building manager's office, located in the ground floor foyer of Stage 1.

7 On 27 October 2000, Meriton and the respondent executed a Deed of Sale of Caretaker Management Rights for which the respondent paid Meriton $310,000. On 20 January 2001 the common seal of the applicant was affixed to a CA, witnessed by the then strata managing agent, and on 16 March 2001

Meriton and the respondent executed that CA which was for a term of ten years but with three options to renew, each for a further five years. As a result, the CA had a potential duration of 25 years. On the basis that each of those options have been exercised, the CA is now in its final five years and will come to an end in just over four years, on 15 March 2026.

8 The Tribunal notes that there are existing proceedings in the Supreme Court between the same parties which raise issues that include what amount is payable by whom to whom. As a result, the applicant does not seek the determination of any quantum issue by the Tribunal. On the other hand, the respondent suggests the existence of those proceedings is a reason why the Tribunal does not have jurisdiction to hear this application.

Hearing

9 During the four-day hearing, which was conducted using audio-visual link facilities and telephone lines due to the COVID-19 pandemic, the following documents were admitted as evidence:

Exhibit A A tender bundle, containing five folders of documents

Exhibit B Documents behind tabs 4 to 21 of those provided under cover of a 15 November 2021 letter from the respondent's solicitor

Exhibit C Two pages headed "*Budget …",* being numbered 425 and 494

Exhibit D Pages 1 to 273 in the applicant's cross examination bundle

Exhibit E Documents produced in response to a call to Dr Mao

10 During the hearing, the following documents were marked for identification:

MFI 1 Folder containing the applicant's Statement of Facts, Chronology, Issues in Contention, and Outline Submissions

MFI 2 Documents behind tabs 1 to 3 of those provided under cover of a 15 November 2021 letter from the respondent's solicitor

MFI 3 The applicant's cross examination bundle

MFI 4 Two pages which became Exhibit C

MFI 6 A copy of the *Strata Schemes Management Bill* 2015, containing an Explanatory Note

MFI 7 Applicant's submissions dated 14 January 2022

MFI 8 Respondent's submissions dated 14 January 2022

11 Since the cross-examination of nine witnesses required the entire three days allocated for the hearing, a fourth day was added, after a day's break, to enable closing addresses to be made on the last day of the week of the hearing.

Applicant's witnesses

12 The applicant had four witnesses, namely Mr Laurans, Mr Eltis, Mr Watson, and Mr Wang. Each of them was cross-examined. Their evidence is summarised below.

Mr Eltis

13 The current secretary for the applicant, Mr Eltis (A33) set out in his affidavit the background to the relationship between the applicant and the respondent. He went on to give evidence of the involvement of Ken Xue on the SC and what occurred at various meetings, namely the 3 September 2028 SC meeting, the 25 October 2018 SC meeting, the 12 December 2018 EGM, the 13 March 2019 SC meeting, the 15 June 2019 AGM, and the 6 August 2019 SC meeting.

14 Among the documents which were annexed and exhibited to this affidavit were emails dated 13, 16 and 19 November 2019 which contained requests, by Mr Eltis, for Ms Sun to provide evidence which entitled the respondent to increase its annual fee by 5%. The evidence of Mr Eltis was that there was no response to those emails. He went on to say that, during 2019 and 2020 he sent an estimated 50 emails to Ms Sun in his capacity as an SC member and that the result was either (1) no response, (2) a cursory response, or (3) in some cases, a threatening response.

15 Mr Eltis also suggested the respondent had not complying with its duties as recorded in a schedule to the CA and he alleged there had been a failure on the part of the respondent to ensure compliance with fire code requirements.

16 Another topic raised by Mr Eltis was that the respondent appears to also operate a business called Central Sydney Finance which he claims manages lots which can lead to conflicts of interest with the respondent's obligations to the applicant. He referred to two commercial lots whose tenant installed an illegal cool room in the car park and the respondent failed to take any steps to address that issue, that cool room finally being removed in November 2020 due to action taken by the applicant's lawyers.

17 He went on to indicate that it was not until the applicant obtained a full copy of the CA in 2020 that it did not provide for the 5% annual increases charged by the respondent. It was noted that a 9 December 2019 SC meeting resolved to request the respondent to provide "*a copy of the contract indicating a 5% annual increase to their fees*". The 20 December 2019 response of Ms Sun was that *"the agreement to the 5% increase was passed at a meeting many years ago. I am surprised the committee have not located a copy of the minutes in the strata records*".

18 In his affidavit, Mr Eltis also raised the question of whether the 2001 contract was validly extended in 2011. He also noted that, since 2011, the respondent has charged about $25,000 per annum for matters including manage cleaning and maintenance of the Stage 1 garbage room that is shared with Stage 2 but apparently without any contract, contrary to words within Schedule 2 of the CA which said the respondent was to *"Perform such further duties for additional payment to the Caretaker as may be agreed in writing between the parties*".

19 Mr Eltis proceeded to give evidence of what he said occurred before, during and after the 8 August 2020 AGM. It is noted that he maintains he heard both Ms Sun and Ken Xue saying words to the effect: "*The AGM has been cancelled – you can go"* to people who were arriving at the venue for that AGM. Further, he said he observed Slyvia (an employee of the respondent), Ken Xue, and Mr Beachem (the then treasurer) attempting to distribute a letter containing a similar message. He maintained that the AGM proceeded on that occasion and provided a copy of what he said were the minutes of that meeting.

20 Mr Eltis also gave evidence of the issue of a first default notice to the respondent on 1 October 2020 and a second default notice on 29 October 2020. He went on to indicate various communications by the respondent since August 2020 which were said to have contained incorrect information. He also referred to a 26 November 2020 request for copies of some building keys and the key register and a same day request for CCTV footage, which requests he said have not been met.

21 The affidavit of Mr Eltis included an allegation that, at 4.40pm on 3 March 2021 he heard Ms Sun say words to the effect: *"I am not taking instructions from the OC*" and "*I am fighting with you and I do not have to do what you say*". A failure to arrange for the removal of trolleys from a nearby shopping centre was also alleged as was allowing Stage 1 of the strata plan to fall into disrepair and four examples were provided in support of that allegation.

22 Further matters set out in this affidavit were (1) the use of unlicensed tradespeople, (2) a failure to be available at the reception area as required by the CA, (3) a failure to maintain adequate records, (4) not accepting instructions from the secretary, (5) refusing to attend SC meetings, (6) failing to answer correspondence, (7) unremedied omissions from the respondent's monthly report, (8) failure to provide the monthly report within time, (9) financial mismanagement by continuing a DVR lease for 3,300 days at a daily rate of $18.77 plus GST (costing more than $68,000) when the applicant was able to buy and install a replacement DVR for $1,320, (10) financial mismanagement by the submission of an invoice for $660 which related to premises in Auburn, and (11) incorrectly claiming the applicant has entered into a contract with Enviro-LCS for the provision of cleaning and hygiene equipment.

23 The final paragraph in the affidavit of Mr Eltis referred to a spreadsheet which was said to set out a comparison of what the respondent had charged the applicant and what he contended the respondent was entitled to charge under the CA.

24 Cross-examination suggested the recollection of Mr Eltis of what occurred at various meetings was not clear, but each such suggestion was firmly denied. As to the illegal cool room, Mr Eltis agreed that was not part of the duties of the

respondent as caretaker but maintained it was part of the respondent's duties as building manager. Mr Eltis did not accept that that the pandemic was the reason why it was suggested the 8 August 2020 AGM could not proceed.

25 In re-examination, in relation to an email distributed by the owner of lot 147 to various lot owners, said to have included false or at least misleading allegations, Mr Eltis referred to metadata which he suggested implicated Central Sydney Finance, being a business conducted by the respondent. The issue raised by that email appears to be the potential misuse of the strata roll.

Mr Laurans

26 The affidavit of Mr Laurans (A24, ie page 24 in Exhibit A) revealed that he has been a lot owner since September 2013 and a member of the SC from 14 May 2015 to 22 May 2018 and since 8 August 2020. He said that at AGMs held prior to 22 May 2018 there was low attendance and lot owners would commonly nominate themselves and be appointed. However, at that AGM, Ms Sun had 15 proxies and her son, Ken Xue, had 11 proxies. He said that all but three of the existing SC members were not re-elected and noted that the minutes recorded the election of Zhuohui Liang but not Ken Xue.

27 Mr Laurans recalled a conversation after that meeting which expressed concern that Mr Sun and her son had taken over the SC for their financial benefit, which had occurred after the SC had sought legal advice in relation to terminating the CA.

28 It was the evidence of Mr Laurans that, despite the respondent having had the caretaker role for more than 20 years, there were significant, unresolved maintenance issues. He referred to (1) damp, damaged carpet, (2) mould in the air conditioning and on the walls of the gym/pool area, (3) grass growing through the skylight above the pool, and (4) the intercom system not working, which required attendance to let guests enter the building until those intercoms were replaced by the current SC early in 2021.

29 He went on to suggest that the respondent had taken steps to limit or reduce the maintenance work to be carried out. The example he provided was of Ms Sun and her son achieving, by using proxies, the repeal of by-law 1 which required regular painting and replacement of the common area carpet in the

Stage 1 building, neither of which had occurred, to his knowledge, since 2001. Mr Laurans also referred to the failure to repair what appeared to be water damage in the gym/pool area. He further suggested that the SC raised concerns with the performance of the respondent, which included failure to repair reaching the point where render was falling from external walls, and of requests for reimbursement which he understood Dr Mao instructed the strata managing agent to pay.

30 As to 8 August 2020 AGM, Mr Laurans noted proceedings in the Supreme Court and the Tribunal which attempted to stop that meeting. He said that, when he arrived at the venue for that meeting, there were about ten private security guards attempting to prevent lot owners from gaining access and that those security guards were acting under instructions from a person named Slyvia, an employee of the respondent. His evidence was that Ken Xue, an employee of the respondent and the son of Ms Sun, was (1) also giving instructions to those security guards, (2) was himself attempting to prevent lot owners from accessing the venue for the meeting, and (3) was saying words to the effect that *"The AGM has been cancelled*".

31 The last paragraphs of the affidavit of Mr Laurans suggested that, since September 2013, he has not seen either Ms Sun or any employee of the respondent wear any uniform, nor had he ever seen the shutters open for the office in the lobby.

32 In cross-examination it was suggested that Mr Laurans had breached a by-law in relation to his installation of a television antenna which he removed after the strata managing agent sent a follow-up letter. Suggestions that George Xue was present most hours and for several hours on the weekend were firmly denied.

33 As with each of the applicant's witnesses, unsuccessful attempts were made to suggest Mr Laurans did not have a clear recollection of the matters to which he referred in his affidavit and the joint statement (B/4, ie tab 4 in Exhibit B).

Mr Wang

34 In his affidavit (A670), Mr Wang indicated that in mid-November 2018 he received a letter in Chinese and English regarding an SC meeting. That letter,

dated 15 November 2018 (A678), noted that the SC had decided on 25 October 2018 that CSR was to be the only candidate considered for a building management contract with a term of at least ten years at an EGM to be held on 12 December 2018. It is sufficient to observe that the letter urged voting against that proposal and set out the reasons for upon which that view was based.

35 Later that month he joined a social media chat group which led him to understand that CSR was the respondent's trading name, Ms Sun was the owner of CSR, and her son, Ken Xue, was the secretary of the applicant. He went on to say that Ms Sun rang him on 6 December 2018, asked why he was not happy with CSR, and during that conversation threatened to report him to the Law Society for posting a copy of a company search on social media. Mr Wang said he made a contemporaneous note of that conversation which formed the basis of what appeared in his affidavit.

36 He also said that, when he went to attend the applicant's AGM on 8 August 2020, he heard Ms Sun, Ken Xue and a lady named Sylvia speak with lot owners who attended that meeting, using words to the effect that "*NCAT does not support this meeting going ahead*".

37 Cross-examination revealed that Mr Wang became a lot owner in June 2016, ceased to be a resident in June 2018, and became a member of the SC in June 2019. He denied that Ms Sun's version of their conversation on 6 December 2018 (A3598) was accurate.

38 As to his affidavit expressing agreement with what was said in the affidavit of Mr Eltis, Mr Wang said he read that affidavit before finalising his affidavit but did not discuss his evidence with Mr Eltis beforehand. He was also taken to a joint statement dated 23 December 2020 (B/4) which he indicated was prepared by a lawyer and submitted to him before he signed it.

39 Mr Wang disagreed with the proposition that he had no accurate recollection of the 15 June 19 AGM, the 6 August 2019 SC meeting, and the 12 December 2019 EGM. In relation to the 8 August 2020 AGM, Mr Wang said his clear recollection was due to there being extraordinary events and that he was able

to hear because the speakers were talking very loudly and were moving around, talking to more than one lot owner.

40 After being referred to the minutes of SC meetings in relation to the extent of the disclosure made by Ken Xue, Mr Wang suggested that disclosure of being an employee of a business did not cover the fact that he was the son of the owner of that business.

41 In relation to the elevators in Stage 1 breaking down on several occasions, including for one month over Christmas in 2018, Mr Wang accepted that elevators break down from time to time but disagreed with the proposition that was not a major issue. He denied that the elevators were promptly repaired and suggested the problem was becoming more frequent and more serious.

Mr Watson

42 In his affidavit (A626), Mr Watson indicated that he is a current SC member. He set out his recollections in relation to the 3 September 2018 SC meeting, the 25 October 2018 SC meeting, the 12 December 2018 EGM and the 13 March 2019 SC meeting, the 15 June 2019 AGM, the 6 August 2019 SC meeting, and the 8 August 2020 AGM.

43 As to the 3 September 2018 SC meeting, he said that a representative of Meriton, which was at that time the building manager for Stage 2, raised a concern that Meriton was not being permitted to tender for the building management contract for Stage 1. Despite the absence of a scope of works that would enable a comparison between the proposals of the respondent and Meriton, the 25 October 2018 meeting resolved to present only the respondent's proposal to the 12 December 2018 EGM. He suggested that, at the 13 March 2019 SC meeting, Ken Xue said he was not a lot owner, and that legal advice obtained after that meeting indicated that he was not eligible to be on the SC. Mr Watson said that, despite that advice, Ken Xue remained on the SC.

44 In relation to the 8 August 2020 AGM, this witness suggested that, when he arrived (1) private security guards were attempting to prevent access to the venue for that AGM, (2) they were primarily acting on instructions from Sylvia, an employee of the respondent, (3) Ken Xue was also present and was

providing instructions to those security guards, and (4) Ken Xue was also attempting to prevent lot owners from accessing the venue for that AGM.

45 Mr Watson also suggested that the respondent had been charging about $25,000 per annum to manage the Stage 1 garbage room and other facilities that are shared with Stage 2 and that he had never seen either Mr Sun or any employee of the respondent wearing any uniform.

46 He annexed a chain of emails which were said to suggest the respondent had attempted to make the applicant responsible for contractors engaged to carry out gardening work, despite that being part of the respondents' contractual obligation, along with two emails from an SC member who complained about the respondent and then resigned from the SC.

47 When cross-examined, Mr Watson accepted that Ms Sun and Ken Xue had left SC meetings when requested to do so. He was asked the same series of questions as the applicant's other witnesses, which served to indicate that his recollections of the meetings to which he referred were clear. As with Mr Laurans, Mr Watson admitted he had breached a by-law on one occasion.

48 A suggestion that Ms Sun was not elected to the SC at the AGM held on 16 May 17 was denied. He noted that Ken Xue became secretary at the SC meeting held after that AGM and agreed that did not marry with the AGM minutes which did not record him being elected as a member of the SC.

49 When taken to a photo which suggested a tree was growing through the roof (B/21), Mr Watson asserted his belief that this was a matter which fell within the responsibility of the respondent. He also strongly disagreed with the proposition that falling render was not a concern. Further that such a matter was, according to his understanding, a matter for the respondent to report, not repair.

Respondent's witnesses

50 The respondent had eleven witnesses. Mr Cakic, Mr Lai, Ms Ma, Ms Rahmat, Mr George Xue and Mr Aguino were not cross-examined. The remaining five witnesses, namely Ms Sun, Ms Xu, Mr Ken Xue, Dr Mao, and Ms Liang, were cross-examined.

