

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC2016/2020

CATCHWORDS

Owners Corporations Act 2006 (Vic) Part 11 Division 4; extension of period of administration, considerations relevant to period of extension; *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* s 60; 'interested party' in Owners Corporations List.

APPLICANT

Balmoral Quay Pty Ltd ACN: 602 240 399

RESPONDENT

Owners Corporation No. 1 PS814484L
(under administration: Mr Matthew
Twiselton, administrator)

FIRST INTERESTED PARTY:

Peter Goss

SECOND INTERESTED PARTY:

Bernadette Alsop

THIRD INTERESTED PARTY:

Adrian Henry Gordon

FOURTH INTERESTED PARTY:

Debra McGinnes

FIFTH INTERESTED PARTY:

Jeannette Ferguson

SIXTH INTERESTED PARTY:

Sharyn Glen

SEVENTH INTERESTED PARTY:

Chris Jones and Linda Jones

EIGHTH INTERESTED PARTY:

John and Anne Grant

WHERE HELD

Melbourne

BEFORE

Deputy President R Wilson

HEARING TYPE

Hearing

DATE OF HEARING

16 May 2022

DATE OF ORDER

19 May 2022

CITATION

Balmoral Quay Pty Ltd v Owners
Corporation No. 1 PS814484L (Owners
Corporations) [2022] VCAT 563

ORDER

1. **The *Application for Directions and Hearings* dated 8 October 2021 filed in the name of the Administrator, Matthew Twiselton seeking extension of the administration is amended to reflect that it is made in the name of**

the respondent, Owners Corporation No. 1 PS814484L and name and status of the respondent in that application and in this proceeding is amended to read ‘Owners Corporation No. 1 PS814484L (under administration: Mr Matthew Twiselton, administrator)’ as the sole respondent.

2. The following persons are joined as ‘interested parties’ to that application:
 - (a) Jeannette Ferguson of Lot 33 plan of subdivision PS814484L, Rippleside 3215;
 - (b) Sharyn Glen of 3/18 Lady Nelson Drive, Rippleside 3215.
 - (c) Chris Jones and Linda Jones, 17 Lumb Place, Rippleside 3215
 - (d) John and Anne Grant, 10 Lumb Place, Rippleside 3215
3. The need for service of the application upon these additional ‘interested parties’ is dispensed with.
4. Leave is granted in connection with this application for extension of the administration to Mr Tom Roe and Mr Theo Axalis to appear to represent the applicant and to Mr Tim Graham, Solicitor and Matthew Twiselton, Administrator to appear to represent the respondent owners corporation.
5. Pursuant to s.174(a) and 176 of the *Owners Corporations Act 2006* (OC Act) the Tribunal extends the appointment of Matthew Twiselton of Excel Strata Managers Pty Ltd, Suite 12 / 14 Albert Street, Blackburn VIC 3130 as administrator of Owners Corporation No.1 PS814484L (‘the OC’) on the following **terms and conditions**:
 - a. the administration is extended for a period of one year from the date of hearing, to expire on 15 May 2023 at 11:59pm;
 - b. the term of appointment of any owners corporation manager appointed to manage by administrator must not extend beyond a date that is 3 months after the expiry of the appointment of the administrator;
 - c. the Respondent must pay the administrator’s remuneration at the rate of \$200.00 + GST per hour plus expenses in accordance with lot liability. Owners corporation manager’s fees are additional to the administrator’s fees;
 - d. the administrator may do anything the Respondent owners corporation or its lawfully elected committee may do;
 - e. the administrator may proceed to alter a plan relating to land affected by the owners corporation in any of the ways set out in section 32 of the *Subdivision Act 1988* only in accordance with an order of VCAT or a

- court order;
- f. the administrator may delegate power in writing;
 - g. the administrator shall have liberty to apply for an order extending or shortening the period of administration and consequently the appointment of the administrator;
 - h. any lot owner, shall have liberty to apply for an order extending the period of administration and consequently the appointment of the administrator.
6. **By 4:00pm on 25 May 2022**, I direct that to the extent it has not been served on an interested party already that the applicant shall serve on interested parties the Deed of Payment and Release dated 23 February 2022 (being the agreement between Balmoral Quay Pty Ltd and the owners corporation).
7. **By 4:00pm on 30 May 2022**, the administrator is directed to:
- (a) prepare a short form status report summarising for the lot owners the current status of the building remediation works planned to be progressed;
 - (b) attach to it as an indexed (and where appropriate, chronological) bundle of the key documents (contracts, correspondence, reports etc) that have been received by or sent to the administrator or to which the owners corporation is a party that relate to the remediation works and the advice or recommendations on which the administrator has acted or which relate to the remediation works proposed at any time or to be progressed;
 - (c) make a copy of that status report available to lot owners who may request a copy.

I direct that the Deed of Payment and Release dated 23 February 2022 (being the agreement between Balmoral Quay Pty Ltd and the owners corporation); terms of settlement with the VMIA in November 2021, HIA approved builders contract with the appointed builder, Scotia Property Maintenance; all engineering reports or other building reports; and all scopes of works or instructions for works, be included in that report as part of the key documents.

If legal advice has been obtained by the administrator in regard to any decision taken by him in the administration he should properly identify that fact in his report. To the extent that the owners corporation has obtained legal advice to which legal professional privilege may be claimed by the owners corporation, the administrator may seek directions from the Tribunal (as may be advised) regarding the manner in which that legal advice or instructions for legal advice can (if possible) be made available to lot owners wishing to

see it in such a manner that does not create a waiver of legal professional privilege and thereby lose the benefit to the owners corporation and potentially lot owners of confidentiality and protection from disclosure that otherwise attaches to that legal advice.

8. Subject to order 9, the parties and interested parties in this proceeding have liberty to make application in this proceeding relating to the administration of the owners corporation for orders concerning:

- a. any further term or condition to be attached to the extended period of administration;
- b. the replacement of the administrator;

by **4:00pm on 15 June 2022**.

9. **To make an application of the type referred to in order 8 the Tribunal directs that such party or interested party must file with the Tribunal and serve on other parties and interested parties:**

- a. an *Application for Directions Hearing or Orders* in this proceeding and pay the appropriate filing fee;
- b. a document headed *Relief Sought in the Administration* containing a concise statement of the key facts they rely on and the orders they seek from the Tribunal under order 8 (set out in numbered paragraphs, A4 size, 12 point print, 1.5 spacing).
- c. all affidavit evidence on which they intend to rely in support of that application;
- d. a summary of the submissions they wish to make, being no more than 2 pages (set out in numbered paragraphs, A4 size, 12 point print, 1.5 spacing);

If an interested party who had filed an *Application for Directions and Hearing* prior to the hearing on 15 May 2022, subsequently files documents complying with para b, c and d of this order 9 and pays the appropriate filing fee, **the Principal Registrar is directed to accept those documents for filing under their previously filed *Application for Directions Hearing or Orders* and the documents referred to in para b, c and d of this order will stand in place of any ‘attachment’ filed with that *Application*.**

If party or interested party did not file an *Application for Directions and Hearing* but filed submissions ahead of the hearing on 15 May 2022 and wishes to advance an application in this proceeding of the type referred to Order 8 then they must do so in the manner provided by this para a, b, c and d of this order 9.

10. **By 4:00pm on 30 June 2022**, each party or interested party wishing to be heard on any application that may be filed pursuant to the liberty granted under order 8 must file and serve:
 - a. a document headed *Response to Relief Sought in the Administration* containing a concise statement of the key facts they rely (set out in numbered paragraphs, A4 size, 12 point print, 1.5 spacing).
 - b. all affidavit evidence on which they seek to rely in support of or against that application;
 - c. a summary of the submissions they wish to make, being no more than 2 pages (set out in numbered paragraphs, A4 size, 12 point print, 1.5 spacing).
11. **This proceeding will be listed for the hearing of any application filed pursuant to order 8 above on a date to be fixed by the Tribunal before Deputy President Wilson or Member AM Moon.**
12. If any application is filed pursuant to order 8, upon receiving notice of the hearing date subsequently fixed by the Tribunal the administrator must notify each Lot owner in writing of the hearing date and of the fact that the hearing is for the purpose of the Tribunal deciding whether to make orders:
 - (a) That any further term or condition be attached to the extended period of administration;
 - (b) For the replacement of the administrator.
13. **The Principal Registrar is directed to amend the Tribunal file to reflect the title to these Orders and the additional interested parties added by these orders.**

GUIDANCE DIRECTIONS FOR ALL PARTIES AND INTERESTED PARTIES

14. If a hearing is by video conference or by teleconference, the parties must follow the instructions for participation in the hearing which VCAT will provide by email two (2) business days before the hearing date.
15. If any Lot owner notifies the administrator of a wish to participate in the hearing, the administrator must provide to that Lot owner a copy of VCAT's instructions for participating the hearing.
16. If a party fails to participate in the hearing, the hearing will proceed in the absence of that party and orders will still be made.
17. When communicating with the Tribunal by email the parties must comply with the following directions:

- a. All emails must be sent to civil@vcat.vic.gov.au
- b. All parties who have not already done so must provide their email address to the Tribunal and to all other parties. They may do so at the time they provide the documents as directed in these orders.
- c. Any party contacting or sending documents to the Tribunal by email must put the Tribunal reference number in the subject line of the email.
- d. Any party corresponding with the Tribunal *must* include (i.e. copy or “cc”) all other parties into that correspondence.