Mr Aguino

51 Although included in the tender bundle, the affidavit of Mr Aguino (A4764) was affirmed in support of the respondent's unsuccessful request for an adjournment of the hearing. This affidavit noted that, on 12 February 2021, the applicant was directed to file and serve Points of Claim by 26 February 2021. Reference was also made to the respondent's application, made with the object of obtaining strata records from the applicant. As indicated above, this witness was not cross-examined.

Mr Cakic

52 The affidavit of Mr Cakic (A680), a solicitor for the respondent, did no more than annex copies of documents which have been lodged in the Supreme Court proceedings. Those documents reveal that the respondent filed a summons on 30 October 2020 and that the applicant lodged a cross-summons on 11 December 2020.

53 Although filed in relation to the interim application, this affidavit serves to inform the Tribunal that the issues in the Supreme Court proceedings are: (1) whether the respondent is entitled to increase the fee payable by the applicant by 5% per annum or by reference to the Consumer Price Index (CPI), (2) whether the respondent is entitled to charge additional amounts following the completion of Stage 2, (3) whether the respondent has been performing the duties required by the CA, and (4) whether the respondent has been charging the applicant twice for the same duties.

Mr Lai

54 In his affidavit (A727), Mr Lai said he was employed by the respondent *"from or around November 2020, until mid-2001 to manage its real estate business*". He said he was a director of the respondent from 22 January 2001 to 12 June 2002.

55 Mr Lai claimed to have become aware, in mid-2001 that Meriton had CAs with other entities which provided for a fee increase of 5% per annum but he was unable to recall how he came to access those documents. He suggested he had a conversation with Meriton's Mr Paskell who said the subject CA was in error and that he would fix it so the increase would be 5% per annum but he

was unable to recall when that conversation occurred. Mr Lai said he was unable to recall whether there was any subsequent documentation to give effect to such a change to the CA.

56 Annexed to Mr Lai's affidavit was a statement dated 11 April 2020 in which he suggested he negotiated the CA with Meriton on behalf of the respondent. He suggested: *"The negotiation which was agreed by Meriton was an oral agreement to remove term 3.1 referring to CPI from the caretaker agreement and replace that with a 5% annual increase of caretaking fees*".

Ms Liang

57 The 30 June 2021 affidavit of Ms Liang (A4733) indicated that she and her husband, Ken Xue, purchased Lot 71 in December 2015. She said that, although she always considered that lot to have been owned 'half each' with her husband, she was initially the sole owner, a decision said to have been based on accountant's advice.

58 Ms Liang said that in late 2016 or early 2017 she suggested her husband should be on the SC and that early in 2019 she decided to register him as "*a title holder of Lot 71*". That was said to have followed him telling her that his eligibility to be a member of the SC had been questioned. As a result, in mid-2019 he became the owner of a 1% interest in Lot 71.

59 Under cross-examination, Ms Liang accepted that her husband was employed by the respondent at the time he was a member of the SC. When her attention was directed to her proxy form at A4737, Ms Liang accepted that on 25 March 2017 she nominated her husband to be a member of the SC and that he signed that nomination to indication his consent to that nomination. She said she never attended any AGM or SC meeting herself.

Ms Ma

60 An accredited interpreter, Ms Ma's affidavits (A1963 and A3742) do no more than indicate she translated the 10 February 2021 and 17 My 2021 affidavits of Ms Sun and George Xue from written English to spoken Mandarin before they signed them.

Dr Mao

61 The 28 May 2021 affidavit of Dr Mao (A3800) was that of a lot owner and former resident who was a member of the SC between 2017 and 2020. Contrary to what appears in the minutes of the 27 May 2018 AGM, Dr Mao suggested that Ken Xue was elected as a member of the SC at that meeting. He disagreed with what may be termed the maintenance allegations in the affidavit of Mr Laurans.

62 Dr Mao also disagreed with much of Mr Watson's affidavit and suggested the respondent performed it caretaking duties *"efficiently, responsibly and conscientiously*". He also replied to the affidavit of Mr Eltis and set out what he maintains occurred at the EGM held on 12 December 2018, which meeting was adjourned.

63 Dr Mao suggested his concern in relation to the 8 August 2020 AGM *"was predominantly due to the Covid-19 pandemic".* He said he was not involved in instructing Mr Beazley of Beazley Lawyers other than consenting for that firm to be retained.

64 When cross-examined, it was ascertained that Dr Mao held a PhD in neuroscience, not covering either epidemiology or infectious diseases, and that he was not a medical practitioner. Dr Mao suggested the reference to Ms Liang in the minutes of the 3 September 2018 SC meeting should be a reference to her husband, Ken Xue. He accepted that Ken Xue disclosed that he was an employee of the respondent but could not recall him disclosing that he was the son of Ms Sun. Dr Mao accepted that the minutes of that meeting did not suggest Ken Xue left the meeting or abstained when a motion relating to the building management contract was considered but did not accept that Ken Xue had a conflict of interest in relation to that topic.

65 In relation to the 25 October 2018 SC meeting, Dr Mao's answers were the same except that he suggested Ken Xue did not vote due to an objection from Mr Watson. He accepted that the contract for Stage 2 was a major contract but, when a figure of $200,000 per annum was put, he said he could not recall the figure.

66 Dr Mao's attention was directed to the proposal to award a building management agreement to the respondent being on the agenda for the 12 December 2018 EGM, being a meeting which he chaired. He accepted that what occurred at that meeting could be described as "*absolute chaos*" and that the meeting was abandoned and had to be adjourned.

67 It was noted that Mr Mao had suggested in his affidavit that Mr Jordan, an employee of a former strata managing agent, had suggested to him that an additional quarterly fee payable to the respondent had been agreed at an SC meeting which should be in the minutes but Dr Mao accepted that such minutes were sought but never provided.

68 In relation to the suggestion of Dr Mao that his concerns in relation to the 8 August 2020 AGM were COVID-related, he accepted that the notice stated *"The venue has confirmed that they can accommodate your meeting with the required social distancing and cleaning COVID measures*" but said he did not agree it was a Covid-safe venue. It was also noted that a 21 July 2020 email from Ms Hu to the strata managing agent, asking whether it would be safe for lot owners to attend the 8 August 2020 (A520) was the subject of a same day reply (A519) which indicated that advice had been obtained from NSW Health.

69 Dr Mao accepted that he, Ken Xue and Ms Hu retained Beazley Lawyers and attempted to stop the 8 August 2020 AGM, those Supreme Court proceedings being brought in the name of the applicant. When it was put to Dr Mao that there was no SC meeting for funds to be spent on those proceedings, he suggested there was an informal meeting, the decision being made by emails.

70 When asked for a copy of those emails he said he did not know where they were, and he also said he did not know who gave instructions to Beazley Lawyers. The voting page of Dr Mao became part of the evidence (E7) and it reveals that the eight motions put to SC members did not include either the commencement of the Supreme Court proceedings or engaging Beazley Lawyers. When it was put to Dr Mao that only Ken Xue gave an affidavit in support of those proceedings, he again said he did not know and added the suggestion that he was not allowed to talk to any witness.

71 When it was put to Dr Mao that the real reason for trying to stop the meeting was not the COVID pandemic but the extent of lot owner anger against the respondent, that he knew that the majority of lot owners were against a contract being awarded to the respondent, and that Ken Xue told him the respondent would be outvoted, Dr Mao denied each of those propositions.

Ms Rahmat

72 This deponent indicated that she purchased a lot off the plan and lived in it until shortly prior to 10 February 2021 which was the date of her affidavit (A1967). She said that, whenever she has seen Ms Sun and George Xue at the complex, they have been dressed in business attire. She claimed that the lawns are no longer well-kept and said she has not seen any maintenance of that kind since October or November in 2020.

73 Mr Rahmat went on to suggest that the barbeque area, fire safety, drain maintenance, carpark and clearing gutters receive proper attention. She recalled a mid-2019 incident when she said a neighbour's bathroom leak was addressed.

Ms Sun

74 The first affidavit of Ms Sun (A736) indicated that the respondent trades as CSR which is now a real estate agency whose activities include caretaking and building management for apartments, selling properties, managing tenancies and strata management. On 27 October 2000, the respondent purchased the caretaker management rights from Meriton for $310,000 and executed the CA on 16 March 2001 (A457 or A847).

75 Ms Sun provided a copy of a letter, dated 26 October 2000, from the respondent's then solicitor which began with the words *"We confirm your instructions that you do not wish to purchase the Caretaker Management Rights for Stage 2 for the sum of $500,000 increased by 5% per annum."* It should be observed that the 5% increase was referring to the sale price of the rights, not the annual charge for the work of the caretaker. She said she raised with Mr Lai that the Stage 1 contract should also increase by 5% every year and claimed he later told her that Meriton had said they would give her a 5% increase which she took to mean a 5% increase in the caretaker fees.

76 By reference to what she described as "*my handwritten ledger of invoices issued*" for 29 March 2001 to 12 March 2003, Ms Sun noted the application of a 5% annual increase.

77 After Stage 2 was completed, it was suggested there was increased pedestrian traffic and usage of facilities in Stage 1 which was said to give rise to an additional workload for the respondent. Ms Sun claimed that the raised the question of an additional fee at a meeting of the SC and that, at the next SC meeting, when she suggested $22 an hour for 20 hours a week, the SC chairman approved that proposal but told her to send an invoice quarterly. She went on to suggest that the chairman told the strata managing agent to ensure that was recorded in the minutes.

78 Ms Sun said she based the $22 figure on the award rate and later revised that rate and adjusted the hours. It was her evidence that the resulting invoices were paid without query or complaint until October 2019. She went on to suggest that in May 2016, Mr Jordan, an employee of the strata managing agent, approved her request to charge a fixed fee every quarter at a time when the award rate was said to be $24.26. That rate, for 20 hours per week, with GST added, was said to be the basis for the quarterly amount of $6,938.36.

79 Although Ms Sun's affidavit suggested the option to renew the CA was exercised in 2010 and 2015, the only letter she annexed was dated 28 October 2015 which related to the five-year period from 19 March 2016 (A915). That affidavit then proceeded to detail the caretaking services said to have been provided by the respondent and annexed copies of various building reports.

80 On 17 December 2019 Ms Sun received an email from the strata managing agent which indicated that a resolution had been passed at a 9 December 2019 SC meeting to request her to provide a document recording the agreement for CSR to increase its fee by 5% each year and indicating that no further payments would be made until that issue was resolved. However, the minutes of the SC meeting held on 12 February 2020 suggest a resolution to pay a caretaker fee based on CPI increases.

81 A copy of the minutes of the 8 August 2020 AGM was provided to Ms Sun under cover of a letter dated 20 August 2020 from the strata managing agent.

Also annexed to Ms Sun's affidavit were copies of the 1 October 2020 default notice issued by the applicant to the respondent, the 12 October 2020 letter whereby the respondent exercised its option to renew the CA for the final five years, from March 2021, and a second default notice dated 29 October 2020.

82 The last document annexed to Ms Sun's first affidavit was a copy of a 28 January 2021 letter to the Tribunal which included a submission that this application be dismissed or alternatively stayed by reason of the pre-existing Supreme Court proceedings between the applicant and the respondent.

83 In her second affidavit (A3576), Ms Sun responded to the affidavits of each of the applicant's four witnesses. As to what occurred on 8 August 2020, Ms Sun suggested that Sylvia, said to be the assistant of her son, Ken Xue, said the security guards were invited by the SC at the suggestion of the solicitor, Mr Beazley. Ms Sun also denied the suggestion of Mr Eltis that she told people that they could go as the AGM had been cancelled.

84 In relation to the issue regarding the provision of CCTV recordings, Ms Sun claims she told Mr Eltis: *"I listen to the OC. But for the CCTV issues I can't just listen to you."*

85 Despite suggesting in her first affidavit (A741 at [17]) that she was not aware of the concept of CPI when signing the CA, in cross-examination Ms Sun agreed that she came to Australia in 1991, having been an accountant in Shanghai for 18 years, started a finance business in 1998 and that she became aware of the CPI. She agreed that Meriton owned all the Stage 1 lots when the subject strata plan was registered with the result that the CA bound future owners.

86 Ms Sun was taken through various provisions in the CA, including clause 10.1, which requires the respondent to sell the caretaker lots (specified in Item 3 in Schedule 1 of the CA to be Lot 107 and Lot 109) in the event the CA is terminated, and clause 18.2, which requires that *"any shareholder or director of the* [respondent] *shall not offer himself for election as an office bearer of the Executive Committee of the Owners Corporation"*.

87 In relation to the duties set out in Schedule 2 of the CA, Ms Sun agreed that paragraph 1(i) required the respondent to carry out all reasonable directions

given by the applicant in relation to the care and maintenance of the complex. Ms Sun also agreed that the words in bold type at the end of Schedule 2 applied, namely:

> All the foregoing activities shall be undertaken and carried out by the [respondent] at the reasonable direction of the Owners Corporation and shall not be a delegation of any duty or obligation of the Owners Corporation.

88 Ms Sun accepted that, as the sole director of the respondent, she was responsible for compliance with the CA. She also indicated that she had engaged an interpreter to translate the entire CA to her.

89 When questioned about the 5% increase, Ms Sun suggested she did not understand that such an increase would give the respondent more than if a CPI increase was used. Her answers to subsequent questions on that topic were evasive, not responsive and on one occasion she asked if she could choose to not answer a question.

90 When it was put to her that the letter to which she referred related to the purchase price of the Stage 2 rights, not the fees charged, Ms Sun suggested that was not her understanding. Ms Sun agreed that she had not been able to provide anything in writing to support her claim that clause 3.1 of the CA had been varied from the CPI increase stated in that provision.

91 As to her suggestion of an oral variation of that provision, when it was suggested to her that she had not provided any evidence of the applicant agreeing to a 5% increase, Ms Sun gave a lengthy answer which suggested that she grew up in China where not everything was in writing and that *"oral is OK"* and she then simply did not answer the next question, when it was put to her alleged conversation with Mr Dunn of the then strata managing agent was not true.

92 When her attention was directed to a schedule of caretaker payments provided to the respondent's lawyers by the applicant's lawyers under cover of a letter dated 19 October 2021, Ms Sun claimed to have never seen that document then claimed she had seen it but not read it. However, she then accepted that the difference between an annual increase 5% instead of the CPI created an additional charge by the respondent to the applicant of $442,963.38.

93 When taken to a paragraph in her first affidavit (A744 at [33]) in which she suggested she proposed a variation in the respondent's remuneration due to the increased workload created by the completion of Stage 2 (the extra fee), Ms Sun suggested she did not ask anyone about that and that she only thought that herself.

94 Despite the minutes of the 5 June 2008 EGM suggesting Ms Sun was elected to the SC, she claimed she was not elected, no-one voted and that the strata managing agent said she should be on the SC. After it was brought to her attention that the minutes of that meeting had been signed as a correct record, and after being reminded that she was under an obligation to answer questions truthfully, Ms Sun was asked if she ever sought to have those minutes corrected. She said she did but when the question was repeated her answer was to the effect: *"I did not request for the minutes to be corrected, I did not agree to participate as an SC member*".

95 When her attention was drawn to the minutes of the 5 June 2008 SC meeting which followed that EGM, Ms Sun initially suggested she attended all meetings as caretaker but in answer to the next question, accepted she attended as an SC member and that she participated in that meeting as an SC member. When it was suggested that she did not declare her interest as the owner of the caretaker company at SC meetings, Mr Sun said that was incorrect then added that most lot owners knew of her role.

96 Ms Sun was asked twice by the Tribunal whether she left SC meetings when there was discussion of matters relating to the respondent. After suggesting she could not recall in answer to the first such question, she responded to the repeated question by suggesting she did leave the room. When her cross-examiner noted that she must have been present because she purported to recall what was said on the topic of an extra fee (A745 at [35]), Ms Sun replied by saying that the meeting did not reach a decision. In answer to the next question, she suggested she was there when that topic was raised but when it was discussed she was not there.