R. Wilson
Deputy President

APPEARANCES:

For the Applicant:	Mr Tom Roe Mr Theo Axalis
For the First Respondent:	Tim Graham, Solicitor Matthew Twiselton, Administrator
For the Third Interested Party:	In person
For the Fourth Interested Party:	In person
For the Fifth Interested Party:	In person
For the Sixth Interested Party:	In person
For the Seventh Interested Party:	Chris Jones, in person
For the Eighth Interested Party:	In person

REASONS

1. On 26 October 2020, the Tribunal made orders in this proceeding under Part 11 Division 4 of the *Owners Corporations Act 2006 (Vic)* (**OC Act**) appointing Matthew Twiselton of the Excel Strata Managers Pty Ltd, Suite 12 / 14 Albert Street, Blackburn VIC 3130 (the **administrator**) as administrator of the first respondent for one year (the **administration appointment**).
2. By application dated 8 October 2021, the first respondent through its administrator applied for extension of the administration appointment beyond 26 October 2021 (**application for extension of the period of administration**) and on 18 October 2021 the Tribunal ordered that, pending final hearing of that application, the administration appointment be extended until further order. The application for extension of the period of administration came before me on 16 May 2022 and I made orders extending the administration appointment for one year from the date of the hearing until 15 May 2023.
3. For the benefit of the parties and interested parties and for other lot owners in the subdivision and the administrator it is desirable that I provide a short summary of the reasons for my decision extending the administration appointment for one year and for the consequential directions that I have made.

Extension of administration period necessary and desirable

4. After hearing from the parties and those interested parties who elected to make oral or written submissions in regard to the application for extension of the period of administration, and taking into consideration the discretionary principles set out by Bongiorno J in *McKinnon v Adams* [2003] VSC 116, I am satisfied that but for the continued appointment of an administrator to the respondent owners corporation, the management of the respondent owners corporation would remain dysfunctional and that an extension of the administration period is necessary and desirable to protect the interests of the lot owners and is in the interests of the owners corporation.
5. In making that finding I rely on the evidence presented by the administrator in the three affidavits filed by him and on the evidence and submissions made by the parties and interested parties that demonstrated that a state of dysfunction would likely continue for the foreseeable future. I refer to some of this evidence in dealing with the length of the extension.

Length of extension of one year

6. Various submissions were put at the hearing regarding the necessary or desirable length of the extension of the administration appointment.

7. In Mr Twiselton's affidavit affirmed 8 October 2021, he provided the Tribunal his 'activity schedule' as administrator to that date (MT-2) and stated that, at that date, an insurance claim with the Victorian Management Insurance Authority (VMIA) was continuing to be pressed. He stated that Balmoral Quay Pty Ltd (the owner of the staged lots and the applicant in this proceeding) had also informed him that the earliest that it anticipated settlement of Stages 3 and 4 was August 2023 but Mr Twiselton said that this 'temporal estimate is subject to change due to matters beyond Balmoral Quay's control including inclement weather, latent conditions and COVID 19 related issues' outlined in a development program (MT-5). For the reasons of ongoing dysfunction which he explained in his affidavits, the need to progress remediation works about which there was ongoing difference of opinion between lot owners, and in part due to this timeline for Stages 3 and 4, on the owners corporation's behalf Mr Twiselton as the appointed administrator had proposed in his application an extension of the administration appointment for 2 years, submitting to me that it need not necessarily be him who was the appointed administrator.
8. Mr Graham, Solicitor appearing for the owners corporation on instructions from the administrator pressed for an extension of the administration appointment for these general reasons for two years or at least until August 2023 when the anticipated settlement of Stages 3 and 4 was forecast. Other parties and interested parties made submissions in support of a period of two years; for one year and for a lesser period of months.
9. On the evidence presented to the Tribunal I find that it is necessary and appropriate that the period of administration be extended for a further year to enable the administration appointment to continue without disruption for two primary and somewhat interrelated (but not exhaustive) reasons, being to facilitate:
 - (a) the owners corporation's effective management during a period that it would otherwise remain dysfunctional; and
 - (b) the progress of the **remediation works** by the owners corporation as expeditiously as possible.

By the expression 'remediation works' I do not mean to attribute a technical or confined meaning but rather simply refer to the rectification works which are currently under consideration by the administrator or that the administrator has determined to progress to address the defects to the common property.
10. Subsequent affidavits affirmed by Mr Twiselton on 3 and 13 May 2022 were filed with the Tribunal, in part responding to matters raised by interested parties and in part as evidence of what, in his 'respectful opinion', he described in para 3 of his 13 May 2022 affidavit as 'diversity of opinion' and as 'evidence of extant, ongoing dysfunction'.

11. In relation to the remediation works, in para 5 of his 3 May 2022 affidavit Mr Twiselton informed the Tribunal that:

‘Rectification works for common property defects have been agreed, although the works are yet to commence’.

He exhibited some of the correspondence with VMIA’s lawyer as ‘MT-3’ which he stated ‘encapsulates the extant status quo of the building defects claim’.

At para 6 Mr Twiselton informed the Tribunal that ‘Balmoral Quay has agreed to fund the shortfall between the cost of rectification works and the amount of cover left remaining under the domestic building warranty insurance policies of lots 1-20 both inclusive’.

12. At para 2 of his 13 May 2022 affidavit Mr Twiselton gave further explanation to the Tribunal about the remediation claim. It is desirable that I set out, as context to the situation in which the owners corporation currently stands, what the administrator states in regard to the decision he has taken as administrator:

The VMIA continues to accept liability in respect to the defects.

The issue at play has never been liability, but rather the rectification methodology. In arriving at my opinion I relied on the recommendations of a qualified, fully insured, Structural Engineer, that provided an alternative means of rectification.

This decision was made in the best interests of all owners, inasmuch as it meant that lot owners were not responsible for uninsured losses potentially exceeding \$1,000,000. On the basis that the previous, invasive rectification method quoted by Streamline Homes at \$1,575,980.00 was that which was approved.

The uninsured component with respect to the alternative means of rectification, as later tendered and accepted by the VMIA, is \$86,949.98. I can advise all owners that I have negotiated an agreement with Balmoral Quay Pty Ltd, to pay for this figure in full, despite no apparent legal obligation to do so.

Therefore, no special levy will be required and all defects can be addressed at no further cost to stage 1 lot owners in accordance with the Scotia Property Maintenance scope of works.

I have the upmost [sic] sympathy to lot 7, who is experiencing water ingress issues as a result of the delay to the defect rectification going ahead. *On behalf of the OC, I signed the terms of settlement with the VMIA in November 2021 and then entered into an HIA approved builders contract with the appointed builder, Scotia Property Maintenance.*

To date, and contrary to that agreement and terms of the HIA contract, the VMIA have not paid the required deposit to commence this works. I have not received any satisfactory explanation as to why this is the case. I continue to chase this matter on a weekly basis.

I have been informed, verbally by Moray Agnew [solicitors] for the VMIA, that two separate appeals have been lodged against the VMIA's decision. I have not received anything in writing to confirm this.

...

I stand by the decisions I have made, always made in good faith and in the best interests of everyone concerned. A plan has been chosen that has been designed by an expert to fix the defects, is prepared to be warranted by a builder, and one that following negotiation, will not leave any owner with an out of pocket expense.

13. Mr Twiselton exhibited (as 'MT-2') his letter to lot owners dated 26 April 2022 providing this information to all lot owners (and a reminder of the VCAT hearing on 16 May 2022). In his letter he used the expression 'means of rectification' in place of 'rectification methodology' and had elaborated:

The VMIA continue to accept liability in respect to the defects and that position hasn't changed from prior to my involvement until now. The issue at play has never been liability, but rather means of rectification.

As explained to you all in previous communications, I supported a position as presented by a practicing, fully qualified, fully insured, Structural Engineer, that provided an alternative means of rectification. This decision was made in the best interests of all owners, insomuch as it meant you were not responsible to an uninsured component of potentially greater than one million dollars. On the basis that the previous, invasive rectification method quoted by Streamline Homes at \$1,575,980.00 was that which was approved.

The uninsured component with respect to the alternative means of rectification, as later tendered and accepted by the VMIA, is \$86,949.98. I can advise all owners that I have negotiated an *agreement with Balmoral Quay Pty Ltd*, to pay for this figure in full. Therefore, no special levy will be required and all defects can be addressed at no further cost to stage 1 lot owners in accordance with the Scotia Property Maintenance, scope of works.