97 When taken to the next paragraph (A745 at [36]), Ms Sun accepted that she had not included in her evidence the minutes of any decision to pay the extra

fee which the respondent has charged every quarter since 2009. In response to the suggestion there was no SC decision to approve the extra fee, Ms Sun suggested that the respondent was entitled to issue those invoices if *"they*" told her she could and, when asked who she meant by "*they*", she said Ms Xu. When it was put to her that she was not aware of any SC resolution approving the extra fee, Ms Sun agreed that she had not seen any such decision but suggested "*they did say OK*". It is noted that Mr Sun agreed that the respondent had sought and obtained online access to all the applicant's minutes since 2008.

98 After being asked questions about those increased fees, Ms Sun also agreed that the charges for that extra fee totalled $255,794.64. It was noted that the respondent was requested to make that admission prior to the hearing but did not do so.

99 When asked to concede that she was an elected member of the SC between 2009 and 2012, Ms Sun suggested she did not feel she was elected. After a series of questions, she accepted that she did not disclose her connection with the caretaker company, which is the respondent in these proceedings.

100 In response to questions from the Tribunal, Ms Sun agreed she expected the applicant to abide by the CA as that was part of the law of Australia and accepted that the applicant expected the respondent to abide by that contract.

101 Ms Sun's attention was also directed to the respondent's proposal for the building management services for Stage 2 which proposed an annual increase in accordance with the CPI (D152). She denied the suggestion that was because it was unreasonable to seek a 5% annual increase.

102 In relation to the invoices for lawnmowing, Ms Sun agreed that was part of the respondent's duties but claimed there was a change in about October 2014 which she claimed was the result of a telephone conversation with the strata managing agent. She accepted there was no resolution for that change but suggested that was because the strata managing agent represents the applicant. It was noted that she had claimed, in a letter dated 23 February 2021 (A665), that Meriton's Mr Walmsley, at a time when he was said to be the sole SC member, has resolved for gardening expenses to be paid by the applicant

instead of the respondent. Ms Sun would not admit that a total of $25,112 had been paid to Gardenmakers since 10 January 2018 or that $4,260 had been paid to Jim's Mowing.

103 As to the 8 August 2020 AGM, Ms Sun initially denied seeing security guards in attendance despite her own affidavit evidence to the contrary (A3588 at [42]). She suggested that the notice being handed out by Ken Xue and Sylvia, both employees of the respondent, was a "*reply from NCAT*". Ms Sun denied telling people that AGM had been cancelled.

104 When asked if she believed, at that time, the meeting had been cancelled, she gave a non-responsive answer and then said she merely provided paper to the others. When the question was repeated, she said she did not believe the AGM had been cancelled. However, in her affidavit in reply (A3589 at [48]) Ms Sun said: *"I was not present at the 2020 AGM because I thought it was cancelled"*. When that was drawn to her attention, Ms Sun suggested that later on it was announced that the meeting was cancelled.

105 Ms Sun's attention was directed to the 11 August 2020 email she received from the strata managing agent (A594) which indicated that a new SC had been elected. On 8 September 2020 the strata managing agent sent another email to Ms Sun (A593) seeking her confirmation that she would address all matters pertaining to the applicant to the elected SC members. The reply from Ms Sun, sent 40 minutes later (A593), included an assertion that the 8 August 2020 AGM was invalid. Despite the clarity of those emails, in her affidavit in reply (A3589 at [49]) Ms Sun suggested: *"I do not recall if I had received or read the minutes of the AGM of 2020 from [the strata managing agent] by 15 September 2020. I do not recall any other form of clarification as to the line of authority given the dispute between the strata executive committee."*

106 The quoted words are further contradicted by the inclusion in the annexures to Ms Sun's first affidavit of the 20 August 2020 covering letter whereby the strata managing agent provided the respondent with a copy of the minutes of the AGM held on 8 August 2020.

107 Despite accepting she was told on 11 August 2020 what had happened in relation to the SC and that she had been given directions by the strata

managing agent, Ms Sun denied the respondent was in breach of the requirement imposed by clause 18 of the CA to obey directions from the applicant's strata managing agent.

108 The next topic explored in cross-examination was the CCTV footage. Ms Sun agreed that on 13 October 2020 Mr Eltis made a request for CCTV footage which had not been provided by 1 December 2020 (A611). A further request made on 2 March 2021 (A88) was also blocked by Ms Sun who questioned the authority of Mr Eltis who was, at that time, the applicant's secretary. A 3 March 2021 email from Mr Eltis (A90) to Ms Sun attached a letter from the applicant's lawyer (A4301). The response was a letter from the respondent's solicitor (A4304) which did not contest what was said in that letter but instead threatened to report the applicant's lawyer to the Legal Services Commissioner.

109 While Ms Sun accepted that Mr Eltis came to her office on 3 March 2021, she denied saying: "*I am not taking instructions from the OC*". She even denied saying *"I can't just listen to you*" despite those words being in her affidavit (A3591 at [55]). However, she accepted that the CCTV footage belonged to the applicant and that she had received direct instructions to provide that footage. It is noted that, from the minutes of the SC meeting held on 1 March 2020 (A129), it was resolved to authorise the secretary (Mr Eltis) to obtain that footage and it cannot be suggested Ms Sun and Ken Xue were not aware of that decision as they both attended that meeting by telephone.

110 On 15 March 2021 a request was made for the password to "*the old stage 1 DVR*" (A78). Ms Sun agreed that password was sought, and that the respondent has that password. That password has not yet been provided.

111 On 26 November 2020 (A613) a request was made for keys to enable access to the building's cable risers and that on or shortly after 01 March 2021 (A132) a request was made for the respondent's rosters or timesheets, neither of which requests have been met.

112 When taken to a voting paper for the SC dated 27 March 2009 (D23), Ms Sun accepted that she signed that document as an SC member. Likewise, for a 6 July 2010 voting paper (D33).

Ms Xu

113 In her affidavit (A1957), Ms Xu indicated that she was a lot owner who served on the SC from about 2007 to about 2013. She claimed that during the period prior to the completion of Stage 2 there was a motion moved for additional payments to be made to the respondent due to the use of the Stage 1 common property by owners/occupiers of lots in Stage 2. However, she was unable to recall the date of that motion or whether it was carried.

114 When cross-examined, Ms Xu agreed that she and Ms Sun were elected to the SC at an EGM held on 18 August 2019, as recorded in the minutes of that meeting. She also agreed that Ms Sun was appointed by the SC on 5 June 2008and 18 August 2009 to liaise with the strata managing agent.

115 During cross-examination it became clear that the recollection of Ms Xu was not sufficient to answer questions without reference to the relevant minutes. There was a sequence of questions directed towards Ms Sun's participation in SC meetings. First, Ms Xu suggested she could only recall who attended SC meetings and not who was on the SC. Next, when asked if she was a friend of Ms Sun, she sought to avoid answering but conceded they had known each other since 2020. Then, asked if there was any reason for not admitting that Ms Sun was an SC member, the response of Ms Xu was that she did not wish to answer that question.

116 Ms Xu agreed that if the SC decided to pay the respondent an additional $25,000 per annum it was important for that to be recorded.

Mr George Xue

117 There were two affidavits from this witness (A1974 and A3746). In the first, George Xue indicated that he has been employed by the respondent as a caretaker, on a full-time basis since 2009. He suggests he has read Schedule 2 to the CA and that he is onsite from 8am to 6pm Monday to Friday, on Saturday from 9am to 1pm, and on Sundays and public holidays for around two hours. Further, that he mans the reception area unless he is conducting his duties elsewhere at the complex. He said he looks after the master keys, that a key register is kept at the office of CSR and that his wife, Ms Sun, maintains the card system for the complex.

118 The evidence of George Xue is that he reports to Ms Sun and his son, Ken Xue, and that he keeps a diary. He went through the matters to which he attends, and said he supervises the cleaner, whose name is Kamal Hossain, and grants access to the gardener and pool cleaner.

119 The second affidavit of George Xue was an affidavit in reply, primarily responding to the affidavit of Mr Eltis on the topics of proxies, compliance with fire code obligations, and other matters. George Xue also responded to maintenance issues raised in the affidavit of Mr Laurans.

Mr Ken Xue

120 In his first affidavit, dated 11 February 2021 (A2592), Ken Xue indicated that he is employed by the respondent, assists his mother (Susan Sun) who delegates tasks to him, and works with his father (George Xue) who is the onsite caretaker employed by the respondent. He said he has been working in that role since 2015 on a full-time basis.

121 After describing his duties, he outlined a conversation he suggests occurred at an SC meeting on 13 March 2019. This affidavit also annexed copies of various building reports, correspondence, and tax invoices of the respondent.

122 The second affidavit of Ken Xue, dated 12 February 2021 (A3530), responded to the joint statement of Messrs Eltis, Laurans, Wang and Watson which was tendered by the respondent (B/4). This affidavit primarily responded to matters relating to the various meetings covered in that joint statement. As to what occurred at the AGM on 8 August 2020, Ken Xue suggested in this affidavit (A3542 at [54]) that Mr Beacham, who was the applicant's treasurer at that time, said: *"There is an NCAT matter on. This AGM may be a waste of time as NCAT may declare it invalid. This meeting is adjourned*." but did not provide any indication of how it was that he was chairing that AGM.

123 This affidavit (A3542 at [60]) also suggested that Ken Xue never saw a copy of a resolution authorising Mr Eltis to take control of the master keys for the property. However, the request was not for master keys but for keys to enable access to the building's cable risers (A613).

124 In his third affidavit (A3911), Ken Xue responded to the affidavits of the applicant's four witnesses. As to the 8 August 2020 AGM, Ken Xue maintained he had separate telephone conversations on 07 August 2020 with four members of the SC in which he said that Mr Beazley had suggested security guards be engaged to ensure the health and safety of lot owners by cancelling the AGM that was scheduled to be held the following day. His recollection of what occurred on the day of that AGM included a senior police officer telling the security guards to leave and then telling the lot owners they could all attend the meeting. Ken Xue repeated the suggestion made in his earlier affidavit that Mr Beacham adjourned the AGM.

125 This third affidavit includes passages which are more in the nature of written submissions prepared by a lawyer in that they set out provisions in the SSDA and the SSMA which are matters of law. The final paragraphs of this affidavit, and the documents referred to, indicate that the interim application related to these proceedings was dismissed on the basis that there were no urgent considerations.

126 In cross-examination, Ken Xue said he had not taken time to read the SSMA. He suggested he became a member of the SC at the 2016 AGM when his wife gave a proxy form to him and that the minutes of the 21 February 2017 SC meeting should record his name and not that of his wife. He accepted that he did declare his interest as the building manager but not as the son of the owner of the respondent company. The position as to his SC membership was said to be the same in relation to the 2017 AGM. He accepted he was not a lot owner at that time, when he was elected to the position of secretary.

127 In relation to the 3 September 2018 SC meeting, Ken Xue accepted that he did not leave the meeting when the building management contract was discussed. He agreed that meeting decided to limit the tender to the respondent and Meriton. He also agreed that he and his mother attended the next SC meeting, held on 25 October 2018, and remained in the meeting when it was decided to only put the respondent's proposal to the next meeting.

128 Ken Xue also accepted that he was the applicant's secretary when the notice of for the 12 December 2018 EGM was issued but he said they were issued by

the strata managing agent. He said he did not see any conflict of interest in him being secretary at a time when his mother's company was seeking to obtain a building management agreement for Stage 2. He accepted that there was *"absolute chaos*" at that meeting, which was adjourned.

129 He agreed that the 15 June 2019 AGM decided to name five candidates with two of them to be short-listed after which the respondent was appointed. When questioned about the first SC meeting held on 6 August 2019, well after that AGM, Ken Xue suggested that was because the venue for the AGM was only booked for three hours. When it was first suggested the length of the AGM was due to discussion of the respondent, Ken Xue suggested most of the time was spent on by-laws but, when the question was repeated, he accepted that the length of the AGM was due to discussion of the respondent.

130 It was noted that the voting at the meeting resulted in Ken Xue and Ms Sun being permitted to remain in the meeting but not participate while Tribunal applications were discussed. Further, Ken Xue agreed that, at the 21 September 2019 EGM, the earlier resolution in favour of the respondent was rescinded and the contract was awarded to Meriton which thereby became the building manager for Stage 2.

131 In relation to the 9 December 2019 SC meeting, which resolved to request the respondent to provide documents to justify its 5% annual fee increase, Ken Xue said he didn't refrain from voting as he was a lot owner and that he did not see any conflict of interest arising from the fact that he was an employee of the respondent.

132 Ken Xue did not attend the 3 May 2021 SC meeting, but he accepted that he received a copy of the minutes of that meeting which included a resolution instructing the respondent *"to provide the password to the Strata Managing Agent and the Secretary for the redundant DVR that serviced Stage 1 within 24 hours of the minutes being issued".* He accepted that a second, similar resolution was passed on 29 June 2021. A third such resolution was passed by the SC on 30 August 2021. He appeared to accept that the applicant was told to contact the security firm who then referred the matter back to the respondent.

133 Ken Xue denied that the suggestion in his second affidavit that he and his wife bought Lot 71 on 10 December 2015 (A2594 at [13]) was misleading but he did concede that it was not until 30 April 2019 that he became the owner of a 1% interest in that lot for $1. He was also forced to admit that he was not a lot owner when he was first elected to the SC.

134 He also admitted that the 13 March 2019 SC meeting resolved to seek advice as to his eligibility to be a member of the SC and that the advice obtained was that he was not eligible. When it was suggested the 30 April 2019 transfer of a 1% interest in the lot owned by his wife to him was an attempt to render him eligible to be on the SC, Ken Xue suggested that was a "*tax decision*", and claimed he had also obtained advice which suggested he was eligible to be a member of the SC.

135 Ken Xue denied that he considered it important for him to be on the SC to protect the interests of the respondent and he denied that, in 2019, he wanted to respondent to obtain the contract for Stage 2.

136 After the notice for the 08 August 2020 AGM (A4128) was issued on 21 July 2020, Ken Xue accepted that he sent out an email at 5.11pm the next day (A514) which was critical of the secretary, although he conceded it was a statutory function of the secretary to send out such notices. He initially suggested Sylvia sent out the email with his name on it but later suggested she drafted it and he sent it. That email contained the closing words: *"I don't agree with the meeting to be held on 8th August and since we now have the majority … we demand you to cancel AGM notice asap...*"

137 The result was a 5.30pm email in which the secretary, who had only agreed to take up the position when voting for that position was evenly divided, resigned. The 5.46pm response did not thank that person for serving as secretary but instead alleged, in bold type, *"You have failed your duty of care to all owners …*". Ken Xue initially suggested that reply was drafted by Sylvia but subsequently accepted it was sent by him.

138 In relation to the Supreme Court proceedings, Ken Xue's cross-examination revealed a number of matters: (1) there was no SC meeting in relation to the commencement of those proceedings, (2) he "*thinks*" the treasurer approved

that expenditure, (3) no costs agreement was distributed because it was an emergency, (4) Beazley Lawyers were chosen because they were recommended by Sylvia, (5) he gave instructions to those lawyers, and (6) the only affidavits provided in support of the application were his. He denied that his affidavit was an attempt to stop the AGM. That answer is contrary to his earlier answer that he sought to stop that AGM.

139 Ken Xue accepted that the summons was dismissed by the Supreme Court. He accepted that a further attempt in the Tribunal later the same day also failed to stop the AGM, but only when that proposition was put a second time because of a non-responsive answer the first time it was put.

140 When it was put to Ken Xue that he and Sylvia were at the venue for that meeting the next morning, again the question had to be asked twice so a non-responsive answer could be replaced by an admission. He suggested they were handing out a paper which indicated that *"NCAT did not make orders for the meeting to go ahead"*. It does not appear that any copy of what was being handed out was included in the evidence. Nor was a copy of any Tribunal order to that effect placed before the Tribunal. He claimed that the hiring of security guards was approved by the treasurer and accepted that his mother, Ms Sun, was present as was Sylvia, an employee of the respondent.

141 After answering questions by seeking to maintain his answer that he and Sylvia were saying that the Tribunal did not say the meeting could go ahead, Ken Xue admitted that he was telling people the meeting could not go ahead.

142 When it was put to Ken Xie that the elected chairperson declined to chair that AGM, Ken Xue said: *"We declared that the meeting be adjourned and left*". He agreed that it was the treasurer, Mr Beecham, and not the person chairing the meeting, who said that there were Tribunal proceedings on foot and that the meeting may be declared invalid, so it was adjourned.