14. The Deed of Payment and Release dated 23 February 2022, being the 'agreement with Balmoral Quay Pty Ltd' to which the administrator referred in his affidavit was filed with the Tribunal during the course of the hearing before me. (I shall direct that to the extent it has not been served on interested party lot owners already that the applicant shall serve that document on all interested parties and that the owners corporation shall make available to any lot owner a copy upon request.)

15. That Deed is between Balmoral Quay Pty Ltd (the applicant) and the

respondent Owners Corporation No 1 PS 814484L and is executed on its behalf by the administrator. Its recitals set out the background as at the date of that deed which again it is helpful to set out by way of context to the situation in which the owners corporation currently stands:

- A. Under a contract dated 26 August 2015, Balmoral Quay engaged Canny Builders Pty Ltd (ACN 081 853 376) (**Builder**) to construct Stage 1 of a residential development known as Balmoral Quay (**Development**) including 20 residential townhouses (**Work**) at 43 Liverpool Street, Ripplside Victoria (**Property**).
- B. On or about 21 July 2016, QBE Insurance (Australia) Limited, as agent of the Victorian Managed Insurance Authority (**VMIA**), issued policies of domestic building insurance numbered 420042465BW1-433 to 420042465BW1-452 inclusive, one for each of the residential lots in Stage 1 of the Development (**Policies**).
- C. On 28 February 2018, an occupancy permit was issued in relation to the residential lots 1-7 and 13-20 at the Development.
- D. On 3 September 2018, an occupancy permit was issued in relation to residential lots 8-12 at the Development.
- E. On or about 24 May 2019, the Builder became insolvent. At the time, parts of the Work were incomplete and/ or defective, including the Stage 1 Common Property Defect.
- F. The OC has lodged the following claims for indemnity with the VMIA, seeking indemnity under the Policies for losses including in connection with the Stage 1 Common Property Defect (collectively the '**VMIA Claims**'):
 - a. Claim 00011557 lodged 25 December 2019;
 - b. Claim 00013840 lodged 20 April 2020.
- G. VMIA has issued liability decisions in relation to the VMIA Claims dated 15 May 2020 and 9 July 2020 (collectively, the '**Liability Decisions**').
- H. On 26 October 2021, VMIA issued a quantum decision in relation to the VMIA Claims (**Quantum Decision**).
- I. VMIA and the OC have agreed to resolve the VMIA Claims on terms, among others, that:
 - a. within 28 days of the execution of the settlement terms, the OC must enter into an agreement with a contractor to carry out the Remedial Works with respect to the Stage 1 Common Property Defect;

- b. subject to the settlement terms, VMIA will indemnify the OC in the sum of \$414,497.02.
- J. As at the date of this Deed, the OC expects there to be a shortfall between the amount which the VMIA has agreed to pay or indemnify under the Policies following the Liability Decisions and the Quantum Decision, and the likely cost to the OC of having the Remedial Works carried out, of \$86,973.58.
- K. The Administrator has informed Balmoral Quay that:
- a. the OC has entered into a HIA Contract, No. 31475, (**HIA Contract**) with Scotia Property Maintenance Pty Ltd for the performance of the Remedial Works; and
 - b. as at the date of this Deed the stage payment for 'Completion' under the HIA Contract is \$86,973.58
- L. In order to assist the OC to fund the Remedial Works and with no admission of liability, Balmoral Quay has offered, and the OC has agreed to accept, a one-off, ex gratia payment to the OC, on the terms set out in this Deed ...

It is otherwise unnecessary to set out the terms of the Deed in full, other than to note that the figure of \$86,973.58 inclusive of any GST is defined as the '**Shortfall Payment**' and dealt with in cl 2 and 4 of the Deed.

16. At para 5 of his 13 May 2022 affidavit Mr Twiselton confirmed his willingness and capacity to act as administrator stating:

'I remain ready, willing and capable of administering the Respondent. I am incisively across all matters relevant to the Respondent's operation. In the best interests of the Respondent, the settlement with the VMIA and HIA approved builders contract with the appointed builder Scotia Property Maintenance are binding on it.'

Considerations relevant to period of extension - s 174 of the OC Act and authorities

17. In extending the period of administration for a further period of one year I have taken into account the underlying consideration that an order for administration under s 174 of the OC Act is a 'drastic remedy': see *Anstat* annotation of the OC Act (update 1/2022) at [174.01] and [174.03]. In *McKinnon v Adams* [2003] VSC 116 (an earlier administration case under the former s 38 of the *Subdivision Act 1988 (Vic)* involving a body corporate under that Act) Justice Bongiorno explained that the appointment of an administrator by the Court under that Act was to 'deprive a body corporate of its *ordinary power of governance*' under the statutory scheme otherwise established by the legislation and held: (emphasis added)

The fact that the legislation *confers upon a court appointed administrator the power to do anything which the body corporate or its committee can do implies that the body corporate and its committee cease to function once an administrator is appointed.* The Legislature could not have intended that the ordinary governing structure of a body corporate should continue to function co-extensively with a replacement power structure imposed upon the body corporate by a court. *It follows that if the appointment of an administrator deprives a body corporate of its power to act, an order appointing such an administrator should only be made where it is appropriate to so deprive the body corporate of that power.*

18. In deciding the principles to be applied to justify the appointment of an administrator where no criteria were set out in the legislation, Justice Bongiorno applied by analogy the criteria for appointment under other legislation ‘where, for one reason or another, the original governing structure of the organisation has broken down’ or where the body corporate ‘is either not carrying out its functions as its statute contemplated it would or is having difficulty in doing so’ and held at [20] – [21]:

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

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

19. The power to appoint an administrator to a body corporate now known in Victoria as an ‘owners corporation’ (being in fact a body corporate established under the *Subdivision Act 1998* (Vic)) is now contained in Part 11, Division 4 of the OC Act, in s 176(c). The authors of current *Anstat* annotation of the OC Act explain the situation following appointment of an administrator in this way at [173.01] which, again, it is convenient to set out for the benefit of the parties and lot owners and the administrator: (emphasis added)

The appointment of an administrator under Division 4 displaces the decision-makers of the owners corporation and gives the administrator their decision-making power. *The administrator may conduct the affairs of the owners corporation as he or she [or they] sees fit, subject to the duty to act honestly and in good faith with due care and diligence (s 177) and subject to any*

terms of the order making the appointment that might require the administrator to refer matters to or consult the members.

20. It follows from the rationale for the remedy of administration appointment under s 174 of the OC Act that the *period* of appointment of an administrator should not extend for longer than is necessary – in a practical sense – to address and redress the inability of the body corporate, the owners corporation, to function at a satisfactory level and for such period as may be necessary to enable it to be returned to the normal governance arrangements under the OC Act. In the usual run of an administration, the administrator in the discharge of their functions will, in the fullness of time and at the appropriate time, make preparations for the restoration of those normal governance arrangements under the legislation and for the election and appointment of a committee, and if necessary, seek further directions or enabling orders from the Tribunal to assist to bring that about. At this juncture, it is apparent to the Tribunal that that time is still some way away.
21. In this case, the administration appointment having been made by order of the Tribunal in late 2020 for a period of one year it is apparent that in making that original appointment order Member AM Moon did *not* (as was submitted by some) contemplate the period of administration should run to through to the settlement of Stages 3 and 4 in August 2023. Had that been in the justification for ordering the remedy of administration under Part 11, Division 4 of the OC Act the original administration appointment order made under s 174 would have been for more than one year. Rather a more limited foundation existed for the original administration appointment which is now sought to be extended.
22. This more limited foundation is reinforced by Member Moon's two cost orders made in relation to this owners corporation in two sets of proceedings before the Tribunal (to which various parties or interested parties referred): the first being in proceeding OC 1011/2020 *Goss v Balmoral Quay Pty Ltd (Costs) (Owners Corporations) [2021] VCAT 244* (22 March 2021) (the **OC Members Dispute**); the second being her costs decision in this proceeding OC2016/2020 *Balmoral Quay Pty Ltd v Owners Corporation No 1 PS814484L (Costs) (Owners Corporations) 2021 VCAT 1036* (6 September 2021). In those two costs decisions, it is apparent that the issue of *power* being given to the administrator to 'proceed to alter a plan relating to land affected by the OC in any of the ways set out in s 32 of the *Subdivision Act 1998* (Vic) only in accordance with an order of VCAT or a court order' was, at the time of administration appointment in 2020, confined to the issue of remediation works for the common property. And so it is by me in these orders extending that appointment.
23. In her costs decision in this proceeding, in *Balmoral Quay Pty Ltd v Owners Corporation No 1 PS814484L (Costs) (Owners Corporations) 2021 VCAT 1036* (6 September 2021) at para 12, Member AM Moon referred to her

observations in her first costs decision in the OC Members Dispute about her original decision to appoint an administrator: (emphasis added)

12 My reasons in the OC Members Dispute included various findings that are relevant to BQPL's claim for costs in the BQPL Administrator Proceedings [ie this proceeding OC2016/2020]. These relevant findings are repeated below:

...