143 Ken Xue agreed that he considered the SC members were not validly elected and that, as a result, the respondent was not obliged to do what they decided. When taken to his third affidavit (A3934 at [60]), Ken Xue accepted that the request for keys had not been for the master keys as he had suggested. When it was then suggested that he was seeking to make an excuse for non-

compliance, Ken Xue suggested that he would have to go and make copies. However, there is no record of that reason having been given previously and no explanation of why copies have not been obtained.

144 In relation to the admitted failure to provide the password for the DVR, Ken Xue suggested the request received *"may be illegal*" and that if there was a specific resolution of the lot owners then it would be provided.

Submissions

145 Submissions for the applicant comprise 35 pages of written submissions (MFI 1, tab 4), oral submissions made on the morning of the fourth day of the hearing, and submissions in reply made that afternoon. The respondent's submissions cover 26 pages of written submissions (MFI 1, tab 5) plus oral submissions delivered on the afternoon of the fourth day of the hearing. Those submissions have been considered by the Tribunal when determining each of the issues.

Jurisdiction

146 As these proceedings relate to premises in Ultimo which are the subject of a strata scheme, the SSMA applies and that would normally be sufficient to find that the Tribunal has jurisdiction to hear and determine the proceedings.

147 However, the respondent raised two reasons in support of its contention that the Tribunal does not have jurisdiction. The first, is that s 72 does not apply to the CA. Secondly, that the pre-existing Supreme Court proceedings between the parties deprive the Tribunal of jurisdiction by reason of clause 5(7) of Schedule 4 to the CATA. Both those issues are considered below.

Relevant law

148 The applicant sought a termination order under s 72 of the SSMA which is set out in full later in these reasons. For present purposes, it is sufficient to note that s 72(1)(a) provides the Tribunal with the power to terminate an agreement for the appointment of a building manager. Since s 72(1) commences with the words "*The Tribunal may …"* that power to terminate is discretionary. There are six grounds for making an order under s 72 and the applicant relies on three of

them, being paragraphs (a), (b) and (f) of s 72(3) which are set out below since they provide the yardstick against which the evidence must be assessed.

> (a) that the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,
>
> (b) that charges payable by the owners corporation under the agreement are unfair,
>
> …
>
> (f) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

149 There does not appear to be any reported decision where the power conferred in the Tribunal by s 72 of the SSMA has been exercised in favour of an applicant. That, of course, is not a defence otherwise that power would never be exercised. The question is not whether the power has been exercised in a previous case but whether it should be exercised in this case.

Consideration

150 The difficulties of dealing with the issues which are, metaphorically speaking, needles in a haystack of evidence as well as submissions, both written and oral, do not require elaboration. Attempting to be both complete and concise involves competing goals. In reaching a decision in relation to this application, the Tribunal has considered each of the documents that were referred to during the hearing, the oral evidence, and the submissions, both written and oral, albeit without the benefit of a transcript.

151 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. 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 …

152 The matters suggested by the parties to be the issues in these proceedings are considered below. Each issue has been considered with the objective that, in the event of a successful appeal, it will not be necessary to conduct a re-hearing.

153 In considering the issues raised in these proceedings, the applicant bears the onus of proof since it commenced the proceedings. The standard of proof is the civil standard, usually expressed as proof on the balance of probabilities. However, it is well-established that, when considering whether the evidence meets that standard and thus satisfies the onus of proof, regard should be had to the nature of the issue under consideration: *Briginshaw v Briginshaw* [1938] HCA 34. Although the rules of evidence do not apply to these proceedings, it is noted that principle has been incorporated in s 140 of the *Evidence Act* 1995 which requires a consideration of the nature of the cause of action or defence, the nature of the subject matter of the proceedings, and the gravity of the matter alleged.

154 The respondent's submissions included the suggestion that matters which were not raised in the applicant's Points of Claim ought not to be dealt with by the Tribunal. It is clear the Points of Claim were phrased by reference to s 72 rather than the evidence. However, there are two reasons why this submission is rejected. First, the Tribunal is not a court of pleading whereby a matter that is not pleaded cannot be raised. Secondly, both parties lodged their evidence, had an opportunity to cross-examine each witness and to make both written and oral submissions with the result that it cannot be said to be procedurally unfair to now consider issues which have been strenuously contested over a four-day hearing.

Chronology

155 A statement of facts and chronology was provided by each party. Combining those four documents yields the following summary of what appears in more than 5,000 pages of evidence.

20 Oct 00 The respondent was incorporated

27 Oct 00 Caretaker rights sold by Meriton to respondent for $310,000

18 Jan 01 The subject strata plan was registered, with 110 lots

20 Jan 01 Applicant's common seal was affixed to the CA

16 Mar 01 Meriton and the respondent executed the CA

15 Mar 02 Respondent began increasing its fee by 5% each year

10 Feb 03 The 2002 amendment of 1996 Act commenced

2009 George Xue was employed as caretaker by the respondent

05 Jun 08 Ms Sun elected to SC and appointed as substitute contact

28 May 09 The subdivision of Lot 110 into 224 lots was registered

18 Aug 09 Ms Sun elected to SC and appointed primary contact point

18 Aug 09 Applicant resolved have a 10-year CA with Meriton for Stage 2

Sep 09 Respondent began charging additional quarterly fee of $5,148 plus GST, backdated to 01 Apr 09

11 Oct 10 Ms Sun elected to SC and appointed primary contact point

20 Oct 10 Respondent excised option to extend CA by five years

04 Jul 11 Ms Sun elected to SC and appointed primary contact point

31 Jul 12 Ms Sun elected to SC and appointed primary contact point

2013-2014 No AGM held

Nov 14 Respondent engaged Jim's Mowing and invoiced applicant

28 Oct 15 Respondent excised option to extend CA by five years

29 Oct 15 Applicant and respondent initialled a CA

10 Dec 15 Lot 71 purchased in the name of Ms Liang (Ken Xue's wife)

May 16 Respondent began charging additional quarterly fee of $6,938.36 plus GST

19 Sep 16 Minutes suggest Ken Xue's wife elected to SC

30 Nov 16 SSMA commenced

28 Mar 17 Ken Xue elected as secretary, appointed primary contact point

10 Jan 18 Gardenmakers replaced Jim's Mowing and invoiced applicant

22 May 18 Ken Xue elected as secretary

13 Mar 19 SC resolved to seek advice re eligibility of Ken Xue

22 Mar 19 SC received legal advice Ken Xue not eligible to be SC member

30 Apr 19 Ms Liang transferred a 1% interest in Lot 71 to Ken Xue

15 Jun 19 Ken Xue and Mr Eltis elected to the SC

15 Jun 19 Applicant resolved to enter CA for Stage 2 with the respondent

06 Aug 19 Ken Xue nominated for position is secretary but not successful

21 Sep 19 15 Jun 19 resolution rescinded, resolved to re-appoint Meriton

Nov 19 Applicant ceased pay fees to respondent for caretaker services

09 Dec 19 Applicant resolved to request respondent to provide documents in support of the 5% annual increase in its fees

12 Feb 20 SC resolved to only pay respondent based on CPI increase and not to pay the additional quarterly fee

11 May 20 Respondent served Dispute Notice on applicant

04 Aug 20 Supreme Court summons filed by Beazley Lawyers

07 Aug 20 Supreme Court refused to grant injunction to stop AGM and the Tribunal decline to cancel the AGM to be held the following day

08 Aug 20 AGM held - no director or employee of respondent elected to SC

01 Oct 20 Applicant served Dispute Notice on the respondent

09 Oct 20 Mediation held between applicant and respondent

12 Oct 20 Respondent excised option to extend CA by five years

13 Oct 20 Respondent directed to provide access to CCTV footage

29 Oct 20 Respondent replied to applicant's Dispute Notice

29 Oct 20 Applicant served second Dispute Notice on the respondent

30 Oct 20 Respondent commenced Supreme Court proceedings

26 Nov 20 Respondent replied to applicant's second Dispute Notice

26 Nov 20 Respondent refused to provide copy of CCTV footage, says it will only permit inspection at its office

01 Dec 20 Respondent refused to provide keys

11 Dec 20 Applicant filed cross-application in Supreme Court proceedings

24 Dec 20 Applicant filed interim and substantive applications with Tribunal

20 Jan 21 Those applications were re-filed

28 Jan 21 Respondent write to Tribunal, alleging abuse of process

12 Feb 21 Interim application dismissed but directions were made in substantive application as abuse of process argument rejected

01 Mar 21 SC resolved to authorise secretary to access CCTV footage

02 Mar 21 Secretary sought to arrange that access with respondent

03 Mar 21 Respondent denied access, saying it required approval by a general meeting of the applicant

30 Apr 21 Respondent directed by secretary to provide access keys

Does clause 5(7) of Schedule 4 of the CATA apply?

156 Both the previously dismissed interim application and the substantive application sought the following orders:

> 1 An order that the Applicant not be required to provide the Respondent with a new Caretaker Agreement pending resolution of the substantive proceedings; and
>
> 2 An order pursuant to Section 72(1)(A) of the Strata Schemes Management Act 2015 terminating the Caretaker Agreement between the Applicant and the Respondent; and
>
> 3 An order varying the term of that Agreement to the effect that the Agreement terminates not later than 15 March 2021; and
>
> 4 An order requiring the Respondent to pay the Applicant compensation for over-payments made by the Applicant to the Respondent; and
>
> 5 An order that the Respondent take such steps as are necessary to transfer to a replacement building manager the Caretaker Lots in accordance with the further orders annexed to this Applicant (sic); and
>
> 6 An order that the Respondent pay the Applicant's costs.

157 In a letter dated 28 January 2021 and in written submissions dated 10 February 2021, the respondent raised clause 5(7) of Schedule 4 of the CATA which is set out below:

> **Effect of pending court proceedings on Tribunal.** If, at the time when an application is made to the Tribunal for the exercise of a Division function, an issue arising under the application was the subject of dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue.

158 When this application was considered by the Tribunal on 12 February 2021, an order was made dismissing the claim for order 4 above and the published reasons clearly indicate that decision was based on clause 5(7).

159 The first order sought relates solely to the interim application and the third order sought has been overtaken by time. As a result, it is only the requests contained in the second, fifth and sixth paragraphs that require consideration. It is clear the issue the applicant wishes to have determined is whether the CA should be terminated, as sought in the second paragraph, and that the fifth and sixth paragraphs raise matters that would be consequential upon any termination order being made.

160 While the written submissions of the respondent (MFI 1, tab 5, at [26] to [43]) detailed the overlapping factual aspects between this application and the pre-existing Supreme Court proceedings, s 72 of the SSMA (quoted below) confers the power to terminate on the Tribunal and it would appear the issue of

whether the CA should be terminated is a matter which cannot be considered in the Supreme Court proceedings.

161 In support of its submissions on this issue, the respondent referred to and quoted portions of the judgement in *The Owners Corporation – Strata Plan 64807 v BCS Strata Management Pty Ltd* [2020] NSWSC 1040, being the unsuccessful application to prevent the 8 August 2020 AGM from being held. In that case, the court noted that proceedings had already been commenced in the Tribunal on 3 August 2020, dismissed some aspects of the summons for want of jurisdiction due to those proceedings, and transferred the remaining aspects to the Tribunal. The respondent's submissions quoted from that judgment ([36, [37] and [45]) in support of the proposition that common factual issues underlying the relief sought was sufficient.

162 However, those paragraphs refer to the judgement of White J (as he then was) in *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Ltd* [2015] NSWSC 289 which, at [105], said (emphasis added):

> Parliament has provided, in effect, that **if an issue arising under the application can be dealt with either by a court or the Tribunal**, the issue should be determined by the court of tribunal in which the proceedings are first commenced.

163 There are two reasons why the Tribunal rejects the respondent's contentions on this issue. First, since it was previously raised, considered, and determined by the Tribunal on 12 February 2021. Secondly, since the issue of whether the CA should be terminated is an issue that can only be determined by the Tribunal by reason of the wording of s 72 of the SSMA.

The 5% annual increase

164 To satisfy the legal burden of proof on this issue, the applicant only needs to point to documents such as the respondent's invoices, which show the application of a 5% annual increase in the amount charged by the respondent, and clause 3.1 of the CA. Clause 3 of the CA is set out in full below:

> 3.1 The Remuneration shall be varied on each anniversary of the date of the Agreement (each such anniversary being "the review date") in accordance with the percentage variation in the CPI (being, in this Agreement, the Consumer Price Index All Groups for Sydney or the index substituted for it by the Australian Statistician) over the twelve months preceding the review date. Regard is to be had to the CPI for the quarter last ending before the date of

this Agreement and to the CPI for the quarter last ending before the review date.

3.2 At the commencement of the 6th year of the term and at the expiration of each 5 year period thereafter, the Remuneration shall be such amount as is mutually agreed upon between the Owners Corporation and the Caretaker.

3.3 If the parties fail to reach an agreement as to Remuneration then the Remuneration shall be determined by an expert who shall determine the fair market remuneration to be appointed by the President for the time being of the Law Society of New South Wales ("the Law Society President") whose decision shall be final and binding on the parties.

3.4 The parties acknowledge that the Remuneration does not include any payment for the provision of leasing, managing, and selling agency services conducted by the Caretaker pursuant to clause 4 of this Agreement.

165 The respondent's written submissions suggested: *"The [applicant] has adduced no evidence from anyone involved with the discussions in relation to the creation of the Agreement, its variation, or the agreed increase in the annual fee of 5% pa".* That submission overlooks that it is not for the applicant to prove the CA was not varied: it is for the respondent to prove it was varied. In other words, while the legal burden of proof remains with the applicant, the evidential burden falls on the respondent in relation to any variation of the CA to permit an annual increase of 5%.

166 It was contended that the evidence of Ms Sun was corroborated by Mr Lai and that Ms Sun believed the applicant had recorded its agreement at a meeting and that Ms Sun had no control over those records. Further, it was submitted that a 5% increase was "*the going rate*" for Stage 2 of the complex.

167 In response to the applicant's submission that an inference based on the decision in *Jones v Dunkel* [1959] HCA 8 should be drawn against the respondent for not calling Mr Paskell, the startling submission in response was that the applicant could have called him, but it was not explained how the applicant could be obliged to call a witness whom the respondent alleged spoke to their witness, Mr Lai, in support of the respondent's case, indicating that Meriton agreed to a 5% increase. As Mr Paskell was said to be a representative of Meriton, not the respondent, the Tribunal does not consider a *Jones v Dunkel* inference warranted and, for the reasons indicated below, such an inference is not necessary.

168 The Tribunal is comfortably satisfied, bearing in mind the serious nature of the allegation, that it should find the CA was never varied to permit a 5% annual increase for the following reasons.

169 First, the 26 October 2000 letter to which Ms Sun referred (A823) related to the purchase price for caretaker management rights for Stage 2, not the caretaker fees. In other words, the letter related to what the respondent would have to pay Meriton for the right to provide the services and not to what the respondent could charge the applicant for providing such services.

170 Secondly, Ms Sun suggested she spoke with Mr Lai who later told her that Meriton had agreed to the increase being 5%. However, not only does that evidence not reflect any agreement by the applicant but also it conflict swith the evidence of Mr Lai who suggested he and Ms Sun spoke to Mr Paskell of Meriton.

171 Thirdly, Mr Lai's evidence goes no higher than suggesting Mr Paskell said a change would be made and he does not give any evidence of any relevant document or conversation after that. As such, even if accepted, that evidence goes no further than a verbal expression of intention by an employee of Mertion and does not contain anything to indicate either that he had the authority to vary the CA on behalf of Meriton or the agreement of the applicant to such a variation. It was submitted, for the respondent, that the letter dated 11 April 2020 that was annexed to Mr Lai's affidavit (A735) was pre-litigation, but it was written many years after the alleged events and post-dated this issue being raised in by the applicant with the respondent in December 2019.

172 Fourthly, Ms Sun's evidence now contradicts what she claimed when this issue was raised in December 2019, as revealed by her email dated 20 December 2019 (A1579) which began with the words: *"The agreement to a 5% increase was passed at a meeting many years ago …*". Further, the suggestion that the applicant cannot locate the minutes of that agreement overlooks the fact that, if such an important agreement was reached, she should have retained her copy of those minutes.

173 Fifthly, a different explanation was provided by Ms Sun in her 24 March 2020 letter (A1615) in which she asserted: *"The issue of the basis of increases was cavilled in 2001 and agreement was reached at that time"*.

174 Sixthly, if there was an agreement to change the basis of the annual increase from the CPI to 5% then, when a CA dated 29 October 2015 (A917) was initialled that was an opportunity to put the alleged variation beyond any doubt.

175 Further, it is to be noted that, when tendering for the Stage 2 rights (D148 at 152), the respondent only proposed that the annual fee increase by the CPI. If, as suggested in the respondent's written submissions, "*5% annual increase in caretaker fees was the going rate for the Stage 2 part of the same building complex*", then why was the respondent only proposing a CPI increase? The better view is that the respondent only proposed a CPI increase because, at that time, it was competing with Meriton for the Stage 2 rights and Meriton had included only a CPI increase in its CA with the respondent for Stage 1.

176 It is convenient to here record that the Tribunal's assessment of Ms Sun's evidence is that she was clearly an unreliable witness whose evidence should not be accepted without satisfactory corroboration. Her suggestion that she did not understand that a 5% increase would provide the respondent with more than if a CPI increase was used cannot be accepted. On that topic, her subsequent answers were evasive, non-responsive and even included an expressed desire not to have to answer a question. Moreover, she later accepted that the resulting additional charge from the application of a 5% increase instead of a CPI increase was $442,963.398.

177 Ms Sun's attempt suggest that she was not elected to the SC and that she did not feel she was so elected also cannot be accepted, those answers being contradicted not only by minutes but also by her signing voting papers. Her attempts to deny her SC membership were sufficient, on their own, to damage her credibility. She denied seeing security guards at the 8 August 2020 AGM despite her own evidence of their presence. Likewise, she said she did not believe that AGM was cancelled but expressed the contrary view in her affidavit.

178 While the respondent adopted a 5% increase instead of a CPI increase from the first anniversary of the CA, and while the applicant paid the resulting invoices for many years, that does not alter the fact that the respondent's conduct was a breach of the CA. Although that breach occurred many years ago, it suggests the respondent was not willing to abide by the terms of the CA early in the life of that agreement.

The additional fee

179 The applicant alleged that there was an additional fee charged quarterly and only needs to note the relevant invoices and the lack of any provision in the CA for that additional fee to render it a matter for the respondent to provide evidence to establish a basis for that fee which, from 19 September 2009 to 19 September 2019, totalled $255,297.64.

180 The respondent alleges this additional fee arose because of additional work in Stage 1 created by the completion of Stage 2 and relies on the evidence of Ms Sun and Ms Xu.

181 Ms Sun's evidence (A745 at [35-36]) was that, during an SC meeting in "*mid-2009*" she raised the question of an additional fee, was told she needed to indicate how such she was seeking, said she would make a calculation and provide details at the next meeting. She claimed that there was a conversation at the next meeting at which she proposed $22 per hour for 20 hours each week and that Ms Xu, who was chairperson at that time, approve that but said it should be invoiced quarterly. She went on to suggest that Ms Xu told the strata managing agent to make sure that agreement was in the minutes of the meeting.

182 That affidavit evidence differs from what was said by the respondent's then lawyers in a letter dated 11 May 2020 (A1662 at [16]) to the effect that in about March 2009 a motion to pay the respondent an additional fee was carried. However, even if it be assumed what was said in that letter does not differ from Ms Sun's affidavit evidence, for the reasons indicated earlier, the Tribunal does not accept the uncorroborated evidence of Ms Sun.

183 It is to be noted that Ms Sun was an SC member at this time which suggests she would have been provided with a copy of the minutes and it is reasonable

to expect that anyone operating a business would retain a document which provided a basis for a charge in the vicinity of $25,000 per annum.

184 The evidence of Ms Xu was that was a motion for an additional fee, but she could not recall if it was carried. As a result, Mr Xu's evidence does not confirm that of Ms Sun. Further, as outlined above, cross-examination revealed that Ms Xu was not able to answer questions without reference to the minutes. Ms Xu was also a less than convincing witness who sought to avoid answering questions and gave non-responsive answers, especially in the question of whether she and Ms Sun were friends. The Tribunal does not consider her evidence reliable without documentary corroboration.

185 Thus, the need for Ms Sun's evidence to be reliably corroborated has not been met since the evidence of Mr Xu's was neither reliable nor corroborative. There was also a telling answer given my Ms Sun during her cross-examination when questioned about a paragraph in her affidavit on this topic (A744 at [33]) and she said words to the effect: *"I did not any anyone. I just told myself to increase the fee."*

186 Accordingly, the position is that the Tribunal is not persuaded that there was an agreement to pay an additional fee, based on the oral evidence of Ms Sun and Ms Xu. It remains to consider the available documentary evidence.

187 There were SC meetings in 2009 on 23 February (paper meeting), 11 March, 16 April (paper meeting), 18 August 2020 and 30 September 2009. However, there is no documentary support for the respondent's case on this issue.

188 There is a second aspect to this issue. as Ms Sun claimed in her affidavit (A746 at [40-41]) that she had a discussion with the strata managing agent after, not during, an SC meeting in "*about May 2016*" at which it was agreed that a the respondent would charge a fixed amount of $6,938.36 per quarter. However, there is no minutes recording any such agreement. Since this allegation is based on the uncorroborated evidence of Ms Sun, the Tribunal does not consider it to have been proved.

189 Accordingly, in relation to this issue, the Tribunal determines that there was no agreement by the applicant to pay the additional fee charged by the respondent, either in 2009 or in 2016.

Additional charges for gardening and mowing

190 In the CA, Schedule 2 set out the duties of the respondent. Clause 1 contained the following words:

> The Caretaker shall by its employees, contractors or agents:
>
> (a) Maintain and care for the Complex scheme and attending to the gardening, cleaning and building maintenance of the Complex and common property and any improvements there and in so doing it shall use its best endeavours to maintain the Complex in a good state of repair, fair wear and tear excepted.
>
> …
>
> (ac) Mows the lawns surrounding the Complex and the adjacent footpath and maintain the gardens and shrubs to a reasonably acceptable standard.

191 Again, there are two strands to the respondent's evidence. First, the affidavit evidence of Ms Sun (A3593 at [61(b)]) was that in about October 2014 she received a phone call from the strata managing agent who said that *"from now on, the owners corporation will approve the gardening works and pay the gardeners*". She said Jim's Mowing was the gardening contractor at that time.

192 However, that differs from what she said in a letter dated 23 February 2021 (A141): *"In 2015, the strata executive committee appointed at the time (namely the sole executive committee member Ryan Walmsley of Meriton) unilaterally resolved for gardening expenses to be paid directly by the owners corporation rather than by the caretakers of Stage 1 and Stage 2 respectfully* (sic)."

193 Secondly, Ms Sun said (A3594 at [61(d)] that in or about mid-2017 she attended an SC meeting at which Ken Xue and Mr Watson were in attendance) during which she claimed Mr Watson said: *"Stage 1 and Stage 2 are using different gardeners. Ken and I decided to give the gardening to Gardenmakers to do Stage 1 and Stage 2 together."*

194 The respondent's submissions are to the effect that the applicant either failed to make or keep records and that it is unlikely that the subject invoices would have been paid if they were not properly owed.

195 As to the first strand, the uncorroborated evidence of Ms Sun is considered insufficient to prove the alleged change and what was asserted in the 23 February 2021 letter was not supported by any record of such a resolution.

196 As to the second strand, the minutes of the SC meetings held on 24 October 2017 and 6 March 2018 do contain references to gardening. However, the minutes of the former meeting only record a resolution to review the gardening contract and the minutes of the latter meeting do not refer to any decision to engage Gardenmakers, as alleged by Ms Sun.

197 Despite suggesting Ken Xue and Mr Watson were present at the SC meeting said to have been held in mid-2017, what Ms Sun alleged Mr Watson said was never put to him in cross-examination and, having searched each of Ken Xue's three affidavits (A2590, A3530 and A3909), it does not appear he provided evidence to corroborate this claim of Ms Sun. Even if he did, for the reasons set out below, he too is considered by the Tribunal to be an unreliable witness.

198 In those circumstances, the evidence led in the respondent's case does not persuade the Tribunal that there is a satisfactory explanation for the payment of invoices from Jim's Mowing and Gardenmakers by the applicant despite the CA making the respondent, not the applicant, responsible for the cost of that the work covered by those invoices.

Ms Sun's membership of the SC

199 Clause 18.2 of the CA was in the following terms:

> The Caretaker, of where the Caretaker is a Corporation, any shareholder or director of the Caretaker, shall not offer himself for election as an office bearer of the Executive Committee of the Owners Corporation.

200 In the 1996 Act, so far as is presently relevant, clause 3A of Schedule 3, which commenced on 1 August 2008, provided:

> (1) A person who is connected with the original owner or caretaker of a strata scheme is not eligible to be elected as a member of an executive committee for the strata scheme unless:
>
> (a) the person discloses the connection that the person has with the original owner or caretaker; and
>
> (b) the disclosure is made at the meeting of the owners corporation at which the executive committee is to be elected and before the election is conducted.

> (2) A disclosure made under subclause (1) is to be included in the minutes of the meeting at which the disclosure is made.

201 The wording of s 32 in the SSMA, which commenced on 30 November 2016, is as follows:

> (1) The following persons are not eligible for appointment or election to the strata committee or to act as members of the strata committee unless they are also owners of lots in the strata scheme-
>
> (a) the building manager for the strata scheme,
>
> (b) …
>
> (c) a person who is connected with … the building manager for the scheme, unless the person discloses that connection at the meeting at which the election is held and before the election is held or before the person is appointed to act as a member,
>
> (d) …

202 As to the words *"a person who is connected*" in s 32, the effect of s 7(1)(a) is that person who is *"a relative (within the meaning of the Local Government Act 1993")* of Ms Sun is covered by those words. The dictionary in that Act contains the following definition:

> relative, in relation to a person, means any of the following—
>
> (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or of the person's spouse or de facto partner,
>
> (b) the spouse or de facto partner of the person or of a person referred to in paragraph (a).

203 Ms Sun's own evidence is that she has been a director of the respondent since it was incorporated on 20 October 2000. The minutes reveal that at the AGM held in 2010, 2011 and 2012, she was elected as an SC member without any prior disclosure of her connection with the respondent.

204 The minutes of the AGM held on 11 October 2010 (D34 at 37) record that only Mr Walmsley "*disclosed a connection with the original owner (developer) or caretaker in accordance with the Act".* The minutes of the AGM held on 4 July 2021 (D40 at 43) record: "*NOTED that NO candidate for election to the Executive Committee disclosed any "connections" with the original owner (developer) or caretaker in accordance with the Act*". The minutes of the AGM held on 31 July 2012 (D46 at 49) only recorded that Mr Walmsley disclosed his connection prior to being elected.

205 For reasons which do not appear to be explained by the evidence, there was no AGM held in 2013 or 2014 and, at the 2015 AGM held on 14 May, Meriton used the majority voting power it had as the owner of Lots 111 to 326 to elect its nominee, Mr Walmsley, as the sole SC member.

206 As a result, the evidence satisfies the Tribunal that Ms Sun was an SC member from 11 October 2010 to 14 May 2015.

207 The respondent's submission suggested the applicant's records were incomplete and went on to suggest that *"Ms Sun was last on the Committee in May 2015 – some 6.5 years ago"*.

208 It is clear Ms Sun was an SC member for more than four years and support for that view is found in the voting papers she signed on 27 March 2009 (D23) and 6 July 2010 (D33). Indeed, as those voting papers suggest Ms Sun was an SC member prior to 11 October 2010, the available evidence supports a finding that she was an SC member for more than six years, from 27 March 2009 to 14 May 2015. The attempts of Ms Sun during cross-examination to suggest she was not a member of the SC are rejected.

209 There appear to have been clear breaches of clause 18.2 of the CA by Ms Sun. However, a technical approach might suggest that clause 18.2 only required Ms Sun to not offer herself for election and there is no evidence she did that. Even if that is accepted, it is clear Ms Sun breached the requirements of the 1996 Act when she was elected to the SC at the 11 October 2010 AGM, the AGM held on 4 July 2011, and the 31 July 2012 AGM.

Ken Xue's membership of the SC

210 As with Ms Sun, there is a trifecta of AGM minutes relating to Ken Xue being an SC member, being the minutes dated 19 September 2016 (D66), 28 March 2017 (D72) and 22 May 2018 (D88). It is convenient to here note that, since Ken Xue has been employed full-time by the respondent since 2015, his relevant connections to the respondent were not only that he is an employee or the respondent but also that he is the son of the owner of the respondent.

211 Although the minutes of each of those three meetings suggests that Ken Xue's wife was elected to the SC and not him, the Tribunal is satisfied that it was he

and not she who was elected on each of those three occasions. The first reason for that finding is that Ms Liang, whom the Tribunal considers was a credible witness, gave evidence that she did not attend those meetings and had not served on the SC. Secondly, there is a form dated 25 March 2017 (A4737) whereby Ms Liang nominated her husband, Ken Xue, for election to the SC and it appears that is the source of an error in the minutes which have recorded the person nominating and not the person nominated as having been elected. Thirdly, the minutes of the SC meeting held on 28 March 2017 (D83), immediately following the AGM, record the election of Ken Xue as secretary which would not have occurred unless he was an SC member.

212 The minutes of the 2016 AGM, 2017 AGM and 2018 AGM do not record any disclosure by Ken Xue of his connection to the respondent. The 1996 Act applied to the first of those meetings, held on 19 September 2016 while the SSMA, which commenced on 30 November 2016, applied to the second and third of those meetings, held on 28 March 2017 and 22 May 2018. It is clear Ken Xue, an employee of the respondent, failed to comply with the relevant statutory provisions, which required disclosure of his relationship to the respondent prior to being elected to the SC at each of those three AGMs.

213 Next, it is to be noted that the eligibility of Ken Xue to be a member of the SC was raised at the SC meeting held on 13 March 2019 and legal advice dated 22 March 2019 (A367) suggested he was not eligible. On 30 April 2019 Ken Xue acquired a 1% interest in the lot that was until then wholly owned by his wife. The Tribunal finds that the transfer of that 1% interest to Ken Xue was made for the purpose of rendering him eligible to remain as an SC member.

214 The suggestion of Ken Xue, during cross-examination, that the 1% transfer was a "*tax decision*" is rejected and that answer damaged his credibility. Secondly, Ken Xue was evasive when questioned about emails issued in his name on 21 July 2020, initially suggesting Sylvia sent an email and later saying that she drafted it and he sent it. Thirdly, he gave non-responsive answers to questions which challenged his conduct, such as in relation to the outcome of the 7 August 2020 Supreme Court hearing. Indeed, on the simple question of whether he and Sylvia were at the venue for the 8 August 2020 AGM, the

question had to be asked three times before he admitted their presence on that occasion.

215 After trying to maintain that, on 8 August 2020, he was saying that the Tribunal did not make orders for the AGM to proceed, he ultimately admitted he was telling people the meeting could not go ahead. Ken Xue was forced to admit that there had been no request for master keys, as he had suggested in his third affidavit (A3934 at [60]). It was not until cross-examination that he sought refuge in the suggestion that he would have to make copies of the requested keys.

216 For those reasons, the Tribunal does not consider the evidence of Ken Xue to be reliable with the result that it could not be accepted without reliable corroboration.

217 It remains to consider the 2019 AGM which was held on 15 June. The minutes of that meeting (D173 at 182) do record that Ken Xue disclosed his position as "*Building Manager (Sunaust Properties)*".

218 The recent decision in *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 [2021] NSWCA 162* (*ACPM*) was referred to in the written submissions of both the applicant and the respondent. That is not surprising since the caretaker agreement under consideration contained an identical clause 18.2.

219 In relation to this issue, it is sufficient to note that the decision in *ACPM* reveals there were two directors of a caretaker company who were nominated and elected to the SC. The Court (Bathurst CJ with whom Payne JA and McCallum JA agreed) held (at [220]) that there was a breach of clause 18.2 that was not inconsequential but did not constitute "*gross misconduct*" which was required by clause 9.3(iv) for the owners corporation to be entitled to terminate the agreement.