39: The Tribunal will never know whether the actions of the applicants ["Interested Parties" in these reasons] in commencing the proceedings on 17 April 2020 brought BQPL to the realisation that the Owners Corporation was so dysfunctional in its operation that an application for the appointment of an administrator should be commenced, or whether it was the factual changes in circumstances that occurred between April and 2 August 2020 that brought about the decision to commence proceedings OC2016/2020 seeking the appointment of an administrator.

40: The result was that BQPL believed an administrator was needed for the proper operation of the Owners Corporation and that the current plan of subdivision as registered also needed amendment. Clearly the only simple way to seek amendment to the plan of subdivision as registered with a dysfunctional Owners Corporation was with the assistance of an administrator.

43: ---- this was an owners corporation that I found was dysfunctional and in need of appointment of an administrator. Further *at the final hearing I also agreed that there was a clear need for the administrator to have the power to amend the plan of subdivision which I hoped might in the long term alleviate the concerns of the applicant about BQPL control of all decisions to do with the building rectification works*. I also found that it was not appropriate for the preferred administrator of BQPL to be appointed so as to avoid any possible appearance of conflict of interest.

44: It is clear that there were problems within the Owners Corporation that could only be fixed with the assistance of the Tribunal exercising its powers under the OC Act.

24. It is evident that from these passages that Member AM Moon was confining her rationale for administration appointment in 2020 to the then dysfunction and the need for building rectification works to be progressed, and that it was for this reason she had *'agreed that there was a clear need for the administrator to have the power to amend the plan of subdivision which I hoped might in the long term alleviate the concerns of the applicant about BQPL control of all decisions to do with the building rectification works'*. It is also clear from these passages, and made plain by her 'Order' of

appointment of Mr Twiselton as administrator on 26 October 2020, in imposing the 'condition of appointment' that:

the administrator may proceed to alter a plan relating to land affected by the owners corporation in any of the ways set out in section 32 of the *Subdivision Act 1988* only in accordance with an order of VCAT or a court order,

that any decision regarding whether to proceed to alter the plan of subdivision was a decision for the administrator to make under the power granted by her Order of appointment. No direction was made by the Tribunal at the time of appointment or is made by me in determining to extend that appointment of administration regarding how the appointed administrator is to exercise that power conferred by Member AM Moon's 'Order' and extended by my 'Orders'.

25. I should add for clarity that while I have declined to extend the appointment for more than one year at this time, the question whether an administration appointment should be made or extended to the settlement of Stages 3 and 4 in August 2023 will remain for another day if such a future application is to be made, and any decision to be made at that time will be based on the evidence then put before the Tribunal.
26. In making my finding to extend the administration period for one year I have also considered the countervailing consideration of the prospect of the owners corporation becoming functional without an appointed administrator and the time that might be required to maintain the administration to allow a period of regularity to assist to restore the operation of the owners corporation to proper functionality under the normal governance structures under the OC Act.
27. There was some discussion before me at the hearing about the ongoing dysfunction and ongoing causes. There is no utility to be gained by venturing into this discussion other than to recognise that there was clearly evident an acceptance amongst those lot owners making submissions to me that the difficulties besetting this owners corporation and the problems with the building defects have been a traumatic experience for lot owners. It was also apparent that many of the difficulties appear to be caused by the building defects and their impact on lot owners and the differences of opinion amongst lot owners concerning the path forward. In part it is through appointment of an administrator and the process of administration that the law creates a remedy – an independent functionary and a clear process – to enable an owners corporation beset by dysfunction, for whatever reason, to operate properly to fulfil its statutory functions under s 4 (and other sections of the OC Act, legislation, regulations, rules and other laws – see s 4(f)) through an appointed administrator.
28. It is also relevant to note, as I did at the hearing to those present, that during the period the owners corporation has been under administration since 2020,

various amendments to the OC Act came into effect on 1 December 2021 including to place additional statutory duties on members of committees and sub-committees. These new legal responsibilities will be a new dawn under which the next committee of the owners corporation will operate when the time comes for the appointment of a new committee after the administration ends.