220 The respondent's written submissions contended that *ACPM* revealed that there was no improper advantage obtained by the building manager, there was no ignorance of the connection and no objection from other SC members and that directors' membership of the SC was tolerated. The applicant's written

submissions noted that *ACPM* was considering the contractual provision relating to termination whereas these proceedings raised the statutory provision relating to termination.

221 It is the Tribunal's view that membership of the SC, considered in isolation, could be considered inconsequential, but the membership of Ms Sun and Ken Xue cannot be so regarded as there is evidence that they not only acted in self-interest but ignored conflicts of interest and sought not to serve the applicant but to control it.

Conduct relating to the 8 August 2020 AGM

222 Mr Eltis, Mr Laurans, Mr Wang, and Mr Watson each gave evidence for the applicant relating to the events surrounding the 8 August 2020 AGM. While the preparation of a joint affidavit by the then solicitor for the applicant appears to have been forensically unwise, they each maintained they had a clear recollection of the relevant events, and their recollections were not damaged by cross-examination. To the extent that there is a difference between their evidence and that of Ms Sun and Mr Xue, both of whom are considered by the Tribunal to be unreliable witnesses, the evidence of the applicant's witnesses is accepted. It is noted that the respondent did not lead evidence from its employee who was only ever referred to by her first name, Sylvia.

223 Dr Mao gave limited evidence in relation to this topic, indicating that, at the time of the 8 August 2020 AGM, he was not permitted to attend any public gathering of more than 20 people as he was working for NSW Health. His affidavit and oral evidence were supportive of the respondent but were plainly phrased carefully, such as (1) his suggestion that his concerns in relation to the 8 August 2020 meeting were "*predominantly*" due to the pandemic (but not providing any other reasons), (2) his suggestion that he did not know who gave evidence in the Supreme Court proceedings because he was not allowed to talk to any witness, and (3) his suggestion that the decision to commence those proceedings was the result of an informal meetings, using emails, but said he did not know where any of those emails were.

224 In relation to this issue, based on the evidence, and having regard to the submissions of the parties, the Tribunal makes the following findings of fact:

(1) At the 15 June 2019 AGM, nine people were elected to the SC.

(2) On 15 July 2020 there was an informal, pre-mediation meeting attended by representatives of the applicant and the respondent, together with their respective lawyers. At that meeting there was discussion that the AGM would be held on 8 August 2020.

(3) On 21 July 2020, after obtaining advice from NSW Health, the applicant's secretary issued a notice for that meeting dated 20 July 2020 (A4128) which indicated *"The venue has confirmed that they can accommodate [our] meeting with the required social distancing and cleaning COVID measures."*

(4) That notice included proposals to have the respondent audited (item 20), and to issue a breach notice to the respondent for overcharging (item 21).

(5) On 22 July 2020 Ken Xue sent an email to the then secretary which was critical of him and included the words: "*since we now have the majority ... we demand you cancel AGM notice asap …"* Shortly after receiving that email, the then secretary resigned.

(6) On 27 July 2020 the chairperson purported to direct the strata managing agent to call a meeting of the SC on 31 July 2020 to call off the AGM otherwise the SC would commence proceedings in the Tribunal, seeking an order to restrain the AGM from being held on 8 August 2020.

(7) On 28 July 2020 the strata managing agent replied that the requested SC meeting could not be convened for 31 July 2020 due to the notice requirements of the SSMA and that the SC had no power to adjourn the AGM.

(8) On 29 July 2020 Mr Eltis filed an application with the Tribunal, seeking orders which included that the AGM be ordered to proceed.

(9) On 31 July 2020 Beazley Lawyers wrote to the strata managing agent, claiming to be instructed by the SC, threatening to seek an injunction if the AGM was not called off by 5pm that day.

(10) The SC had not met to discuss and decide to engage those lawyers, there was no approval given to incur legal costs and there was no costs disclosure, as required by s 105 of the SSMA.

(11) On 04 August 2020 Beazley Lawyers emailed documents, including a Supreme Court summons in which the applicant was named as the plaintiff and the strata managing agent was named as the defendant, to Ken Xue who then forwarded those documents to SC members. The same day, the strata managing agent was served with a copy of the summons and two affidavits from Ken Xue.

(12) As the summons was emailed by Beazley Lawyers to Ken Xue and as Ken Xue was the only person who provided affidavit evidence in support of that summons, it is a reasonable inference that Ken Xue was the person providing instructions to Beazley Lawyers.

(13) That summons, which was made returnable two hours after it was served, was adjourned to 7 August 2020 at 10am. At that hearing, the application for an injunction was refused and the proceedings were transferred to the Tribunal by reason of the pre-existing proceedings, commenced on 29 July 2020.

(14) Later that day, the Tribunal declined to cancel the AGM, indicted that the AGM could proceed and acknowledged that COVID-19 safety measurers had been put in place.

(15) On the morning of 8 August 2020 there were ten private security guards attempting to prevent access to the venue. Those guards were being directed by Ken Xue, an employee of the respondent, and another employee of the respondent, named Sylvia. Those security guards left when instructed to do so by the Police.

(16) Prior to the AGM on 8 August 2020, Ms Sun, Ken Xue and Sylvia were telling arriving lot owners the meeting had been cancelled. Ken Xue and Sylvia were also handing out notices which suggested the Tribunal did not make orders for the meeting to go ahead. Those oral and written representations were false to the knowledge of Ms Sun, Ken Xue and Sylvia.

(17) The first item on the agenda for the meeting was the election of the chairperson for that meeting. When Ms Hu declined to chair that meeting, the then treasurer (Mr Beacham) said words to the effect that the meeting was adjourned. However, at the time he said those words, he had not been elected to chair that meeting.

(18) Mr Denney of the strata managing agent was then elected to chair the meeting which proceeded with 51 lot owners present in person and a further 143 by proxy. Nine SC members were duly elected. The proposals listed in the notice as Items 20 and 21, which related to the respondent, were both carried in a slightly amended form.

225 The applicant contended that the respondent meddled in the affairs if the applicant and sought to retain control of the SC, being motivated by a desire to maintain its caretaker role, and thereby abused its position as building manager. In contrast, the respondent suggested there were "*COVID-19 related circumstances underpinning the dispute as to whether or not the 8 August 2020 AGM should go ahead*" and that this was an issue which did not provide a proper basis for termination of the CA. There was an attempt to justify the Supreme Court proceedings on the basis that majority of the SC members supported that course of action.

226 It is sufficient to here record that the Tribunal considers the conduct of the respondent, (1) by its sole director and shareholder, Ms Sun, (2) by her son, Ken Xue, who is an employee of the respondent who reports to her and is

obliged to follow her instructions, and (3) by Sylvia, an employee of the respondent who reports to Ken Xue and is obliged to follow his instructions, to be relevant to a consideration of whether the CA should be terminated.

227 Further, the Tribunal is satisfied that the Supreme Court proceedings were not properly initiated or pursued and that what was said and done by those three persons on the morning of 8 August 2020, prior to the AGM, was knowingly false. The Tribunal is also satisfied that such conduct, which sought to prevent the 8 August 2020 AGM from being held, was not motivated by any COVID-related concern but by an attempt to prevent the applicant passing resolutions adverse to the interests of the respondent.

Failure to act on instructions

228 There are four strands to this issue. The first is that on 11 August 2020 Ms Sun sent a building management report to the former rather than the current SC members. That prompted the strata managing agent to send an email to Ms Sun (A406), providing her with the email addresses of the current SC members and requesting that all communications from the respondent to the SC be sent to those persons.

229 However, an 8 September 2020 email from Ms Sun (A593), sent in response to an email from the strata managing agent (A593) indicates she was still contending that the 8 August 2020 AGM was invalid more than a month later. A week later, on 15 September 2020, Ms Sun sent another building manager's report to the former SC.

230 The respondent's submissions contended (MFI 1, tab 5, at [122] that building management reports were sent to the strata managing agent and the members of the new SC, but the reference provided in support of that proposition related to subsequent reports, sent on 7 October 2020, 3 November 2020, 4 December 2020, and 8 January 2021 (A752 and A2598).

231 The second strand arose on 13 October 2020 when the strata managing agent directed the respondent to provide access to CCTV footage owned by the applicant which had still not been provided by 1 December 2020 (A611). Despite a 26 November 2020 letter from the respondent's solicitors (A604) suggesting that footage could be reviewed at the respondent's office upon

certain conditions, it was necessary for the SC to formally resolve on 1 March 2021 that "*for clarity and further confirmation, that Nick Eltis, the Secretary of the Owners Corporation, is authorised to issue instructions to stage 1 & 2 building managers on all matters*" (A134).

232 On 2 March 2021 the secretary, by email (A88), sought to access the CCTV footage the following day. However, on 3 March 2021 Ms Sun sent an email to the SC (A88) which suggested that a resolution of the applicant, not its SC, was required before access to the CCTV footage would be granted. As a result, it was necessary for a letter from the applicant's solicitor to be sent to the respondent (A90) on 3 March 2021. But, when the secretary and another SC member attended the respondent's office later that day, neither the CCTV footage nor access to it was provided.

233 There was a curious suggestion by Ken Xue, in his third affidavit (A3937 at [63(f)] that the secretary could not exercise the applicant's powers as they had been delegated to the strata managing agent. However, that contention overlooks that s 53(2) of the SSMA entitled the applicant to continue to exercise any functions which had previously been delegated to the strata managing agent. It is clear, from s 182(3)(j) of the SSMA, that the CCTV footage is a record of the applicant and is its property and not the property of the respondent.

234 The third strand related to a 26 November 2020 request for keys to enable access to the building cable risers (A613) which was followed up with a further email on 30 November 2020 (A612). Instead of providing those keys, Ms Sun sent an email on 1 December 2020 (A612) in which she began by saying: *"We express doubt that you are entitled to the keys themselves*".

235 As indicated earlier, Ken Xue sought to suggest that this was a request for master keys but, after conceding that was incorrect, suggested there was a need to obtain copies of the subject keys.

236 The fourth strand was the respondent's refusal to provide the password to the digital video recorder (DVR) system. As indicated earlier, on 15 March 2021 a request was made for the password to "*the old stage 1 DVR*" (A78). Ms Sun

agreed that password was sought, and that the respondent has that password. That password has not yet been provided.

237 The respondent's submissions suggested the respondent *"was left in a state of uncertainty as to the valid committee*" but goes on to accept *"that situation has long been resolved*". It is the respondent's contention that these matters are minor, are no longer of any relevance, and do not warrant termination of the CA.

238 Insofar as these items relate to matters of security, namely the CCTV footage and the DVR password, it is noted that Schedule 2 of the CA contains, as its third heading, the words: *"SECURITY DUTIES TO BE CONTROLLED BY BODY CORPORATE*" with no other words, thereby suggesting no other words were necessary.

239 The Tribunal considers that these four strands each involve instances where the respondent failed to comply with requests without any reasonable basis for such non-compliance.

The 25-year term

240 In the applicant's submissions, it was contended that the CA should be found to be unreasonable by reason of its 25-year term. The argument advanced in support of that proposition began by noting that the 2002 amendments to the 1996 Act, by reason of clause 12(2)(c) of the savings provisions (quoted below), did not enable the CA to be terminated under s 183A (also quoted below) on the ground that its 25-year term was harsh, oppressive, unconscionable, or unreasonable but that the savings provisions in the SSMA did not contain any such restriction. It was contended that difference should be taken to have been intentional.

241 The Tribunal was referred to the judgement of the New Zealand High Court in *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 1957 (*Sentinel*) which held that a building management agreement was harsh or unconscionable because it had a potential term of 30 years and there was a vast difference between the termination rights of the caretaker and the owners corporation.

242 In the exercise of the Tribunal's discretion, that submission is rejected in that, while the termination provisions are skewed in favour of the respondent in the CA, it has less than four years to run.

Circumstances before 2001

243 It was also contended that the CA was "*a 'cosy' private deal between Meriton and* [the respondent]" which prevented the applicant from making any choice of caretaker or having any ability to negotiate the price for caretaker services for 25 years and was this inherently unreasonable.

244 Reference was made to *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 at [234] where it was observed that *"Australand garnered a profit for itself, in the form of the premium of $190,000, through its exploitation of its control of the Association"* which words were said to be applicable to this case where Meriton obtained a $310,000 profit late in 2000 and locked lot owners into a 25 year contract with the respondent by finalising a CA on 16 March 2001, shortly prior to the first AGM which appears to have been held in April 2001.

245 It was also noted that the 1996 Act had amendments introduced in 2002 to limit the term of such contracts and to enable them to be terminated, which provisions were carried over into the SSMA.

246 The applicant's written submissions referred to what was said to be a decision reached in similar circumstances, in *OC SP 81647 v Corporate Property Management NSW Pty Ltd* [2013] NSWCTTT 351. The respondent noted that decision was overturned on appeal to the District Court: *Corporate Property Maintenance NSW Pty Limited v The Owners - Strata Plan No 81647* [2014] NSWDC 22.

247 Although the applicant suggested the decision was overturned on other grounds, the first instance decision was based on a failure to obtain two quotations, contrary to the requirement in s 80B of the 1996 Act to obtain at least two quotations for expenditure in respect of a large strata scheme (defined in the Dictionary for the 1996 Act to be a scheme with more than 100 lots). In this case, the CA was finalised prior to the registration of the strata scheme, ie before the 2002 amendments to the1996 Act could have applied.

248 The applicant's submissions did not point to any specific conduct of the respondent in support of its case on this issue. Assuming s 72 of the SSMA applies to the subject CA, since that section commences with the words *"The Tribunal may …*", the making of an order under that section requires the Tribunal to exercise its discretion. The Tribunal is not satisfied that its discretion should be exercised in favour of the applicant by reason of the passage of more than 20 years since the 2001 CA was finalised and since the conduct complained of was that of Meriton and not the respondent.

249 The Tribunal notes that the applicant led evidence to suggest that the respondent's personnel failed to wear uniforms, as required by paragraph (ay) in section 1 of Schedule 2 in the CA. There was also an evidentiary contest as to whether there was compliance with the opening hours required by paragraph (ai) in section 1 of Schedule 2 in the CA. While those two matters appear to have been proved, they are plainly not sufficient to warrant termination of the CA. Although they could be said to provide support for the applicant's case in that they suggest a failure to obey the terms of the CA, they add little to the other matters raised.

250 The respondent led evidence to suggest there was an occasion when Mr Laurans breached a by-law and likewise for Mr Watson. However, those matters appear to have been raised on the basis that the best form of defence is attack. They do not assist the Tribunal in the determination of the real issues between the parties to the proceedings in relation to the CA.

Two versions of the CA?

251 There are two versions of the CA which require consideration. The first is dated 16 March 2001 (A457 or A847) while the second is dated 29 October 2015 (A917). It is convenient to refer to those two documents as the 2001 CA and the 2015 CA.

252 It is clear from the decision of the Privy Council in *Mahon v Air Zealand* [1984] 1 AC 808 that a court or tribunal should not decide an issue about which the parties have not had an opportunity to make submissions. Since neither party addressed this issue either in their written or oral submissions, the Tribunal provided an opportunity for the provision of written submissions on this point

which have been taken into consideration on the question of the status and effect of the CA dated 29 October 2015.

253 The supplementary submissions of the applicant (MFI 7) and the additional submissions of the respondent (MFI 8) both contended that this application is to be determined by reference to the 2001 CA and that the 2015 CA was not a new agreement, only an affirmation of the 2001 CA.

254 It appears that the 2015 CA was initialled on each page by the strata managing agent and was signed by him and Ms Sun on the past page. However, (1) it was not a complete document as Schedules 1, 2 and 3 were absent, (2) it was dated the day after an option to renew the 2001 CA was exercised, and (3) that CA was exercised again on 12 October 2020.

255 Accordingly, the Tribunal finds, in accordance with the submissions of the parties, that the 2015 CA was not a new agreement but was a confirmation of the 2001 CA. Even if it could be somehow said the 2015 CA was a new agreement, the position in relation to termination is the same in relation to the 2001 CA and the 2015 CA for the reasons indicated below.

Termination under s 72 of the SSMA?

256 Assuming s 72 applies, does the evidence warrant a termination order? As the order sought is termination, pursuant to s 72(1)(a), it is necessary to consider two questions: first, whether one or more of the grounds set out in s 72(3) has been established; secondly, whether the Tribunal should exercise its discretion in favour of making a termination order. The grounds upon which the applicant relies are those set out in paragraphs (a), (b) and (f) of s 72(3).

257 Before considering those three paragraphs, the Tribunal notes the following excerpted provisions of the CA, in addition to clause 3 (quoted above):

> 1 The Owners Corporation engages the Caretaker to perform the duties set out in Schedule 2 in a conscientious, expeditious and workmanlike manner so as to maintain the complex building and to permit it to be enjoyed to a standard appropriate to a residential development and the Caretaker accepts the engagement upon the terms and conditions of this Agreement.
>
> 18.1 The Caretaker must not seek or accept instructions from the Owners Corporation about the performance of its responsibilities except from the Owners Corporations' strata managing agent or from a person who has been appointed by the Executive Committee for that purpose.

18.2 The Caretaker, or where the Caretaker is a corporation, any shareholder or director of the Caretaker, shall not offer himself for election as an office bearer of the Executive Committee of the Owners Corporation.

26.3 The Executive Committee of the Owners Corporation must from time to time authorise one if its members to give instructions to and communicate with the Caretaker on behalf of the Owners Corporation and not more than one member of the Executive Committee at any one time must be given such authority.

258 The following excerpted provisions in Schedule 2 of the CA are also relevant:

1 GENERAL DUTIES

(a) Maintain and care for the Complex scheme and attend to the gardening, cleaning and building maintenance of the Complex and common property and any improvements thereon and in so doing it shall use its best endeavours to maintain the Complex in a good state of repair, fair wear and tear excepted.

(e) Keep in its possession the master keys or keys, and a register of such keys, for the services, lots and buildings under the control of the Owners Corporation, or individual Lots so far as individual owners shall permit, provided however that the possession of those keys shall be surrendered to no other person than an authorised representative appointed by the Executive Committee of the Owners Corporation or the individual owner concerned but the Caretaker shall allow a lawfully authorised person in the course of his or her duties free access to any part of the Complex so authorised at all reasonable times.

(i) Comply with an carry out all reasonable directions from time to time given by the Owners Corporation to the Caretaker in and about the maintenance and care of the Complex.

(ac) Mow the lawns surrounding the Complex and the adjacent footpath and maintain the gardens and shrubs to a reasonably acceptable standard.

(ai) Be available at the reception areas of the Complex between the hours of:

Monday to Friday inclusive 8.00an – 6.00pm

Saturday 9.00am – 1.00 pm

Sunday & Public Holidays for 2 hours between the hours of 9.00 am and 5.00 pm or such hours as the Caretaker and the Owners Corporation may agree in writing from time to time provided that the Caretaker will ensure that the reception areas of the Complex are attended for twenty-four hours per day by either the Caretaker or a security guard.

(ay) Ensure that all employees of the Caretaker, and the Caretaker, wear a standard uniform equivalent to that worn by employees of a 4-Star hotel.

259 As was noted earlier, the last paragraph of Schedule 2 contained the following words (emphasis original):

All the foregoing activities shall be undertaken and carried out by the [respondent] at the reasonable direction of the Owners Corporation and shall not be a delegation of any duty or obligation of the Owners Corporation.

260 As to paragraph (a) of s 72(3), the Tribunal considers the respondent:

(1) has refused to perform the CA by (a) not providing access to CCTV footage, (b) failing to provide keys, and (c) refusing to provide the password for the DVR facility, contrary to clauses 18.1 and 26.3 of the CA and section 3 of Schedule 2 of the CA.

(2) has unsatisfactorily performed the CA by (a) charging, since 2002, based on a 5% annual increase instead of a CPI increase as specified in the CA, (b) charging an additional fee that was neither agreed by the applicant nor authorised by the CA, and (c) charging for gardening and mowing which was not agreed by the applicant and was contrary to the terms of the CA, notably clause 3.1.

(3) has unsatisfactorily performed the CA by Ms Sun being a member of the SC from 11 October 2010 to 14 May 2015, contrary to the SSMA.

(4) has unsatisfactorily performed the CA by the conduct of its employee, Ken Xue, improperly commencing and pursuing Supreme Court proceedings in the name of the applicant, which attempted to prevent the 8 August 2020 AGM from being held, which conduct was contrary to the provisions of the SSMA and the instructions of the applicant's servants and agents.

(5) has unsatisfactorily performed the CA by the conduct of Ms Sun, Ken Xue and Sylvia on 8 August 2020 prior to the AGM which falsely represented that meeting had been cancelled and that the Tribunal did not make orders for that meeting to go ahead (when the Tribunal had decline to make an order preventing that meeting from going ahead) which conduct was borne of a desire to control and instruct the applicant rather than to serve the applicant, as required by the CA.

261 Although it seems clear that the conduct outlined in the previous paragraph constituted gross misconduct, the Tribunal in these proceedings is only considering whether there is a statutory basis for terminating the CA and not whether there is a contractual basis for its termination.

262 As to paragraph (b) of s 72(3), the Tribunal considers the charges imposed by the respondent were unfair in the following respects:

(1) The 5% annual increase was not an agreed variation, exceeded the CPI-based increase set out in the CA, and involved a breach of clause 3.1 of the CA.

(2) The additional fee said to relate to extra work arising from the completion of Stage 2 was not an agreed variation and the amounts charged were not authorised by the CA.

(3) The charges for gardening and mowing were not an agreed variation and were contrary to the terms of the CA.

263 As to paragraph (f) of s 72(3), the Tribunal notes that the question of whether, in the circumstances of this case, the CA is *"otherwise harsh, oppressive, unconscionable or unreasonable"*. Two points need to be noted in relation to those quoted words. First, that the inclusion of the word "*otherwise*" suggests it operates to cover matters not covered by paragraphs (a) to (e) inclusive. Secondly, that the word unreasonable has been added to the trifecta of harsh, oppressive, or unconscionable used in s 139(1) and s 150 of the SSMA which serves to make paragraph (f) of s 72(3) easier for an applicant to satisfy.

264 From the decision of the Court of Appeal in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, at [24] to [28], it appears that those four words set a single criterion, that those words should be considered and not dictionary-sourced synonyms, and that the Tribunal should apply contemporary community standards about what is just when dealing with the question of whether those words apply to a particular situation.

265 The Tribunal considers the CA to be "*harsh, oppressive, unconscionable or unreasonable"* in the following respects:

(1) Consistent with what was said in *Sentinel*, the termination rights are favourable to the respondent in that it can, under clause 9.2, terminate the agreement at any time by giving the applicant at least three months' notice while the applicant, under clause 9.3, can only terminate the agreement in specifically limited circumstances and sets a high test of "*gross misconduct or gross negligence*" on the part of the respondent before the applicant can terminate the CA.

(2) The agreement does not specifically preclude the caretaker, or a shareholder of the caretaker, or a director of the caretake from being a member of the SC since clause 18.2 only requires that such a person not "*offer himself for election*" which provision might be avoided by having someone else nominate such a person.

(3) The agreement does not extend to prevent an employee of the caretaker from being elected to the SC.

(4) The agreement does not require the caretaker to comply with the relevant statute and any successor statute which, at the time of the 2001 CA and 2015 CA was the 1996 Act and which now would be the SSMA with the result that a breach of the applicable statute does not appear to constitute a breach of the agreement and would not entitle termination unless that breach involved *"gross misconduct or gross negligence*".

266 Further, it is noted that the evidence reveals there were periods when it was resolved that Ms Sun or Ken Xue be either the contact point or substitute contact point: 5 June 2008 Ms Sun became the substitute contact point for communication between the strata managing agent and the SC, and on 18 August 2009, 11 October 2010, 4 June 2011, and 31 July 2012 she became the primary contact point. It appears she retained that role until 14 May 2015 by reason of no AGM being held in either 2013 or 2014. On 28 March 2017 Ken Xue became the primary contract point.

267 If holding that position was not permitted by the CA, then accepting that position provides support for paragraph (a) of s 72(3) in that it would amount to an unsatisfactory performance of the CA. However, as it appears there was no provision in the CA to prevent Ms Sun or Ken Xue from accepting or holding that position, it provides a fifth reason in support of the view that the CA is unreasonable and that paragraph (f) of s 72(3) is satisfied in this case.

268 There is a clear conflict of interest when anyone associated with the respondent holds that position as they are representing the caretaker and the applicant at the same time. For example, the strata managing agent would not be able to know, when speaking to Ms Sun or Ken Xue during those periods, whether they were speaking to a representative of the applicant or a representative of the respondent. That difficulty is magnified when there is a matter as between the applicant and the respondent.

269 On the question of whether the Tribunal's discretion should be exercised in favour of the applicant, the reasons why the Tribunal is satisfied that the applicant is entitled to an order are that (1) the respondent's conduct has occurred over a long period of time, (2) there is recent conduct which is a continuing problem, and (3) the conduct of the respondent reveals a consistent attitude of not being bound by the CA. It is plainly unfair to expect the applicant to comply with the CA when the respondent is not complying with that contract.

270 While it is relevant to note that the respondent paid $310,000 on or about 27 October 2000 for the rights it acquired under the CA and terminating the agreement would deprive it of those rights, the respondent has now enjoyed those rights for more than 20 years and has received amounts considerably

more than envisaged by the CA, namely $698,758.02 (calculated as $442,963.38 in respect of the application of a 5% annual increase in its fee and $255,794.64 in respect of the additional fee charged, without any addition for interest on those amounts).

271 Accordingly, the Tribunal is comfortably satisfied that the applicant has established a basis for a termination order based on s 72 of the SSMA. If such an order is made, it would be necessary to make an ancillary order for the sale of the caretaker lots (Lot 107 and Lot 109), as envisaged by clause 10 of the CA in the event of termination.

Does s 72 of the SSMA apply?

272 As this is the crucial question on which the outcome of this application depends, and since this question is likely to arise in other proceedings in the Tribunal, it needs to be considered in some detail.

273 The 1996 Act, which took effect from 1 July 1997, did not contain any provision which permitted the termination of a caretaker agreement. It was not until the passage of the *Strata Schemes Amendment Act* 2002, which took effect on 10 February 2003, that such provisions came into force. The amendments introduced by that 2002 Act in relation to caretaker agreements were s 40A, s 40B, s 40C and s 183A.

274 In s 40A a caretaker was defined a person who was entitled to possession of a lot, meaning that a person who was not so entitled was not considered to be a caretaker. That section is set out in full below (emphasis added):

> (1) **A caretaker is a person who is entitled to possession** (whether or not jointly with another person or other persons) **of a lot** or common property and assists in exercising any one or more of the following functions of the owners corporation for the strata scheme concerned:
>
> (a) managing common property,
>
> (b) controlling the use of common property by persons other than the owners and occupiers of lots,
>
> (c) maintaining and repairing the common property.
>
> (2) However, a person is not a caretaker if the person exercises those functions only on a voluntary or casual basis or as a member of the executive committee.
>
> (3) A person may be both a caretaker and an on-site residential property manager.

(4) For the purposes of the Act, a person is taken to be a caretaker for a strata scheme if the person meets the description of a caretaker set out in this section, regardless of whether the title given to the person's position is caretaker, building manager, resident manager or any other title.

275 In relation to the term of a caretaker agreement, s 40B(2) provided:

Unless it otherwise expires or ceases to have effect earlier, a caretaker agreement (including any additional term under an option to renew it) expires:

(a) at the conclusion of the first annual general meeting of the owners corporation, if the agreement was executed by the original owner, or

(b) when 10 years have expired after it commenced to authorise the caretaker to act under it, in any other case.

276 Titled *"Orders relating to caretaker agreements*", s 183A is set out in full below:

(1) The Tribunal may make an order with respect to a caretaker agreement:

(a) terminating the agreement, or

(b) requiring the payment of compensation by a party to the agreement, or

(c) varying the term or varying or declaring void any of the conditions of the agreement, or

(d) confirming the term or any conditions of the agreement, or

(e) dismissing the application.

(2) An order under this section may be made only on an application made by the owners corporation for the strata scheme concerned on one of more of the following grounds:

(a) that the caretaker has refused or failed to perform the agreement or has performed it unsatisfactorily,

(b) that charges payable by the owners corporation under the agreement for the services of the caretaker are unfair,

(c) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

(3) Any amount ordered to be paid under this section may be recovered as a debt.

277 The relevant transition and savings provision was clause 12 within Part 4 of Schedule 4 which is set out below:

(1) Any agreement that was in force immediately before the commencement of Part 4A of Chapter 2 that, if entered into after that commencement, would be a caretaker agreement is taken to be a caretaker agreement appointing a caretaker.

(2) The Tribunal may make an order under this section on any of the following grounds-

> (a) the caretaker is not required to be or have been entitled to exclusive possession of a lot or common property either while the agreement is in force or as a precondition to entering into the agreement, and
>
> (b) section 40B(2) does not apply to such an agreement,
>
> (c) an application for an order under section 183A may not be made with respect to such an agreement on the ground that the period for which the agreement is in force is harsh, oppressive, unconscionable or unreasonable.

278 The effect of clause 12 was to render existing caretaker agreements subject to the amendments but not in relation to its term, by excluding the term of the agreement from the operation of both s 40B(2) and s 183A. That position is confirmed by the Second Reading speech, delivered on 30 October 2002 in relation to the 2002 amendments to the 1996 Act, which included the following paragraph:

> The main concern that has arisen over the appointment of caretaker managers by developers is that an owners corporation may be tied to a 25-year contract with little opportunity to challenge its terms. The developer has in effect decided, before there are individual lot owners in the scheme, what is in the best interests of the owners for the next 25 years. However, it is the developer who has received the financial benefit, as the sale of caretaker management rights can be quite a lucrative transaction. The bill provides that no future caretaker management contract will be able to exceed a total period of 10 years. Contracts already in existence, which may have periods in excess of 10 years to go, will be allowed to run their course but from the day this bill becomes law 10 years will be the maximum contract period for new arrangements. If after the 10-year period the parties wish to renew for a further 10 years, that is in order. The important thing is that it will be the owners corporation, with input from individual owners, both investors and owners-in-residence, making a decision on what is desirable rather than a developer with little ongoing interest in the operation of the scheme.

279 When the SSMA took effect on 30 November 2016 the 1996 Act was repealed. Within Schedule 3, which is entitled "*Savings, transitional and other provisions*" is clause 15, titled "*Caretakers and building managers*", which provides:

> (1) An agreement in force immediately before the commencement of this clause is taken to be a building manager agreement for the purposes of this Act, despite any of the provisions of the agreement, if—
>
> (a) the agreement provides for the appointment of a person to carry out any of the functions specified in section 66(1) in relation to the owners corporation for a strata scheme, and
>
> (b) the primary purpose of the agreement is to provide for that appointment and related matters, and
>
> (c) the person is not entitled to exclusive possession of a lot or common property in the strata scheme.

(2) Any such building manager agreement expires 10 years after the commencement of this clause unless the terms of the agreement provides that it expires on an earlier day or the agreement is terminated on an earlier day.

(3) A reference in any instrument to a caretaker in relation to a strata scheme is taken to be a reference to a building manager in relation to that scheme.

280 Headed "*Strata managing agent and building manager agreements may be terminated or varied by Tribunal*", section 72 of the SSMA provides as follows:

(1) The Tribunal may, on application by an owners corporation for a strata scheme, make any of the following orders in respect of an agreement for the appointment of a strata managing agent or building manager for the scheme—

(a) an order terminating the agreement,

(b) an order requiring the payment of compensation to a party to the agreement,

(c) an order varying the term, or varying or declaring void any of the conditions, of the agreement,

(d) an order that a party to the agreement take any action or not take any action under the agreement,

(e) an order dismissing the application.

(2) If the Tribunal makes an order terminating the agreement, the Tribunal may also order the strata managing agent or building manager to return to the owners corporation, within the period specified in the order, any documents or other records relating to the strata scheme that are in the possession of the agent or manager.