29. As I have noted the OC Act imposes statutory functions on an owners corporation (including under s 4) and places various statutory duties on an owners corporation (including under s 5) when carrying out its functions and powers. While the powers, responsibilities and duties on an administrator appointed under Part 11, Division 4 of the OC Act remain unaltered under s 176 and s 177, in regard to the *members* of committees and subcommittees, in addition to the pre-existing statutory duties of honesty and good faith, due care and diligence, the amended Act imposes a new statutory duty ‘to act in the interests of the owners corporation’ – see s 117(1)(a), (b) and (c) and (2) of the OC Act. New statutory duties are now also imposed on an owners corporation manager (**OC manager**) who might be engaged by an owners corporation. In addition to the contractual duties and responsibilities set out in the OC manager’s contract of appointment and as may arise under the general law, supplementing the long-standing statutory duties set out in s 122(1)(a) – (c) of the OC Act, new statutory duties apply from 1 December 2022 in s 122(1)(d) – (f). Additionally, in connection with meetings, Part 4 Division 6 Voting has been recast and *new* provisions inserted, including s 89D (Restriction on number of lot owners on behalf of whom a proxy may vote on a resolution) and s 89H (Term of contract of sale limiting voting rights void). The amendments that came into effect on 1 December 2021 also introduced five tiers of owners corporation (s 7) and impose distinct governance and financial reporting and account auditing obligations: see generally *Owners Corporation 1 Plan No. PS735439F v Singh (Owners Corporations)* [2022] VCAT 389 at [92] discussing some of the amendments.

Applications for further orders

30. There is one final matter I should mention. In the various *Applications for Directions Hearing* or submissions filed by lot owners seeking to be heard as ‘interested parties’ in this application for extension of the period of administration, some indicated that wished to apply for additional or other orders in this administration proceeding between the applicant and respondent owners corporation.
31. It is important to make clear to lot owners that this proceeding is confined to the current administration of the owners corporation under the orders made by the Tribunal on 26 October 2020 in an application between the applicant and respondent in which the ‘interested parties’ have an interest in being heard under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act)*.

32. The ability to be heard as an 'interested party' in Tribunal proceedings in the Owners Corporations List does not carry with it any right to *apply* for an *order*: it is simply a procedural right to be heard in the Tribunal proceeding between an applicant and respondent where, for example the interested party's interests are affected or where the Tribunal determines that it is desirable that the person is joined as an interested party so that they may be heard: see s 60(1)(b) and (c) of the VCAT Act. The joinder of a person as an 'interested party' under s 60 does *not* authorise the grant of relief for the joined party. The power to grant relief must be found in the general law or other statute (such as the OC Act). If a person wishes to apply for an order against someone else they must file a proper application with the Tribunal.
33. If a lot owner (whether or not they are an 'interested party') wishes to *apply for an order* in this proceeding concerning the current administration of the respondent owners corporation they must:
 - a. First make a joinder application to become a 'party' (such as a respondent or joined party) to the proceeding;
 - b. Set out in their joinder application the basis on which they seek to be joined and the basis on which they apply for the orders sought and set out precisely the orders that they seek from the Tribunal;
 - c. File and serve all affidavit evidence on which they intend to rely on in their application to be joined as a party and in their application if joined as a party.

On filing of that application with the Tribunal and payment of any appropriate fee:

- d. The parties to the current proceeding will be given the opportunity to be heard both on the application for joinder and the application for orders sought by the party seeking to be joined as a party;
 - e. If joinder is granted the Tribunal will make an order stating how they are to be joined (whether to be added as a respondent, or otherwise) before determining the application for orders sought in the current administration of the respondent owners corporation.
34. However, if a person (whether they are an interested party or not) being a person under s 163 of the OC Act who wishes to apply for the Tribunal to hear and determine an 'owners corporation dispute' of the nature described in s 162 of the OC Act and to seek orders under s 165 of the OC Act that are *not* part of the administration the owners corporation or matters properly to be heard and determined by the Tribunal in this proceeding, they must:
 - a. First commence a new proceeding in the Tribunal as 'applicant' and must name as 'respondents' the parties against whom orders from the

Tribunal are sought;

- b. Set out in their new application the orders sought and the basis upon which such orders are sought;
- c. State whether any interlocutory (interim) orders are sought pending a final hearing of that application for final orders;
- d. Pay the appropriate filing and application fee.

On filing of that application and payment of the appropriate fee:

- e. The parties to the new proceeding will be given the opportunity to be heard on the application for final orders or any application for interlocutory orders;
 - f. Directions will be given by the Tribunal, as the Tribunal may determine, for the filing of material (for example, points of claim or defence, evidence, or submission) by the parties and timetable set before the case is listed for hearing in the Tribunal.
35. I strongly encourage lot owners to obtain independent legal advice and legal representation before making any application for orders or commencing new proceedings.
36. The application before me related solely to an application for extension of the period of administration. Should any party or interested party wish to pursue an application for further orders *in the administration of this owners corporation*, such application must be made by them as directed by these orders.

R. Wilson
Deputy President