(3) The Tribunal may make an order under this section on any of the following grounds-

(a) that the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,

(b) that charges payable by the owners corporation under the agreement are unfair,

(c) that the strata managing agent has contravened section 58 (2),

(d) that the strata managing agent has failed to disclose commissions or training services (including estimated commissions or value of training services or variations and explanations for variations) in accordance with section 60 or has failed to make the disclosures in good faith,

(e) that the strata managing agent or building manager has failed to disclose an interest under section 71,

(f) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

281 While the Second Reading speech in relation to the SSMA does not shed light on the issue relevant to these proceedings, the Explanatory Note (MFI 6) does in Part 4 where paragraph (g) says:

> caretakers for strata schemes are now to be referred to as building managers and a building manager is not required to be a person entitled to exclusive possession of a lot or common property

282 It is noted that the terms caretaker agreement (the term used in the 1996 Act) and building management agreement (the term used in the SSMA) are synonyms by reason of s 40A(4) of the 1996 Act and clause 15 in the SSMA.

283 Importantly, the 2002 amendments to the 1996 Act only impacted on agreements when the caretaker had exclusive possession of a lot. In the SSMA, s 66(4) expanded the position because it said: *"A building manager may be a person who is entitled to exclusive possession (whether or not jointly with any other person) of a lot or common property in a strata scheme.*" That is consistent with what was said in the relevant paragraph in the Explanatory Note (set out above).

284 The respondent contended that clause 15 operated to exclude agreements which did include exclusive possession of one or more lots that were in existence on 30 November 2016, when the SSMA commenced, because clause 15 in the transitional provisions only operated to subject such an agreement to the SSMA if the caretaker was not entitled to excusive possession of a lot. When clause 15 is read in isolation that appears to be the case.

285 However, when clause 15 is viewed in the context of the expansion of the rights in relation to agreements to include agreements where the caretaker is not entitled to exclusive possession of a lot, the position is that clause 15 was expanding the operation of rights to give rights not only in relation to caretakers who did have exclusive possession of a lot but also in relation to caretakers who did not have exclusive possession of a lot. In other words, clause 15 was including agreements where the caretaker was not entitled to exclusive possession of a lot and was not excluding agreements where the caretaker was entitled to exclusive possession of a lot.

286 To illustrate the legislative history, it is convenient to label and describe four potential situations:

> Category 1 An agreement that took effect prior to 10 February 2003, which is governed by clause 12 within Schedule 4, which limits the

application of s 40B and s 183A of the 1996 Act (being amendments introduced by a 2002 amending Act).

Category 2 An agreement that took effect on or after 10 February 2003, which is governed by s40B and s 183A of the 1996 Act.

Category 3 An agreement which took effect prior to 30 November 2016, which is governed by the SSMA, subject to clause 15 within Schedule 3 of the SSMA.

Category 4 An agreement which took effect on or after 30 November 2016, which is governed by s 66 to s 72 of the SSMA.

287 At the risk of stating the obvious, when the 1996 Act was repealed on 30 November 2016, Category 1 and Category 2 agreements became Category 3 agreements. It is convenient to here note that the 2001 CA was a category 1 agreement while the 2015 CA was a category 2 agreement but they both became Category 3 agreements on 30 November 2016. As a result, the question of whether the 2015 CA replaced the 2001 CA is of no consequence.

288 If the respondent's contention is correct, then clause 15 would operate to deprive a Category 1 or Category 2 agreement of the rights acquired under the 2002 amendments to the 1996 Act when that agreement became a Category 3 agreement on 30 November 2016. That contention is rejected because it would mean that an owners corporation would lose rather than maintain its rights and that cannot be seen as the statutory intention in view of what was said in the Explanatory Notes.

289 The SSMA expanded the rights of an owners corporation in two respects. First, it expanded the number of grounds for termination from three to six, as revealed by a comparison of s 183A of the 1996 Act and s 72 of the SSMA. Secondly, the provisions in the 1996 Act, after it was amended in 2002, were confined to caretaker agreements where the caretaker did have exclusive possession of a lot while the SSMA was not so confined as it applied whether or not the caretaker had exclusive possession, as revealed by a comparison of s 40A(1) in the amended 1996 Act and s 66(4) in the SSMA.

290 The Tribunal considers the correct interpretation to be that the provisions introduced to the 1996 Act in 2002 only apply to Category 1 and Category 2 agreements only if the caretaker has exclusive possession of a lot while the provisions of the SSMA apply to Category 3 and Category 4 agreements regardless of whether the caretaker has exclusive possession of a lot.

291 Put another way, clause 15 does not operate to exclude a Category 3 agreement which does have exclusive possession rights from the operation of s 72 of the SSMA but operates to bring a Category 3 agreement which does not have exclusive possession rights within the operation of s 72 of the SSMA.

292 In other words, caretaker agreements commencing on or after 30 November 2016 are subject to the prospect of a termination order under s 72 regardless of whether the caretaker has exclusive possession of a lot. As caretaker agreements commencing before that date only had the prospect of termination (under s 183A of the 1996 Act) if the caretaker had exclusive possession of a lot, clause 15(1)(c) ensures that caretaker agreements commencing before 30 November 2016 are subject to the prospect of a termination order if the caretaker does not have exclusive possession of a lot.

293 By way of summary, the position appears able to be reduced to three propositions. First, that an owners corporation which has a caretaker agreement which commenced on or after 30 November 2016 has a right of termination under s 72 of the SSMA regardless of whether the caretaker is entitled to exclusive occupation of one or more lots. Secondly, for an owners corporation which has a caretaker agreement under which the caretaker does have exclusive possession of one or more lots, which commenced prior to 30 November 2016, then that owners corporation had termination rights under s 183A of the amended 1996 Act and has the same rights (with six grounds instead of three) under s 72 of the SSMA. Thirdly, that an owners corporation which has a caretaker agreement under which the caretaker does not have exclusive possession of one or more lots, which commenced prior to 30 November 2016, then that owners corporation had no termination rights under s 183A of the amended 1996 Act but does have termination rights under s 72 of the SSMA by reason of cl 15.

294 Noting that cl 15 appears within a section of the SSMA which is headed "*Savings, transitional and other provisions*", it appears that cl 15 does not operate to save a caretaker agreement with exclusive possession of a lot from the operation of s 72 of the SSMA, but instead operates to create a transition for existing caretaker agreements which did not contain provision for the exclusive possession of a lot by making them the subject of a potential application for a termination order under s 72 of the SSMA, which was not possible under the amended 1996 Act.

295 In *ACPM* at [330-342] the position in relation to a similarly worded caretaker agreement was considered. However, that was in the context of a claim for damages, not termination. It was noted, at [330] that statutory provisions "*are to be considered having regard to their text, context and purpose",* as indicated by the High Court in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]. The Tribunal's analysis in this case, set out above, has been in accordance with that principle of statutory interpretation.

296 At [331] it was noted that the purpose of the 2002 amendments to the 1996 Act was *"plainly to limit the extent that lot owners in a strata scheme could be bound by a long-term contract entered into between the developer and Caretaker providing lucrative returns to the Caretaker, the sale of which conferred a significant financial benefit on the developer"*.

297 In the next paragraph, ie [332], it was noted that: *"The purpose of the exception in the transitional provisions was to protect caretakers who had already entered into such agreements, and not retrospectively deprive them of rights they had acquired sometimes for substantial payment.*"

298 After determining that what was referred to as a 2010 Deed was a new agreement and not a variation of an existing agreement, the position in relation to what was called the 2015 Deed was considered. It was decided that the 2015 Deed did not fall within clause 15 of the transitional provisions of the SSMA because the plaintiff in *ACPM* was entitled to exclusive possession of the Caretaker Lots (at [338]).

299 However, after expressing the view that clause 3 of the transitional provisions of the SSMA does not operate in a manner inconsistent with clause 15 of those

transitional provisions (at [340]), it was held (at [341]) that, by reason of the operation of s 30 of the *Interpretation Act* 1987, *"to the extent the 1996 Act as amended operated to limit the effect of the 2010 and 2015 Deeds, the limitation remained in force*" and it was said that such an approach was not inconsistent with the savings and transitional provisions of the SSMA and the decision of the High Court in *Attorney-General for the State of Queensland v Australian Industrial Relations Commission* [2002] HCA 42 at [6]-[8].

300 The outcome of that analysis in *ACPM* was stated as follows at [342]: *"Thus, the question of the effect of the 2015 Deed is to be determined having regard to the 1996 legislation.*" Damages were then assessed on the basis that a 10-year term limitation applied to a caretaker agreement which provided the caretaker with exclusive possession of caretaker lots and pre-dated the SSMA (ie a Category 3), despite the view taken of clause 15 in the transitional provisions.

301 If the decision in *ACPM* can be distinguished on the basis that it was a decision which involved a consideration of the term of a caretaker agreement and not the termination of such an agreement, then the Tribunal's analysis of the statutory provisions, set out above, suggests the applicant is entitled to a termination order. Alternatively, if the decision in *ACPM* cannot be distinguished then, if either the Tribunal's analysis of the statutory provisions is wrong or if the view taken of clause 15 of the transitional provisions in *ACPM* is binding, then the applicant is still entitled to a termination order on the same basis as the decision in *ACPM*, namely that rights acquired under the 1996 Act, as amended, survived by reason of s 30 of the *Interpretation Act* 1987.

302 In other words, if the statutory right relating to the term of a caretaker agreement survived the introduction of the SSMA in *ACPM*, in like manner the statutory right relating to the termination of a caretaker agreement provided the applicant with a right which survived the introduction of the SSMA. It is noted that each of paragraphs (a), (b) and (c) of s 183A(2) in the 1996 Act, as amended, was carried over into paragraphs (a), (b), and (f) of s 72(3) in the SSMA.

303 The Tribunal notes that, on 27 October 2000 the respondent and Meriton executed a Deed of Sale of Caretaker Management Rights (A824) whereby, in return for paying $310,000 (clause 3.1), it acquired a right to have a CA (clause 5.1) and to purchase what were termed interdependent lots (clause 6.1). Further, that the 2001 CA specified that Lots 107 and 109 were caretaker's lots (Item 3). As a result, these proceedings involve a CA which does include exclusive possession of one or more lots in the strata scheme which is the subject of the CA.

304 For the reasons indicated above, the Tribunal considers the applicant is entitled to a termination order under that s 72(3) of the SSMA, either by reason of the Tribunal's interpretation of the relevant statutory provisions or by an application of the same reasoning as in *ACPM*.

Costs

305 As the question of costs was not argued during the hearing, provision will be made in the orders for the provision of written submissions on that topic.

Orders

306 An order terminating the CA needs to be accompanied by an order in relation to the sale of the respondent's lots, being lots 107 and 109. Clause 10 of the CA, which sets out a detailed mechanism for the sale of such lots in the event of termination by either the applicant or Meriton under clause 9.3, is set out in full below:

> 1. The Caretaker must sell or cause the owner(s) of the Caretaker's Lots to sell, together with the Caretaker's interest in this Agreement ('the Caretaker-Management Rights') the Caretaker's Lots to a person nominated by the Owners Corporation;
>
> 2. The Owners Corporation may nominate in writing on or before the date being ninety (90) days after the termination of the Agreement, ("the Nomination Period") any person or persons, corporation or corporations ("the Nominee") who shall be deemed to have the right of the first refusal to purchase ("the Right of Pre-emption") from the owners of the Caretaker's Lots in the Complex together with the Caretaker-Management Rights at such price and on such terms as are agreed upon between the Caretaker and the Nominee or, failing such agreement, at such price as is fixed as being the fair market value of the Caretaker's Lots and the Caretaker Management Rights by a valuer appointed for the purpose by the Law Society President and on such terms and conditions as are fixed as being the usual ones applicable in such a transaction by a Solicitor appointed for the purpose by the Law Society President. The exercise of the Right of Pre-emption shall be made in writing

and served upon the Caretaker within fourteen (14) days after the date of nomination by the Owners Corporation of the Nominee. If no nomination is made by the Owners Corporation within the Nomination Period or if the right of Pre-emption so created is not exercised then the Caretaker shall be at liberty to affirm this Agreement and to retain the Caretaker's Lots and the Caretaker-Management Rights or to sell the Caretaker's Lots and to assign the Caretaker-Management Rights in accordance with Clause 21

3. The parties must continue to perform and fulfill their obligations pursuant to this Agreement during the Nomination Period.

4. The Caretaker must admit the Owners Corporation by its agents, servants and contractors to the Caretakers Lots for the purpose of restoring the lots and its fittings and fixtures to a state of good, serviceable and clean repair.

5. The Caretaker irrevocably appoints the Owners Corporation its attorney for the purpose of doing any act or executing any document necessary for or conducive to the discharge of the Caretaker's responsibilities under this Clause 10.

6. The Caretaker irrevocably consents to the Owners Corporation lodging a caveat over the Caretaker Lots to protect the Owners Corporations interests pursuant to this Clause 10.

307 The Tribunal has used that wording to draft an order for the sale of those lots, noting that s 72(1)(d) empowers the Tribunal to make "*an order that a party to the agreement take any action … under the agreement*". Although it appears that the registered proprietors of Lot 107 are Ms Sun and her husband, George Xue, that lot is rendered subject to sale in the event of the termination of the CA. As the parties have not made submissions in relation to the sale of the lot consequent upon a termination order being made, the practical course is to make an order but include a mechanism for its revision. Accordingly, if either party contends for a different form of order for the sale of those lots, written submissions are to be filed and served by 31 January 2022 and any written submissions in reply are to be filed and served by 14 February 2022.

308 Any such submissions should be accompanied by an indication of whether it is agreed that the Tribunal should make an order pursuant to s 50(2) of the CATA, dispensing with a hearing for that issue. Of course, if the parties agree on the form of an alternative order for the sale of those lots, then that should be submitted so that the Tribunal can make such an amendment pursuant to regulation 9(1)(a) of the *Civil and Administrative Tribunal Regulation* 2013.

309 While an order under s 72(1)(a) of the SSMA terminating the CA will resolve the any remaining questions of access to CCTV footage and keys, it will not

result in the provision of the password to a DVR system. However, as noted above, s 72(1)(d) empowers the Tribunal to make "*an order that a party to the agreement take any action … under the agreement*". The Tribunal considers it both necessary and appropriate to make an order for the provision of that password to the applicant's secretary, and notes that s 247A of the SSMA provides for the imposition of a civil penalty of up to 50 penalty units ($5,500) for a contravention of an order of the Tribunal.

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

(1) Pursuant to s 72(1)(a) of the Strata Schemes Management Act 2015, the caretaker agreement between the applicant and the respondent is terminated.

(2) Pursuant to s 72(1)(d) of the Strata Schemes Management Act 2015, the respondent is to sell Lots 107 and 109 in accordance with Schedule 1.

(3) If either party seeks to vary order 2 and/or Schedule 1:

  (a) any submissions seeking a variation are to be filed and served by 31 January 2022,

  (b) any submissions in reply are to be filed and served by 14 February 2022, and

  (c) any such submissions are to indicate whether it is agreed that the Tribunal should dispense with a hearing for that issue, pursuant to s 50(2) of the CATA.

(4) Pursuant to s 72(1)(d) of the Strata Schemes Management Act 2015, on or before 5pm on Friday 21 January 2022 the respondent is to provide the secretary of the applicant with the password for the digital video recording system.

(5) Should either party seek an order for costs:

  (a) any submissions seeking an order for costs are to be filed and served by 31 January 2022,

  (b) any submissions in reply are to be filed and served by 14 February 2022, and

  (c) any such submissions are to indicate whether it is agreed that the Tribunal should dispense with a hearing for that issue, pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013.

Schedule 1

1. The respondent must sell or cause to sell Lot 107 and Lot 109 to a person or corporation nominated by the applicant within 90 days of the date of these orders.

2. If there is no agreement as to the price to be paid for either of those lots, the price is to be determined by a valuer appointed for that purpose by the President of the NSW Law Society and the decision of that valuer shall bind the parties.

3. If there is no agreement as to the terms upon which either of those lots is to be sold, the terms are to be determined a solicitor nominated by the President of the NSW Law Society and the decision of that solicitor shall bind the parties.

4. Pending completion of the sale of both those lots, the applicant may lodge a caveat to protect its interests in those lots.

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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